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AUTOMOBILE ACCIDENTS AT RAILROAD CROSSINGS IN NORTH CAROLINA

JOHN FRIES BLAIR*

The difficulty our courts have had in allocating liability between motorists and railroads arises, perhaps, from three sources. The first is the necessity of applying the same standard of due care to different instrumentalities operating on different road-beds under conditions that are essentially unlike. The second is the doctrine of *Neal v. R.R.*,¹ that if the plaintiff's own evidence betrays contributory negligence the court itself may enter judgment of nonsuit. The third, which applies in some cases, is a peculiarity of the automobile law which provides, after making it mandatory to stop at certain grade crossings, " * * * No failure so to stop, however, shall be considered contributory negligence *per se* in any action against the railroad or interurban company for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence."² On these three points hang at least part of the law and the prophecy of what the law is to be.

The first situation is not new in the law. Perhaps a majority of torts cases are of this type. It does, however, prevent the application of an artistic mutuality as a critique of the decisions of the courts. The doctrine of *Neal v. R.R.* involves at least three theoretical difficulties. In the first place, it involves a finding of the affirmative issue of negligence against the defendant before he has put on his evidence, as otherwise the question of contributory negligence would not arise. In the second place, it involves a finding of the affirmative issue of contributory negligence against the plaintiff from his own evidence, when the statute says " . . . where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial,"³ and the court has held that the burden of proving this issue is on the defendant.⁴ In the third place, it involves a finding by the court of proximate cause in the form of concurrent or insulating negligence,⁵ whereas, at least if more than one legitimate inference can be drawn from the evidence, the question of proximate cause is said to be for

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¹ 126 N. C. 634, 36 S. E. 117 (1900).

² N. C. GEN. STAT. (1943) §20-143.

³ N. C. GEN. STAT. (1943) §1-139.

⁴ *Hudson v. R. R.*, 190 N. C. 116, 129 S. E. 146 (1925).

⁵ *Construction Co. v. R. R.*, 184 N. C. 179, 113 S. E. 672 (1922).

the jury⁶—all these in the face of a statutory prohibition against giving in the charge an opinion on whether a fact is fully or sufficiently proven.⁷ The provision of the statute with respect to the evidentiary value of a failure to stop means that the court is under the necessity of giving an evaluation to the omission of an act the performance of which is made mandatory by statute, the omission of which is a misdemeanor,⁸ but the non-performance of which is not negligence *per se* in an action against the railroad.⁹ Is it any wonder that standards have had a tendency to disintegrate into rules, that there are opinions which appear contradictory, and that the court has sometimes been accused of sitting as a jury and of deciding cases on the basis of distinctions which are not apparent to someone who has not read the entire record?

The purpose of this paper will be to state the rules arrived at by the court as crystallizations of the standard of due care, to summarize the statutory provisions, and then to discuss a few of the recent cases in the light of those formulations.

JUDICIAL FORMULATIONS OF THE STANDARD OF DUE CARE

Fortunately, the first task has been very largely performed. In *Johnson v. R.R.*,¹⁰ Mr. Justice Walker, speaking for the court, laid down the rules derived from previous cases which govern the conduct of railroads and motorists but illustrate not so much the parity as the lack of parity in the conduct which is required of them. These rules were formulated so concisely and have been quoted so frequently and departed from so slightly that it seems appropriate to quote them at length at this point.

"1. Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross; but the traveler must yield the right of way to the railroad company in the ordinary course of the latter's business.¹¹

"2. While a train has the right of way at a crossing, it is the duty of the engineer to give signals and exercise vigilance in approaching such crossings.¹²

"3. A railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a careful lookout for danger, and the degree of vigilance is in proportion to the known danger; the greater the danger, the greater the care required of both.¹³

⁶ *Lincoln v. R.R.*, 207 N. C. 787, 178 S. E. 601 (1935).

⁷ N. C. GEN. STAT. (1943) §1-180.

⁸ N. C. GEN. STAT. (1943) §20-176.

⁹ A similar provision applies to failure to stop before entering roads which have been marked as through highways. N. C. GEN. STAT. (1943) §20-158.

¹⁰ 163 N. C. 431, 79 S. E. 690 (1913).

¹¹ *Duffy v. R. R.*, 144 N. C. 26, 56 S. E. 557 (1907).

¹² *Coleman v. R. R.*, 153 N. C. 322, 69 S. E. 251 (1910).

¹³ *R. R. v. Hansbrough*, 107 Va. 733, 60 S. E. 58 (1908).

"4. On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective.¹⁴

"5. The duty of the traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence, by not taking proper measures for his safety, to be submitted to the jury.¹⁵

"6. If he fails to exercise proper care within the rule stated, it is such negligence as will bar his recovery. *Provided, always*, it is the proximate cause of his injury.¹⁶

"7. If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received.¹⁷

"8. If the traveler is without fault, or if his fault is either excused by some act of the company or is not the proximate cause of his injury, the company having the last clear chance, and if in attempting to cross track on a highway he is suddenly confronted by a peril, he may without the imputation of negligence adopt such means of extrication as are apparently necessary, and is only held to such measure of care as a man of ordinary prudence would exercise in the same circumstances."¹⁸

STATUTORY PROVISIONS

In arriving at the relative rights and duties of motorists and rail-

¹⁴ Wolfe v. R. R., 154 N. C. 569, 70 S. E. 993 (1911); Coleman v. R. R., 153 N. C. 322, 69 S. E. 251 (1910); Cooper v. R. R., 140 N. C. 209, 52 S. E. 932 (1905).

¹⁵ Wolfe v. R. R., 154 N. C. 569, 70 S. E. 993 (1911); Sherril v. R. R., 140 N. C. 252, 52 S. E. 940 (1905).

¹⁶ Wolfe v. R. R., 154 N. C. 569, 70 S. E. 993 (1911); Strickland v. R. R., 150 N. C. 7, 63 S. E. 161 (1908); Cooper v. R. R., 140 N. C. 209, 52 S. E. 932 (1905).

¹⁷ Osborne v. R. R., 160 N. C. 309, 76 S. E. 16 (1912); Mesic v. R. R., 120 N. C. 490, 26 S. E. 633 (1897).

