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# Contributory Negligence -- Last Clear Chance -- Stop, Look and Listen

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**Contributory Negligence—Last Clear Chance—Stop, Look and Listen**

In a recent federal case[1] the plaintiff was hit by a train at a blind crossing. He looked and listened, slowing down to five miles per hour, but did not come to a complete stop because of the position of the watchman, who was standing to one side across the tracks, looking in the opposite direction. After getting on the tracks the watchman suddenly rushed out to stop the plaintiff in such a manner that he stalled his engine with the train about 500 feet away. *Held,* judgment for plaintiff reversed. A non-suit should have been granted, as he failed to stop and thus made chance, not precaution, his guarantee of safety.

There has been a growing tendency, since the Goodman case,[2] to make failure to stop at a crossing with an obstructed view negligence *per se.*[3] Some of the courts so holding have, nevertheless, made an exception[4] where the railroad has established a means upon which travelers are, partially, permitted to rely. The presence of a watchman does not absolve all duty of care by the traveler[5] but it does require less care, and this situation usually is a question for the jury as distinguished from the Goodman case. *Ipso facto* the majority

[1] Baltimore and Ohio R. Co. v. Shaw, 35 F (2d) 410 (C. C. A. 3rd, 1929).

[2] Baltimore and Ohio R. Co. v. Goodman, 275 U. S. 66, 48 Sup. Ct. 24, 72 L. ed. 167 (1927). Discussed in: (1928) 3 ALA. L. JOUR. 136; (1928) 16 CALIF. L. REV. 238; (1928) 28 COL. L. REV. 250; (1928) 3 IND. L. JOUR. 478; (1928) 26 MICH L. REV. 582; (1928) 12 MINN. L. REV. 86; (1928) 6 N. C. L. REV. 212; (1928) 76 U. OF PA. L. REV. 321; (1928) 37 YALE L. J. 532.

[3] Chicago, G. W. Ry. Co. v. Biwer, 266 Fed. 965 (C. C. A. 8th, 1920); Delaware & Hudson Co. v. Boyden, 269 Fed. 881 (C. C. A. 3rd, 1921), (giving the Penna. rule, the trial being in that state); But *cf.* Payne v. Shotwell, 273 Fed. 806 (C. C. A. 3rd., 1921). For the state holdings, Koster v. Southern Pacific R. Co., 78 Cal. 233, 279 Pac. 788 (1929), discussed in (1930) 18 CALIF. L. REV. 203; Williams v. Iola Electric Ry., 102 Kan. 268, 170 Pac. 397 (1918); Crandall v. Hines, 121 Me. 11, 115 Atl. 464 (1921); Benner v. Philadelphia & R. Ry. Co., 262 Pa. 307, 105 Atl. 283, 2 A. L. R. 759 (1918); Beckwith v. Spokane Internat'l Ry. Co., 120 Wash. 91, 206 Pac. 921 (1922).

[4] Canadian Pac. R. Co. v. Slayton, 29 F. (2d) 687 (C. C. A. 2d, 1928); Vaca v. Southern Pac. R. Co., 91 Cal. App. 470, 267 Pac. 346 (1928). *Contra:* O'Neill v. Reading Co., 296 Pa. 319, 145 Atl. 840 (1929) (Absolute duty to stop. Open gates and negligence in shutting gates no excuse for failure to stop); *cf.* Serfas v. Lehigh & N. E. R. Co., 270 Pa. 306, 113 Atl. 370 (1921) (Rule of law, peremptory, absolute and unbending; jury should never be permitted to pare it away by distinctions and exceptions).

[5] Missouri Pac. R. Co. v. Elvins, 176 Ark. 737, 4 S. W. (2d) 528 (1928); Moeller v. Missouri Pac. R. Co., 272 S. W. 990 (Mo. App. 1925). *Cf.* Landers v. Erie R. Co., 244 Fed. 72 (C. C. A. 6th, 1917); Vascacillas v. Southern Pac. Co., 247 Fed. 8 (C. C. A., 1918).

rule,[6] which holds that failure to stop must be viewed under the circumstances, would be unlikely to result in a non-suit in such cases.

