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Torts: Contributory Negligence at Railroad Crossings

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cutes it to a verdict, he has had his day in court.[5] Since there is a judgment on the merits, the same conclusion could be reached by applying res judicata.

In the recent case of *Marks v. Fields*[6] the Florida Supreme Court permitted the plaintiff, even after the introduction of his testimony, to amend his pleadings, waive the tort of deceit, and sue in general assumpsit. The Court adopted a liberal view and deviated from precedent[7] in stating, "The law of our state favors liberality in amendments to pleadings."[8] In the principal case the Court extended the liberal tendency introduced in the *Marks* decision by adopting the reasoning that although the judgment is final in form it is not final on the merits. Res judicata, therefore, does not apply when the court directs a verdict for the defendant prior to plaintiff's completion of his case.

In the instant case the Court stated that, had the first action been prosecuted to a final judgment on the merits, res judicata would have been applicable and relitigation not permitted.[9] This indicates, therefore, that the common-law view of res judicata is still in effect in Florida.

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TORTS: CONTRIBUTORY NEGLIGENCE AT RAILROAD CROSSINGS

Seaboard Air Line R. Co. v. Boles, 37 So.2d 578 (Fla. 1948)

At daybreak on a foggy morning plaintiff approached a series of railroad tracks crossing a highway in the town of Waldo. At the first track, stationary railroad cars on both sides of the crossing obstructed the plaintiff's view. He stopped, shut off his motor, and looked and listened before crossing the first track. Then, without stopping or looking, he proceeded

[5]State *ex rel.* Ingen v. Panama City, 126 Fla. 776, 171 So. 760 (1937); Weeke v. Reeve, 65 Fla. 374, 61 So. 749 (1913); McKinnon v. Johnson, 59 Fla. 332, 52 So. 288 (1910).

[6]36 So.2d 612 (Fla. 1948); see 2 U. OF FLA. L. REV. 142 (1949).

[7]Capital City Bank v. Hilson, 64 Fla. 206, 60 So. 189 (1912); American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908); Campbell v. Kauffman Milling Co., 42 Fla. 328, 29 So. 435 (1900).

[8]36 So.2d 612, 615 (Fla. 1948).

[9]40 So.2d 145, 147 (Fla. 1949).

to the second track, a distance in excess of twenty-two feet, and was hit by a slow-moving train at the second track. Had he stopped or looked after crossing the first track, he could not have failed to see the approaching train. There was conflicting evidence as to whether the locomotive's headlight was on, its bell ringing, or its whistle blowing. Verdict and judgment for plaintiff. On appeal, HELD, the plaintiff was guilty of contributory negligence. A traveler approaching a grade crossing must look and listen, and circumstances may require him to stop. By way of dictum, however, the Court further held that he is not required to leave his vehicle and reconnoiter. Judgment affirmed on condition of remittitur based on a comparative negligence statute.[1]

A Florida statute providing that a motor vehicle operator on a public road outside of an incorporated town or city must stop, look, and listen at railroad crossings designated as dangerous[2] was not considered in the principal case. Facts requiring its application did not appear.

Under the so-called Pennsylvania rule, closely followed only in that state, the driver of a vehicle must stop, look and listen when approaching a grade crossing or be held contributorily negligent as a matter of law, regardless of the circumstances.[3] The majority of the courts apply a less exacting standard which ordinarily requires the traveler to look and listen,[4] the duty to stop depending on the circumstances revealed by such precautions.[5] Under this latter view, which is accepted today by the Florida Supreme Court,[6] the standard of care is not absolute and may be qualified by unusual situations presenting new factors.[7]

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[1]FLA. STAT. §768.06 (1941).

[2]FLA. STAT. §320.45 (1941).

[3]Benner v. Philadelphia & R. Ry., 262 Pa. 307, 105 Atl. 283 (1918); *cf.* Pennsylvania R. R. v. Yingling, 148 Md. 169, 129 Atl. 36 (1925). *But cf.* School v. Philadelphia Suburban Transp. Co., 356 Pa. 217, 51 A.2d 732 (1947).

[4]*E.g.*, Swenson v. Chicago, M., St. P. & R. R. R., 336 Ill. App. 287, 83 N. E.2d 375 (1949); McIntosh v. Union Pac. R. R., 146 Neb. 844, 22 N. W.2d 179 (1946) (alternative holding); Hynek v. Kewaunee, G. B. & W. Ry., 251 Wis. 319, 29 N. W.2d 45 (1947).