¹⁸ Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 332, 55 N. W. 872, 20 L. R. A. 853 (1893); Crompton v. Ivie Bros., 124 N. C. 590, 34 S. E. 548 (1899); Vallo v. Express Co., 147 Pa. 404, 23 Atl. 594, 14 L. R. A. 743 (1892); Douglass v. R. R., 82 S. C. 71, 62 S. E. 15 (1908); 2 ELLIOT ON RAILROADS (2 ed. 1907) §1173.

roads at crossings the following statutory provisions are also relevant:

1. *Duty to Slow Down*

The present statute provides that the fact that the speed of a vehicle is lower than the various *prima facie* limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection.¹⁹ Since, under a previous statute with respect to maximum speeds, a railroad was held to be an "intersecting highway,"²⁰ it seems probable that the present section also applies to railroad crossings.

2. *Duty to Keep to the Right*

In crossing the intersection of a highway by a railroad right-of-way, the driver of a vehicle must at all times drive on the right half of the highway unless that half is obstructed or impassable.²¹

3. *Duty not to Pass*

The driver of a vehicle must not overtake and pass at a railway grade crossing any other vehicle proceeding in the same direction unless permitted to do so by a traffic or police officer.²²

4. *Duty to Obey Warning Signals*

If there is a clearly visible and positive signal giving warning of the immediate approach of a railway train or car the driver must bring his vehicle to a complete stop before traversing the grade crossing.^{23*}

5. *Duty to Observe Stop Signs*

The state highway and public works commission and local authorities, within their respective jurisdictions, have the authority to designate certain grade crossings at which vehicles using the highways are required to stop. It is then the duty of the railroads to erect signs notifying drivers. When the signs have been erected, the driver of any vehicle must stop within fifty feet but not closer than ten feet to the tracks before crossing the intersection. The evidentiary effect of a failure to stop has already been considered.²⁴

¹⁹ N. C. GEN. STAT. (1943) §20-141(c).

²⁰ *Hinton v. R. R.*, 172 N. C. 587, 90 S. E. 756 (1916).

²¹ N. C. GEN. STAT. (1943) §20-147. See *Montgomery v. Blades*, 222 N. C. 463, 23 S. E. (2d) 844 (1942).

²² N. C. GEN. STAT. (1943) §20-150(c). See *Murray v. R. R.*, 218 N. C. 392, 11 S. E. (2d) 326 (1940); *Boyd v. R. R.*, 200 N. C. 324, 156 S. E. 507 (1931).

^{23*} This is a strange provision, since the statutory duty seems to have been complied with when the vehicle is brought to a stop. To be effective it must be supplemented by the common law duty to keep a lookout before placing the vehicle again in motion.

In *Keller v. R. R.*, 205 N. C. 269, 171 S. E. 73 (1933) and *Davis v. R. R.*, 205 N. C. 269, 171 S. E. 73 (1933) the signals were improperly heeded, and the plaintiff was allowed recovery.

In *Miller v. R. R.*, 220 N. C. 562, 18 S. E. (2d) 232 (1941) the plaintiff knew the signals were not working and was therefore not relieved of his common law duty to keep a lookout.

²⁴ N. C. GEN. STAT. (1943) §20-143. *White v. R. R.*, 216 N. C. 79, 3 S. E. (2d) 310 (1939).

RECENT JUDICIAL APPLICATIONS OF THE RULES

In the light of these formulations it may be interesting to review some of the recent decisions and to see how the difficulties already enumerated have contributed to the perplexities of the court in deciding those cases. For convenience, and also because some of the cases mention—as perhaps of distinguishing significance—the question of whether the negligence is active or passive,²⁵ in this brief discussion those cases in which the plaintiff's force has come to rest shall be considered firstly; secondly, those cases in which both forces are in motion; and lastly, those cases in which the defendant's force has come to rest. In connection with both the latter topics shall be discussed the question, whether recovery against the railroad by a guest shall be barred because the driver of the car is negligent.

CASES WHERE THE PLAINTIFF'S FORCE HAS COME TO REST

The cases in which the plaintiff's force has come to rest are not numerous. They usually occur where a vehicle is stalled upon the railroad track and is then hit by a moving train. The negligence of the defendant usually consists in failing to sound a bell, whistle, or other warning signal, and sometimes also in exceeding a speed limit fixed by ordinance. Excluded from consideration will be those cases in which the negligence of the defendant consists primarily in failing to keep up the road-bed.²⁶

Of course, if the defendant was negligent and there is no evidence of contributory negligence on the part of the plaintiff, there is no difficulty about allowing the plaintiff to recover. A good example of this type is *Moore v. R.R.*,²⁷ where the plaintiff was approaching a railroad crossing in a bakery truck which he was driving for his father, who was with him. He stopped, twice as a matter of fact, to look for approaching trains. His view at the first stop was obstructed, and at the second stop he did not see the train. He entered upon the tracks where, for some unaccountable reason, his truck stalled. He attempted to start the engine, but was unable to do so. An approaching train gave a signal, but too late for him to escape to safety. The train demolished the truck, injured the plaintiff, and killed the plaintiff's father. Separate suits were started by the plaintiff, the administratrix of the father, and the owner of the truck. Recovery was allowed in all three cases, and the supreme court found no error in the judgments.²⁸

²⁵ *E.g.*, *Baker v. R. R.*, 205 N. C. 329, 171 S. E. 342 (1933).

²⁶ *E.g.*, *Cashatt v. Brown*, 211 N. C. 367, 190 S. E. 480 (1937); *Campbell v. R. R.*, 201 N. C. 102, 159 S. E. 327 (1931); *Stone v. R. R.*, 197 N. C. 429, 149 S. E. 399 (1929).

²⁷ 201 N. C. 26, 158 S. E. 556 (1931).

²⁸ *Accord*, *Costin v. Power Co.*, 181 N. C. 196, 106 S. E. 568 (1921).