North Carolina is in the latter class[7] and goes so far as to say that the presence of a watchman is an assurance of safety and an ample invitation to cross, upon which the traveler may presume it safe.[8] The principal case goes further than the Goodman case and is a vast extension away from the principle recognizing a traveler's equality with the railroad at a grade crossing.[9]

[6] (1919) 1 A. L. R. 198 and note; (1926) 41 A. L. R. 405, 424; (1908) 11 L. R. A. (N. S.) 963, 967; good discussion of the relative merits in (1921) 21 COL. L. REV. 290; Beckham v. Hines, 279 Fed. 241 (C. C. A. 6th, 1922); Allen v. B. & M. R. Co., 197 Mass. 298, 83 N. E. 863 (1908); Crabtree v. Missouri Pac. R. 86, Neb. 33, 124 N. W. 932 (1910); Dobbs v. West Jersey & Seashore, R., 78 N. J. L. 679, 75 Atl. 905 (1910); Payne v. Brown, 133 Va. 222, 112 S. E. 833 (1922). States with the humanitarian doctrine send it to the jury usually, Zumwalt v. Chicago & A. R. Co., 266 S. W. 717 (Mo. 1924); *cf.* Lincks v. Illinois Cent. R. Co., 143 La. 445, 78 So. 730 (1918). In two states contributory negligence cannot be a matter of law by the constitution and it is always a question for the jury. Pacific Const. Co. v. Cochran, 29 Ariz. 554, 243 Pac. 405 (1926); Oklahoma Union Ry. Co. v. Lynch, 115 Okl. 146, 242 Pac. 176 (1925).

[7] Hunt v. R. R., 170 N. C. 442, 87 S. E. 210 (1915); Dail v. R. R., 176 N. C. 111, 96 S. E. 734 (1918); N. C. Public Laws, c. 148, §6 (1927), ch. 222 §1 (1929); N. C. CODE (Michie, 1927) §2621 (48); (1928) 6 N. C. L. REV. 212.

[8] Shepard v. R. R., 166 N. C. 539, 82 S. E. 872 (1914); Goff v. R. R., 179 N. C. 216, 102 S. E. 320 (1920); Barber v. R. R., 193 N. C. 691, 138 S. E. 17 (1927) (Where a railroad company maintains a flagman at a crossing, whether voluntarily, by law, or by custom, the public generally has a right to presume that this safeguard will be reasonably maintained and attended to, and in the absence of knowledge to the contrary, the fact that the flagman is absent from his post, or, if present, is not giving the warning of danger, is an ample invitation to cross, upon which a traveler familiar with the crossing may rely and act). *Cf.* Cooper v. R. R., 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391 (1905); Perry v. R. R., 180 N. C. 290, 104 S. E. 673 (1920) (Holding that if failure to stop was caused by breach of duty on part of R. R., in that it failed to give any notice of the approach of the train, then it could not be said as a legal conclusion that it was contributory negligence); see Russell v. Carolina Cent. R. R., 118 N. C. 1098, 24 S. E. 512 (1896) (Duty to stop is the peculiar province of the jury to pass upon); and see Harrison v. R. R. 194 N. C. 656, 140 S. E. 598 (1927) (Rule in Goodman Case is considered just another way of stating the prudent man theory). For the other states following this *cf.* Cincinnati, N. O. & T. P. Ry. Co. v. Prewitt's Adm'r., 203 Ky. 147, 262 S. W. 1 (1924); State v. B. & O. R. Co., 145 Atl. 611 (Md. 1929); Wiggin v. B. & M. R. Co., 75 N. H. 600, 75 Atl. 103 (1910); Passarello v. West Jersey & S. R. Co., 98 N. J. L. 790, 121 Atl. 708 (1923) (Failure of flagman to do duty and give proper warning is prima facie negligence of R. R.); Southern Ry. v. Stockdon, 106 Va. 693, 56 S. E. 713 (1907). But *cf.* Louisville & N. R. Co. v. Webb, 90 Ala. 185, 8 So. 518 (1890).

[9] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403 (1877); Delaware, L. & W. R. Co. v. Rebmann, 285 Fed. 317 (C. C. A. 2d, 1922) (Railroad's precedence conditioned upon duty to give due and timely warning of approach. People have equal right to travel on the highways as railroads have to run trains): *cf.* U. S. Director Gen'l. of R. R. v. Zanzinger, 269 Fed. 552 (C. C. A. 4th, 1920) (Necessity to stop, look and listen is based on reasonable,

In the principal case it is submitted that even if the plaintiff was negligent in going upon the tracks the watchman was subsequently negligent in stopping him in a dangerous position. The plaintiff by his negligence had gotten into a perilous position and the watchman saw him and owed the care of an ordinary prudent man under the circumstances to extricate the plaintiff and avoid the accident.[10] The plaintiff's negligence, being seen and known, brings this under the conscious last clear chance doctrine which all the courts recognize in one form or another.[11]

It is submitted that the principal case puts an undue burden upon the traveler of attracting the watchman's attention to get an invitation[12] to cross. It is also an encroachment upon the province of the jury. The railroads[13] and travelers should be equally encouraged to increase their diligence and when the railroad is at fault it would best serve society to spread the loss, through injury or death, by

prudent man under all the circumstances and one of the circumstances is right to expect a warning from R. R. The presumption is in favor of the traveler as his safety is involved).