[5]*E.g.*, Rhineberger v. Thompson, 356 Mo. 520, 202 S. W.2d 64 (1947); Judson v. Central Vermont R. R., 158 N. Y. 597, 53 N. E. 514 (1899); Snyder v. Missouri Pac. Ry., 183 Tenn. 467, 192 S. W.2d 1007 (1946); Tawney v. Kirkhart, 44 S. E.2d 634 (W. Va. 1947).

[6]*See* Atlantic C. L. R. R. v. Timmons, 36 So.2d 430, 431 (Fla. 1948).

[7]*E.g.*, Guess v. New York Cent. R. R., 319 Ill. App. 522, 49 N. E.2d 652 (1943); Pennsylvania R. R. v. Sargent, 83 N. E.2d 793 (Ind. 1949); Fisher v. Grand Trunk Western Ry., 306 Mich. 95, 10 N. W.2d 321 (1943); Rhineberger v. Thompson, 356 Mo. 520, 202 S. W.2d 64 (1947); Fischer v. New York Cent. R. R., 188 Misc. 72, 66

In *Baltimore & Ohio R. R. v. Goodman,*[8] decided in 1927, Mr. Justice Holmes of the United States Supreme Court took the position that a traveler approaching a railroad crossing must leave his vehicle and reconnoiter if he cannot otherwise be sure whether a train is dangerously near. This statement, however, was not neccessary to the decision; and subsequently in 1934 the Supreme Court expressly limited the *Goodman* case to the particular facts therein and overruled the dictum regarding reconnoiter.[9] Prior to the 1934 decision the Florida Supreme Court approved in its entirety the standard upheld in the *Goodman* case, as manifested in three cases ranging from 1928 to 1931.[10] In none of these cases, however, does it appear that the reconnoitering rule is of substance to the decision.

In the principal case the Supreme Court of Florida has, as a result of its holding by dictum, overruled its former decision in regard to the necessity of reconnoitering; and in so doing the Court is in accord with the majority of other recent decisions.[11] The argument in support of the prevailing view is that the delay caused by reconnoitering might make the attempt to cross even more perilous by reason of the interval during which the traveler is regaining his vehicle after inspecting the tracks.[12] It is pertinent to note that this view more generally conforms to the general theory of the law of negligence. The standard of care in negligence cases is that expected of an ordinarily prudent person under the circumstances.[13] Although custom is not necessarily conclusive as to the question of what a reasonable and prudent person would do,[14] it is of con-

N. Y. S.2d 557, *aff'd* 273 App. Div. 135, 77 N. Y. S.2d 196 (1948).

[8]275 U. S. 66 (1927).

[9]Pokora v. Wabash Ry., 292 U. S. 98 (1934).

[10]Seaboard A. L. Ry. v. Watson, 103 Fla. 477, 137 So. 719 (1931); Atlantic C. L. R. R. v. Watkins, 97 Fla. 350, 121 So. 95 (1929); Germak v. Florida E. C. Ry., 95 Fla. 991, 117 So. 391 (1928).

[11]*E.g.*, Pokora v. Wabash Ry., 292 U. S. 98 (1934); Fish v. Southern Pac. Co., 183 Ore. 294, 143 P.2d 917 (1943); Key v. Carolina & N. W. Ry., 150 S. C. 29, 147 S. E. 625 (1929); *see* Dobson v. St. Louis-San Francisco Ry., 223 Mo. App. 812, 10 S. W.2d 528, 532 (1928). *But see* Koster v. Southern Pac. Co., 207 Cal. 753, 763, 279 Pac. 788, 792 (1929); Davis v. Pere Marquette Ry., 241 Mich. 166, 216 N. W. 424, 425 (1927); Mussari v. Lehigh Valley R. R., 149 Pa. 342, 25 A.2d 763, 765 (1942).

[12]Pokora v. Wabash Ry., 292 U. S. 98 (1934); Georgia R. R. & Banking Co. v. Stanley, 38 Ga. App. 773, 145 S. E. 530 (1928).

[13]Russ v. State, 140 Fla. 217, 191 So. 296 (1939). Wright v. Minneapolis St. Ry., 222 Minn. 105, 23 N. W.2d 347 (1946).

[14]Owen v. Rheem Mfg. Co., 83 Cal. App.2d 42, 187 P.2d 785 (1947); Hood v. City of Nashua, 91 N. H. 98, 13 A.2d 726 (1940); Ribarin v. Kessler, 78 Ohio App. 289, 70 N. E.2d 107 (1946).