*Temple v. Hawkins*²⁹ is entirely consistent, although the opposite result is reached. In that case the plaintiff approached a railroad grade crossing and stopped in accordance with the statute. He saw the defendant's train about 1500 feet down the track, but thought he had ample time in which to cross. He started forward, but his truck stalled upon the track. He continued his efforts to move the truck until too late to get further than the running board in an effort to save himself. He was severely injured and brought suit for his resultant damages. The trial court nonsuited the case, however, and the supreme court affirmed, saying, "The fact of the failure to give a signal from the engine could not militate against the defendants, since all that such signal could have availed the plaintiff would have been to give him notice of the approach of the train, and this notice the plaintiff already had, since he saw the train at a distance of 1500 feet down the track moving or in the act of starting to move in the direction of the crossing he was taking."³⁰ In other words, the plaintiff had here the very notice which a signal would have given in the case previously discussed, so that it is entirely logical to say that the negligence of the defendant was not the proximate cause of the injury.

In spite of the sufficiency of this ground for the decision, however, or perhaps to avoid deciding the case so obviously on the basis of proximate cause and to bring it more clearly within the doctrine of *Neal v. R.R.*, *supra*, the court discussed the question of the plaintiff's contributory negligence, although it was not logically involved saying, "It clearly appears that the plaintiff was guilty of contributory negligence in driving the truck upon the main track of the defendants in front of a train which he had seen 1500 feet away either moving or starting to move in the direction of the crossing."³¹ If the question of contributory negligence had been decisive, it seems that it might well have been left to the jury, since the train was only "moving or starting to move" and was more than a quarter of a mile away.

Having discussed contributory negligence, the court discussed the doctrine of the last clear chance, which again was not applicable if the case was to turn on the question of the defendant's primary negligence not being the proximate cause of the injury. Applying the usual rule in pedestrian cases,^{32*} the court said: "The engineer had a right to

²⁹ 220 N. C. 26, 16 S. E. (2d) 400 (1941).

³⁰ *Id.* at 27, 16 S. E. (2d) at 401.

³¹ *Ibid.*

^{32*} Although our court has been rather liberal in applying the doctrine of the last clear chance as between automobiles [*Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384 (1939); *Morris v. Transportation Co.*, 208 N. C. 807, 182 S. E. 487 (1935)], the doctrine as applied to railroads grew up largely in cases involving pedestrians where it is very easy for the pedestrian to step off the track [*Davis v. R. R.*, 187 N. C. 147, 120 S. E. 827 (1923)], and the doctrine is not applied unless the plaintiff "is down and helpless, or apparently in such a position of peril

assume up to the very moment of the collision that the plaintiff could and would extricate himself from danger.”³³ It is true the court said, “There is no evidence the engineer knew, or by the exercise of due care could have known that the plaintiff was helpless upon the track of the defendants.”³⁴ Actual knowledge would be difficult to prove in any event. If the driver of the car could see the train, the engineer of the train could also doubtless see the car stalled upon the railroad more than a quarter of a mile away. Again, if this question were decisive, it seems that it might also have been left to the jury and that the inference would have been reasonable that the engineer saw or ought to have seen the plaintiff and to have assumed that in being upon the track he was helpless.

The court points out also that the plaintiff may have been negligent in failing to leave the car after he knew it was stalled upon the track. The case might have been tried on the theory that the primary act of negligence on the part of the defendant was failing to stop the train after the engineer knew or ought to have known that the plaintiff was in a helpless condition upon the track and that the contributory negligence of the plaintiff consisted in failing to get out of the car after he knew it was stalled. However, the case was not tried on that theory, and on the theory upon which it was tried a consideration of this element in the plaintiff's contributory negligence seems likewise irrelevant.

However just the decision in *Temple v. Hawkins* may have been upon its facts, it surely is not authority for *Wilson v. R.R.*³⁵ for which it is cited as authority in a *per curiam* decision sustaining a judgment of nonsuit. In that case the plaintiff was approaching a railroad grade crossing on a farm tractor to which plows were attached. There is no evidence that he came to a complete stop, but the brief summary of the facts does not disclose that there was a stop sign at the crossing. Even if there was, the peculiar provision of the statute with respect to the evidentiary value of a failure to stop would not have made that fact controlling. The plaintiff approached at a speed of “five or ten miles an hour” and when “about 25 or 50 feet” from the track he did look in both directions and saw no train. He changed “into low gear to ease the tractor across,” but unfortunately, as he crossed, the plows caught against the rails. A train approached without sounding a warning, and he was not aware of its presence in time to save himself

that ordinary effort on his part will not avail to save him.” [*Id.* at 151, 120 S. E. at 829]. Even in those cases there is an intimation that some concession will be made where the pedestrian is killed or injured at a regularly used crossing, and is not, therefore, a mere trespasser or licensee. [*Id.* at 149, 120 S. E. at 829]. See the concurring opinion of Mr. Justice Walker in *Lapish v. Director General*, 182 N. C. 593, 109 S. E. 852 (1921).

³³ *Temple v. Hawkins*, 220 N. C. 26, 27, 16 S. E. (2d) 400, 401 (1941).

³⁴ *Ibid.*

³⁵ 223 N. C. 407, 26 S. E. (2d) 900 (1943).

from injury. Here negligence of the defendant is proved by the failure to sound a warning. The only suggestion of contributory negligence is the failure of the plaintiff to maintain a lookout after the tractor was stuck. The question of last clear chance is not mentioned. Though it is possible that a jury might have reached the result arrived at by the court, surely *Temple v. Hawkins* is not authority for the decision, since in this case the plaintiff did not see the train; and it is here specifically stated that he did not become aware of its presence in time to save himself from injury.

Another opinion in this sequence which gives the present writer pause is that in *Bailey v. R.R.* and *King v. R.R.*,³⁶ which were consolidated for purposes of trial. In those cases a train traveling in excess of the speed limit fixed by municipal ordinance was approaching a grade crossing without sounding a whistle or ringing a bell. The plaintiffs' intestates, engaged in a joint enterprise, were approaching the same crossing in their truck. Of the fact that the intestates were guilty of contributory negligence there can be no doubt, since they neither stopped nor saw, down an unobstructed track, the train which a near-by pedestrian did see at the time when the truck entered upon the crossing. When on the track, the truck somehow became entangled with the rails and refused to move forward. One witness testified "The truck looked like it was trying to get off, kinder moved back and forth and settled down at the time the train hit it."³⁷ In other words, the very essence of the case was the last clear chance. The trial court excluded as evidence a statement of the engineer that he had seen the truck and entered judgment of nonsuit. This nonsuit the supreme court upheld.