[10] Van Sickler v. Washington & O. D. Ry., 142 Va. 857, 128 S. E. 367 (1925); McGowan v. Tayman, 144 Va. 358, 132 S. E. 316 (1926).

[11] (1927) 26 MICHIGAN L. REV. 460; (1927) 1 DAK. L. REV. 51; (1927) 61 AMERICAN L. REV. 929. For particularly good discussion of entire subject see Leon Green, *Contributory Negligence and Proximate Cause* (1927) 6 N. C. L. REV. 3, 21. This was clearly brought out in the charge to the jury in the Lower Court. "If the flagman, in the exercise of reasonable care and prudent judgment, knew or should have known that he could not have stopped Shaw or that Shaw could not have stopped the automobile in which he was riding, considering his rate of speed, before getting upon the track, and, if the watchman in the exercise of that same discretion, prudence and care, knew or should have known that Shaw could have passed over and thus avoided injury, then it was the duty of the watchman to permit him to pass, but that permission to pass is predicated upon the knowledge that he could not stop, in time to avoid running upon the track." This is usually a question for the jury, Curtis v. R. R., 130 N. C. 437, 41 S. E. 929 (1902), and see (1926), 5 N. C. L. REV. 58, unless the evidence is so overwhelming that only one inference is possible, Coleman v. Norfolk & West. Ry. Co., 100 W. Va. 679, 131 S. E. 563 (1926). In the principal case there are reasonable doubts. The U. S. Supreme Court and many state courts have gone so far as to recognize the unconscious last clear chance where it was defendant's duty to exercise due care to discover the plaintiff's peril, Kansas City Southern Ry. Co. v. Ellzey, 275 U. S. 236, 48 Sup. Ct. 80, 72 L. ed. 259 (1927); Haynes v. R. R., 182 N. C. 679, 110 S. E. 56 (1921).

[12] The court says, "The watchman was there and the sounding of the truck's horn would have caused him to turn and give the proper signal to come or wait." Should this responsibility be all placed on the traveler and the railroad be relieved of all care in picking competent watchmen? Under this rule it would be nearly impossible to have an accident whereby the Railroad would have any liability.

[13] The railroads have used the Goodman Case in posters and thus we see the railroad's opinion of the decision as involving a shift of responsibility to the traveler.

making it an item of the cost of maintenance. This seems more desirable than the result of the principal case.

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**Corporations—Non-Cumulative Preferred Stock—Participation in Past Undistributed Profits**

In 1927, the directors of a corporation declared a dividend—the first since the organization of the corporation in 1915—from profits which had accumulated over a period of twelve years. The plaintiffs, owners of non-cumulative preferred stock, sought to enjoin the payment of this dividend to junior shareholders until the directors had paid to the plaintiffs preferential dividends alleged to have been earned, but not distributed to them, in previous years. A Federal District Court in New York denied plaintiffs injunctive relief.[1] But, in 1929, the Circuit Court of Appeals reversed this decision and held that the non-declaration of dividends from the profits earned in previous years made the corporation a dividend debtor to the plaintiffs to the extent of their preferential right to share in the corporation's yearly profits, and that this debt must be paid before dividends to junior stockholders could be declared.[2] Then, in 1930, the Supreme Court of the United States overruled the holding of the Circuit Court of Appeals.[3] It decided that, since the profits made in previous years had been devoted each year to capital improvements instead of dividends, the non-cumulative, preferred shareholders had no claim to the past invested profits. The reason given was that "a common and reasonable" interpretation of the nature of non-cumulative stock gives to its holders the right to share only in the declared dividends of any given year and precludes any right to share in undistributed profits earned in past years.

Since the right of any shareholder to participate in the profits of a corporation is a contract right the nature of which is determined by the particular type of stock owned by him,[4] a preliminary test in

[1] Barclay v. Wabash Ry. Co., 23 F. (2d) 691 (S. D. N. Y. 1928).
[2] Barclay v. Wabash Ry. Co., 30 F. (2d) 260 (C. C. A. 2d, 1929).
[3] Wabash Ry. Co. et al. v. Barclay, 50 Sup. Ct. 106 (1930).
[4] Day v. U. S. Cast Iron Pipe, etc. Co., 96 N. J. Eq. 736, 126 Atl. 302 (1924); Continental Ins. Co. v. Minn., etc. Ry. Co., 290 Fed. 87 (C. C. A. 8th, 1923); Scott v. Baltimore, etc. Ry. Co., 93 Md. 475, 49 Atl. 327 (1901); Elkins v. Camden, etc. Ry. Co., 36 N. J. Eq. 233 (1882). See Note (1929) 14 CORN. L. Q. 341, 342. "Corporate charters are contracts and preferred stock created by such charters carries only the rights derived from the charter provisions." Berle, *Non-Cumulative Preferred Stock* (1923) 23 COL. L. REV. 358.