Without going into the rule of evidence that excluded the statement of the engineer, and conceding that without that in the record there may have been insufficient evidence on which to support a finding of the last clear chance, it seems to the present writer that the court went beyond previous authorities in saying: "Furthermore, the plaintiffs do not plead the last clear chance, which is required before such doctrine is available. . . ."³⁸ It is submitted that previous authorities do not go so far. That statement of the law, if it is the law, puts the plaintiff, though he is faced with *Neal v. R.R.* in the position of having to point out his own negligence in his complaint in order to attempt to avoid the effect of it, or of filing a reply, when the statute does not make it mandatory that to do so in the absence of the service of an answer containing a counterclaim.³⁹ McIntosh⁴⁰ says: "When the defendant

³⁶ 223 N. C. 244, 25 S. E. (2d) 833 (1943) (two cases).

³⁷ *Id.* at 246, 25 S. E. (2d) at 835.

³⁸ *Id.* at 248, 25 S. E. (2d) at 835.

³⁹ N. C. GEN. STAT. (1943) §1-140.

⁴⁰ MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES, §478.

pleads contributory negligence, it is deemed to be denied without a reply, and the plaintiff may also take advantage of the last clear chance or plead it specially in a reply." Mr. Justice Avery, in *Nathan v. R.R.*⁴¹ said: "When the testimony raises the question whether a culpable act of the defendant intervening after the act constituting the alleged contributory negligence was the proximate cause of the injury, in the sense that it was an omission to discharge a legal duty, the performance of which would have avoided it, it would be manifest, if the point had never been passed upon before, that an issue involving that specific inquiry would be one raised by the general allegation that the injury was caused by the defendant's want of reasonable care and the defendant's denial thereof. In contemplation of law, the injury is not attributed to the wrongful act unless it is shown to be the immediate and proximate cause. So that the allegation by the plaintiff that the injury was due to the defendant's carelessness, and the denial of that, coupled with the averment by defendant that the contributory negligence of the plaintiff was the cause, necessarily involves the question whether the defendant negligently omitted to avail itself of the last clear chance to avoid the accident by the performance of a legal duty."

In *Ellerbe v. R.R.*⁴² it was held that it was not error not to submit an issue of the last clear chance when there was no evidence to support it. In *Redmon v. R.R.*⁴³ it was held that it was error to submit the issue of the last clear chance when there was no evidence to support it. In *Leach v. Varley*⁴⁴ pleadings are mentioned, but the case is really weaker than *Ellerbe v. R.R.*, *supra*. In that case the court says there was "no pleading or evidence entitling plaintiff to the issue." The issues of negligence and contributory negligence were submitted without objection, and there was no request for special instruction. Even *Redwine v. Bass*⁴⁵ goes no further than to say that if the matter is not raised by the pleadings and the court fails to cover it in its charge, the plaintiff cannot in the supreme court complain of the charge if he made no request for special instructions. That the matter is often covered by the charge, even though no specific issue is submitted with respect to it is shown by the cases of *Goss v. Williams*⁴⁶ and *Moore v. Powell*.⁴⁷ It seems that the court should somehow clarify its procedural rules so that the plaintiff will not be deprived of what may be his only valuable right.

⁴¹ 118 N. C. 1066, 24 S. E. 511 (1896).

⁴² 118 N. C. 1024, 24 S. E. 808 (1896).

⁴³ 195 N. C. 764, 143 S. E. 829 (1928).

⁴⁴ 211 N. C. 207, 189 S. E. 636 (1937).

⁴⁵ 215 N. C. 467, 2 S. E. (2d) 362 (1939).

⁴⁶ 196 N. C. 213, 145 S. E. 169 (1928).

⁴⁷ 205 N. C. 636, 172 S. E. 327 (1934).

CASES WHERE THE TRAIN AND CAR ARE BOTH IN MOTION

Redmon v. R.R., already mentioned, is a good case on which to make the transition from those cases in which the plaintiff's force has come to rest to those cases in which both forces are still in motion. In that case the train approached a grade crossing apparently without giving a proper signal. The plaintiff's intestate approached the same crossing without stopping for a stop sign, and without keeping a proper lookout. The fact that he did not keep a proper lookout was proved by a witness for the defendant who was in another automobile behind the deceased and, nevertheless, saw the train. The engineer of the defendant's train testified that he saw the deceased when he drove upon the track, but that at that time it was impossible for him to stop. In spite of this testimony the court submitted the issue of the last clear chance to the jury which found it against the defendant. Judgment was accordingly entered for the plaintiff. The supreme court modified the judgment so as to allow no recovery, saying that the plaintiffs were barred by the contributory negligence of their intestate; and, since the defendant could not have stopped, it was error to have submitted an issue of the last clear chance.

If, however, the railroad is negligent in failing to sound a warning or in violating an ordinance as to speed, and the crossing is obstructed in such a way that the plaintiff, even though perhaps he did not stop, may be said to have complied with his duty to keep a proper lookout, he will not be barred of recovery. This is particularly true if the obstruction exists by reason of the fault of the defendant.

In *Hill v. R.R.*⁴⁸ the defendant had piled up cross-ties so that the view of the track was obstructed except at one point. The car in which the plaintiff was riding was about to enter on the tracks when the driver suddenly became aware of the defendant's train, which was approaching without warning. He turned sharply to the right, but threw all the occupants into or under the train. All were killed. The trial court nonsuited the plaintiff's case, but the supreme court reversed, apparently on the theory that the jury ought to have been allowed to say whether the plaintiff's duty to keep a reasonable lookout had been performed. A similar result has been reached, either sending the case to the jury, or upholding the verdict of a jury, where the view of the motorist was obstructed by freight cars which the railroad company had left standing on a parallel track,⁴⁹ by tank cars on a spur track,⁵⁰

⁴⁸ 195 N. C. 605, 143 S. E. 129 (1928).

⁴⁹ *Scoggins v. R. R.*, 199 N. C. 631, 155 S. E. 255 (1930); *White v. R. R.*, 216 N. C. 79, 3 S. E. (2d) 310 (1939).

⁵⁰ *Madrin v. R. R.*, 200 N. C. 784, 158 S. E. 483 (1931) and 203 N. C. 245, 165 S. E. 711 (1932).

by buildings of the defendant itself,⁵¹ by a house and cut,⁵² by an embankment,⁵³ by a cut and trees,⁵⁴ and even by buildings maintained by other persons in *Harper v. R.R.*⁵⁵ although in that case there was some evidence also that the view was obstructed by weeds, apparently on the defendant's right-of-way. On the other hand, the plaintiff is not entitled to the benefit of this doctrine if the obstruction is caused by another train of the defendant railroad moving with due care,⁵⁶ still less by another automobile which was not under the control of the railroad.⁵⁷ If the night is dark and rainy,⁵⁸ if there is fog,⁵⁹ or if snow is falling⁶⁰ the situation is much the same as if there were a physical obstruction to prevent the plaintiff's view, and the cases take a similar course.

The question frequently raised is whether, at a much frequented crossing, it is the duty of the railroad to maintain a watchman or gates in addition to blowing a whistle or sounding a bell. On this question the charge approved by the court in *Moseley v. R.R.*⁶¹ is probably still good law, although electrical signal devices have now largely taken the place of gates. In that case the trial court charged the jury: "A railroad company is not legally bound to provide and maintain gates at street and highway crossings along its line, unless so required by statute or ordinance, or unless it appears that the particular crossing is peculiarly dangerous. In the absence of a statutory requirement it is not negligence *per se* for a railroad company to fail to maintain a flagman or watchman at a grade crossing of its track and a public road to warn travelers on such road of approaching trains. The mere absence of a statute requiring a flagman or watchman at crossings will not, however, of itself relieve the railroad company from the duty to maintain one, and when a crossing is so peculiarly dangerous that the reasonable safety of the traveling public requires the presence of a flagman or other extraordinary means to signal the approach of trains, it is incumbent upon the railroad company to employ such means. It is for the jury to say whether under all the circumstances of a particular case the railroad has been guilty of negligence in not maintaining a flagman or watchman at a particular crossing. Before a jury will be warranted

⁵¹ *Moseley v. R. R.*, 197 N. C. 628, 150 S. E. 184 (1929).

⁵² *Preddy v. Britt*, 212 N. C. 719, 194 S. E. 494 (1938).

⁵³ *Lofin v. R. R.*, 210 N. C. 404, 186 S. E. 493 (1936).

⁵⁴ *Coltrain v. R. R.*, 216 N. C. 263, 4 S. E. (2d) 853 (1939); *Jackson v. R. R.*, 181 N. C. 153, 106 S. E. 495 (1921).

⁵⁵ 211 N. C. 398, 190 S. E. 750 (1937).

⁵⁶ *Moore v. R. R.*, 203 N. C. 275, 165 S. E. 708 (1932).

⁵⁷ *Eller v. R. R.*, 200 N. C. 527, 157 S. E. 800 (1931).

⁵⁸ *Collett v. R. R.*, 198 N. C. 760, 153 S. E. 405 (1930).

⁵⁹ *Dancy v. R. R.*, 204 N. C. 303, 168 S. E. 200 (1933); *Butner v. R. R.*, 199 N. C. 695, 155 S. E. 601 (1930).

⁶⁰ *King v. R.R.*, 200 N. C. 398, 157 S. E. 28 (1931).

⁶¹ 197 N. C. 628, 150 S. E. 184 (1929).

in saying, in the absence of statutory direction to that effect, that a railroad company should keep a flagman or watchman at a crossing, it must first be shown that such crossing is more than ordinarily hazardous, as for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself, or by other objects proper in themselves. The frequency with which trains are passing, and the amount of travel, or noise, are also material circumstances in considering the question of danger."^{62*}

On the other hand, if a railroad has undertaken to maintain a watchman at a crossing and fails to do so, it is quite likely to be accounted to it as negligence. In *Oldham v. R.R.*⁶³ the plaintiff approached a crossing at which he knew a watchman was ordinarily stationed. He looked and saw no train approaching from either direction, although he saw some freight cars to the north. Just as he reached the track, the watchman ran out to flag him down, looking to the south, as though a train were coming from that direction. The intervention of the watchman caused the plaintiff to choke his engine, at which time the freight cars to the north backed, pushing the plaintiff's car 70 or 80 feet down the track, demolishing his car and injuring the plaintiff. The plaintiff recovered a judgment, and the supreme court held that there was ample evidence to justify the verdict.^{64*}

Another situation in which the railroad might be said to have "induced" the motorist onto the tracks is presented by the case of *Finch v. R.R.*⁶⁵ There a freight train was standing across an intersection and, in response to the signals of the employees of the railroad, parted to let motorists go by. The plaintiff's intestate, thinking that the way was clear, entered between the parted halves of the freight train and was killed by a passenger train on the next track. His executors recovered in the trial court; and, although the supreme court reversed on an error in the instructions, it is clear that in its opinion there was ample evidence on which to go to the jury.

In most of the cases considered so far in this section, the plaintiff was allowed to go to the jury or his recovery before the jury was

^{62*} See *Caldwell v. R. R.*, 218 N. C. 63, 10 S. E. (2d) 680 (1940) in which the court said that upon proof of the unusual hazard of a crossing, the failure to provide gates, signal devices, or flagman would not itself constitute negligence but would rather furnish evidence from which the jury might find the railway company had failed to exercise due care with respect to the use of reasonable and timely warning devices.

⁶³ 210 N. C. 642, 188 S. E. 106 (1936).

^{64*} *Accord*, *Barber v. R. R.*, 193 N. C. 691, 138 S. E. 17 (1927). In *Thurston v. R. R.*, 199 N. C. 496, 154 S. E. 836 (1930) the watchman was standing with his signal down, talking to another party. He rushed out too late, crying, "Stop, stop, stop!" Plaintiff recovered. In *Pitt v. R. R.*, 203 N. C. 281, 165 S. E. 689 (1932) the watchman was walking forward in the center of the crossing with a flag and sign, although he put them up a little late. Plaintiff was not allowed to go to the jury.

⁶⁵ 195 N. C. 190, 141 S. E. 550 (1928).

upheld. However, it should be remembered that at a railroad crossing the train has the right-of-way in the ordinary course of business, and that it is the duty of the motorist to keep a careful lookout. Then if the driver of an automobile fails in the latter duty and runs into the 42nd car of a freight train which is already passing, he cannot recover for the simple reason that the blowing of a whistle or the sounding of a bell sometime previously would not have prevented the accident.⁶⁶ If he does not look down the track and is run into by the engine, he is barred by his own contributory negligence.⁶⁷ If the view is somewhat obstructed, he may be barred by a failure to keep a lookout very close to the tracks,⁶⁸ or even between tracks;⁶⁹ and this may bar his recovery, even though he did stop but at a distance from the track too great to see the train.⁷⁰ It goes without saying that if he saw the train and still tried, unsuccessfully, to get across no recovery is allowed.⁷¹

Sometimes a defendant is negligent, but the active force of a third party intervenes in such an illogical and unexpected way that the negligence of the railroad is no longer said to be the proximate cause of the injury. Thus in *Thompson v. R.R.*⁷² the defendant was operating two trains negligently and in violation of ordinances of the city of Greensboro. However, the plaintiff was sitting calmly in his automobile waiting for the trains to pass. Suddenly a truck struck him from behind and pushed his car against one of the moving trains. In his effort to extricate himself from his car he caught one of his legs beneath the wheels of the moving train, with the result that it had to be amputated. He recovered a judgment against the railroad; but the supreme court reversed, quite properly pointing out that it was the negligence of the truck driver and not that of the railroad which was the proximate cause of the injury.

Sometimes, when the suit is by the passenger in an automobile, and the railroad is negligent, the conduct of the driver of the very car in which the plaintiff is riding is so illogical, unpredictable, and unexpected that the railroad is, because of his act, relieved of liability for its own negligence. In *Ballinger v. Thomas*,⁷³ for instance, the driver of the car in which the plaintiff was riding approached a railroad crossing at a rapid rate of speed when he suddenly became aware that a train was about to reach the same crossing. The plaintiff alleged that he ". . . carelessly, negligently and without regard for the safety of

⁶⁶ *Chinnis v. R. R.*, 219 N. C. 528, 14 S. E. (2d) 500 (1941).

⁶⁷ *Harrison v. R. R.*, 194 N. C. 656, 140 S. E. 598 (1927).

⁶⁸ *Hampton v. Hawkins*, 219 N. C. 205, 13 S. E. (2d) 227 (1941).

⁶⁹ *Godwin v. R. R.*, 220 N. C. 281, 17 S. E. (2d) 137 (1941).

⁷⁰ *Godwin v. R. R.*, 202 N. C. 1, 161 S. E. 541 (1931).

⁷¹ *McCrimmon v. Powell*, 221 N. C. 216, 19 S. E. (2d) 880 (1942); *Lamm v. R. R.*, 213 N. C. 216, 195 S. E. 381 (1938).

⁷² 195 N. C. 663, 143 S. E. 186 (1928).

⁷³ 195 N. C. 517, 142 S. E. 761 (1928).

plaintiff . . . suddenly turned his automobile to the right and drove it off the concrete or asphalt highway and into a hole so that it turned over and injured plaintiff." This allegation was held good against demurrer, the court specifically pointing out, however, "It is not alleged in the complaint that Thomas, the driver of the automobile, ran his machine off the highway to avoid a collision or in an effort to extricate himself and the plaintiff from a position of peril, produced by the negligence of the railroad company," but the allegation is that said defendant "carelessly and negligently, i.e. *needlessly (italics ours)*, drove his car off the highway, after he had all the information which bell or whistle signal would have given him, and injured the plaintiff." This necessarily means that the alleged negligence of the railroad company was remote, while that of the defendant Thomas was proximate.

The same line of reasoning might be made to justify the case of *Hinnant v. R.R.*,⁷⁴ questionable as it may be on its facts. There the plaintiff was riding as the guest of a motorist who approached a railroad intersection where the tracks were visible at some distance from the railroad but obstructed by a cut upon a closer approach. The driver failed to heed a railroad warning sign and continued to drive at 25 to 30 miles an hour. When about 69 feet from the crossing he became aware of the approach of a train, which had failed to sound a warning. The car was going down grade, and the brakes failed to hold on a wet, muddy road. In order to save himself, the driver jumped from the car, and the plaintiff, seeing the driver abandon the car, attempted to extricate himself likewise. In so doing, his clothing caught in the emergency brake of the car so that he was thrown under the train and his foot was crushed. The plaintiff sued both the railroad and the driver of the car. The trial court overruled both demurrers, but the supreme court reversed as to the railroad. Unfortunately, the case was made to turn on whether the engineer of the train could "foresee" that the driver would approach at so great a speed that he could not stop within 69 feet instead of whether the conduct of the driver in jumping out of the car when he had 69 feet within which to stop was logical and natural or illogical and not in accord with ordinary human experience. If the case had been made to turn on the latter ground, however, the plaintiff would probably have been permitted to go to the jury in its claim against the railroad, since the court had already held in *Nash v. R.R.*⁷⁵ that a guest, at least, was not negligent in jumping from a moving car in order to avoid an expected collision with a train.

A result similar to that in the *Hinnant* case was reached in *George*

⁷⁴ 202 N. C. 489, 163 S. E. 555 (1932).

⁷⁵ 202 N. C. 30, 161 S. E. 857 (1932).

v. *R.R.*,⁷⁶ where the driver of the car, instead of stopping or slowing down, speeded up on being apprised of the presence of a train.

This line of thought has led the court into serious difficulty, however, legitimate as it is in proper cases. The ordinary rule is that the negligence of the driver will not be "imputed" to the gratuitous passenger or guest who had no control over the operation of the automobile; that is, that the guest will not be barred of recovery because the driver was negligent and could not himself recover.⁷⁷ Are we going to say that the unexpected act of the driver "insulates" the negligence of the railroad, and so reach the same result as if the negligence were "imputed"? Some of the cases say that we are.⁷⁸ And suppose it is not a last minute irrational act like turning off the road, jumping out of the car, or speeding up when it might have been possible to stop. Suppose it is merely driving too fast, failing to stop or failing to keep a proper lookout. Are we going to say that the negligence of the driver then "insulates" the negligence of the railroad? Could we not equally say that the negligence of the railroad, continuing to the moment of the injury, "insulates" the negligence of the driver?

"Foreseeability" is often made the test instead of the more objective one of whether the conduct seems natural and in accord with the probabilities of human conduct in looking back upon it. People do not turn off roads ordinarily when they could stop. Nervous people do sometimes jump out of cars or speed up in the presence of danger whereas calmer people would stop. All these acts are illogical, however. The preponderance of human experience is against their occurring. People do speed, however, and do not always see or abide by railroad warning signals. People do drive down roads without keeping a proper lookout to the front or to the right or left. People do drive other than on the right-hand side of road. People do pass other cars, even at railroad intersections. Surely, the latter kind of conduct should be called "foreseeable" if that unfortunate expression is to be used; the former kind, "not foreseeable." Surely, the doctrine of "insulating negligence" should be restricted to the negligence of third persons or to the negligence of the driver of the car when acting irrationally, illogically, not in accord with the observed propensities of persons similarly situated.

As to the present state of the authorities, the most that one can say is that they are in confusion. Two illustrations of the contradictory

⁷⁶ 207 N. C. 457, 177 S. E. 324 (1934).

⁷⁷ *Johnson v. R. R.*, 205 N. C. 127, 170 S. E. 120 (1933); *Smith v. R. R.*, 200 N. C. 177, 156 S. E. 508 (1930); *Earwood v. R. R.*, 192 N. C. 27, 133 S. E. 180 (1926); *Williams v. R. R.*, 187 N. C. 348, 121 S. E. 608 (1924).

⁷⁸ *Reeves v. Staley*, 220 N. C. 573, 18 S. E. (2d) 239 (1941); *Butner v. Spease*, 217 N. C. 82, 6 S. E. (2d) 808 (1941); *Powers v. Sternberg*, 213 N. C. 41, 195 S. E. 88 (1938); *Smith v. Sink*, 211 N. C. 725, 192 S. E. 108 (1937); *Herman v. R. R.*, 197 N. C. 718, 150 S. E. 361 (1929).

lines of thought will suffice. In *Henderson v. Powell* and *Rattley v. Powell*,⁷⁹ which grew out of the same accident as *McCrimmon v. Powell*, cited above, the plaintiffs approached an obstructed intersection as guests of a driver who stopped, but seeing no train in motion, drove his car upon the crossing where it was hit by a train going about 60 miles an hour and sounding no warning. The driver of this car had his window shut, so that it would have been difficult for him to hear the train, or a warning, if sounded. It was held that, although the driver could not recover, the driver's negligence would not be "imputed" to the guests. In *Jeffries v. Powell* and *Branch v. Powell*⁸⁰ the plaintiff Jeffries approached a somewhat less obstructed intersection as the guest of a driver who had his car in second gear, and was proceeding at five to ten miles an hour. The driver, being conscious of no train, drove his car upon the crossing where it was hit by a train going about 60 miles an hour and sounding no warning. The driver of this car had his window open and was listening attentively for trains. It was held that the negligence of the driver "insulated" the negligence of the railroad, so that the guest could not recover. It is true that the vicinity of the second crossing was less populous than the first. If the duty of the railroad was less, was not the duty of the driver less likewise, or shall people be injured by railroads with more impunity in rural than in urban districts? It is true that the second driver did not stop. Shall the law be abrogated which says that a failure to stop shall not be considered negligence *per se*? It is true that if the first driver had had his window open he would have heard no warning, for none was sounded. But shall it be said that the driver who did not stop but had his window open exercised less care than the one who stopped and had his window closed? Which driver was more "foreseeable" on the road? What function do "twelve good men and true" play in a system of jurisprudence where such questions are determined by the court?

CASES WHERE THE DEFENDANT'S FORCE HAS COME TO REST

Equally confusing are the cases in which the defendant's force has come to rest. These usually occur where the defendant has left a train across an intersection, perhaps for a longer time than is permitted by ordinance, or maintains an underpass with a pier in the middle which is or has become improperly lighted. The accidents in these cases usually occur at night. The cases seem to make no distinction as to whether the plaintiff's machine collides with the obstruction or with another object in an effort to avoid the obstruction.

The leading case is that of *Weston v. R.R.*⁸¹ which enunciates the

⁷⁹ 221 N. C. 239, 19 S. E. (2d) 876 (1942) (two cases).

⁸⁰ 221 N. C. 415, 20 S. E. (2d) 561 (1942) (two cases).

⁸¹ 194 N. C. 210, 139 S. E. 237 (1927).

principle that a plaintiff is negligent if he is driving at a rate of speed making it impossible for him to stop within the range of his lights. However, liability was discussed on broader grounds. In that case the defendant left its train standing across a highway on a dark and misty night and made no effort by lights or otherwise to notify motorists of its presence there. The plaintiff approached on a road, with which he was not familiar, at a speed of 30 to 35 miles an hour, his lights showing for a distance of only 35 feet. A railroad stop sign was on the right-hand side, but as the plaintiff turned around a curve his lights did not illuminate it. When the plaintiff finally saw the train and applied his brakes, his car skidded; and he ran off an embankment in an effort to avoid the train. The jury allowed recovery, but the supreme court reversed, relying on the somewhat analogous case of *Hughes v. Luther*,⁸² and saying it was evident that in view of the conditions of the road and weather the plaintiff was driving too fast and failing to maintain a proper lookout.

As to whether a guest should be allowed to recover against the railroad when the driver also is negligent, there is the same division of thought in this line of cases as in that just considered. In one sense, the negligence of the railroad is passive, and there is more room for arguing that it is "insulated" by the intervening active negligence of the driver of the car. On the other hand, the effect of it indisputably continues until the time of the injury, and circumstances may place the railroad in the position of maintaining a known hazard. The negligence of the driver in failing to keep a proper lookout perhaps differs from that in the previous cases only in the angle of his vision. As in the previous cases, the distinction that differentiates the decisions is not satisfactory to the casual peruser of the opinions.

In *Dickey v. R.R.*,⁸³ the facts of which were very similar to *Weston v. R.R.*, the guest was allowed recovery, the supreme court saying, "*Weston v. R.R.* . . . is distinguishable, for there the suit was by the owner and driver of the car, while here the plaintiff, a mere invited guest with no authority or control over the car and not its owner, brings the action. Ordinarily the negligence of the driver, under such circumstances, is not imputable to the guest or passenger. . . . But this principle may be subject to modification if it should appear that the occupants of the car were engaged in a joint enterprise."⁸⁴

*Baker v. R.R.*⁸⁵ probably falls rightfully on the other side of the line. There the defendant maintained in the middle of an underpass a pier which was not lighted but was, however, equipped with reflectors.

⁸² 189 N. C. 841, 128 S. E. 145 (1925).

⁸³ 196 N. C. 726, 147 S. E. 15 (1929).

⁸⁴ *Id.* at 728, 147 S. E. at 16.

⁸⁵ 205 N. C. 329, 171 S. E. 342 (1933).

The car in which the plaintiff's intestate was riding approached the underpass at about 35 miles an hour. When some 200 to 300 feet from the underpass the driver fell asleep and ran head-on into the obstruction. The driver was injured and the passenger killed. The driver and the administratrix of the passenger both started suits, and both were non-suited by the trial court. The supreme court affirmed, and the correctness of its decision is unquestionable in the case of the driver. As to the passenger, the court said: "It is equally clear, we think, that the negligence of the driver was the sole, proximate cause of plaintiff's intestate's death."⁸⁶ Granted the fact that people do not fall asleep at the wheel when acting logically and rationally, the decision of the court is probably correct.

The case of *Montgomery v. Blades*,⁸⁷ however, which reached the supreme court four times on various aspects of the case, is much harder to justify in the light of previous decisions. There the plaintiff was the passenger of a driver who also ran into the pier in the center of an underpass. The plaintiff was injured and the driver of the car killed. The plaintiff sued the railroad, which constructed the pier, the city, which permitted the pier to be maintained, and the administratrix of the driver of the car. It is to be noted that although the plaintiff alleged against the railroad and the city negligence in the construction of the pier, the case was tried on the theory that they were negligent in that, having attempted to equip the pier with reflectors, they had provided only glass buttons which were insufficient in number and size, that some of these had come out, and the others were dimmed with dust and dirt. Against the driver of the car, *Blades*, the plaintiff alleged that he had failed to keep a proper lookout, did not drive on the right hand side of the street, and drove at a negligent and careless rate of speed. After the first hearing in the supreme court, which concerned only a cross-action among the defendants, the trial court sustained a demurrer *ore tenus* as to the city and the railroad. The supreme court reversed, however, saying, ". . . there are two instances, at least, where the intervening negligence of an independent responsible agency would 'insulate' the primary negligence charged to a defendant. One is where such intervening negligence has no logical connection by way of causation with the original negligence, and stands, therefore, independently as the sole proximate cause. The other is where the negligence of the intervening agency is of such an extraordinary nature as not to be reasonably foreseeable by the author of the original negligence and must, therefore, be considered the proximate cause—the

⁸⁶ *Id.* at 331, 171 S. E. at 343.

⁸⁷ 217 N. C. 654, 9 S. E. (2d) 397 (1940); 218 N. C. 680, 12 S. E. (2d) 217 (1940); 222 N. C. 463, 23 S. E. (2d) 844 (1942); 223 N. C. 331, 26 S. E. (2d) 567 (1943).

original or primary negligence under such circumstances being considered too remote. . . .

"As the pleading stands, plaintiff has sufficiently alleged, and may be able to establish by the evidence, such logical connection between the alleged negligence of the corporate defendants and that of Blades as to remove the case from the first category. As to the second, we are unable to say, as a matter of law, from the complaint, that the negligence of Blades was of such a character as to be unforeseeable or that it may not, upon the trial, turn out to be the natural and probable result of the failure to properly light or otherwise protect the obstruction or structure described in the pleading as being maintained in the highway, and with which the Blades' car came into collision; or that the conduct of Blades was not a normal reaction to the situation in which he was placed by the negligence of the defendants, assuming that there was such negligence."⁸⁸

In the consequent trial on the merits the plaintiff recovered a judgment. He adduced testimony to prove his allegation that some of the glass knob reflectors were missing and others dirty, although there was also testimony that the reflectors were visible for an undetermined distance down the block. The speed of the driver was established at only about 18 to 20 miles an hour. There was testimony that there was a white line down the middle of the road, and that the car was straddling it; if the driver had not been somewhat to the left there would not have been a collision in the first place. In other words, it seems that the allegations in the complaint were substantially proved, although the speed of the driver was shown as somewhat less than might have been anticipated from the complaint; his negligence in pulling across the white line somewhat more than if there had been no white line there, although it might have indicated a curve or hilltop as easily as an underpass. Nevertheless, the supreme court reversed, saying, "To hold that defendant railway company and city owed to the plaintiff the duty to foresee that a driver of an automobile would drive it on a city street for a whole block 'just straddling the white line,' going 'perfectly straight,' with nothing to obstruct his view, and centering the white line and run 'right into the cement post' in the middle of the street, when the street was open and clear twenty feet wide to the right of the post,' would not only 'practically stretch foresight into omniscience,' but would, in effect, require the anticipation of 'whatsoever shall come to pass.'"⁸⁹ Yet surely the city and the railroad must have had some such foresight in placing on the pier the reflectors which the driver apparently did not see.

⁸⁸ 218 N. C. 680, 684, 12 S. E. (2d) 217, 219 (1940).

⁸⁹ 222 N. C. 463, 468, 23 S. E. (2d) 844, 848 (1942).

The plaintiff filed a petition for a re-hearing which the supreme court denied. It is interesting to note, however, that the justice who wrote the earlier of the two opinions discussed dissented from the refusal to grant a re-hearing. He declared that the vacillation of the court through a long series of cases on the general proposition as to whether negligence of one person was "insulated" by the supervening negligence of another reminded him of the man who said his prayer was, "Lord, give me this day my daily opinion and forgive me the one I had yesterday."