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Warning Devices at Crossings

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which suggested that state taxation could be applied to radio if it were a severable gross receipts tax. The court said it could sustain a tax on gross receipts from intrastate commerce and condemn only that part of the tax that reached receipts from interstate commerce. In *Whitmore v. Bureau of Revenue,* a case based on facts like those in the instant case, the United States District Court for New Mexico held that the business of radio broadcasting was partially intrastate and partially interstate and that the intrastate business was taxable by the state. The Supreme Court affirmed this decision without opinion.[21]

The New Mexico courts have approached the subject of state taxation of radio broadcasting from a practical viewpoint, adopting the views Mr. Justice Stone first advanced in 1938. In accordance with these views, the court would strike down a tax measured by the gross receipts only if such receipts were derived from activities which extended beyond the territorial limits of the taxing state, or if such tax was capable of duplication by other states. However, in the recent case of *Freeman v. Hewit,*[23] the language of the court indicates the possibility of returning to the pre-1938 doctrine of "direct" and "indirect" burden as the test to be applied, and of discarding what seems to be the more practical tests; apportionment to intrastate commerce and the danger of multiple taxation. A return of the court to the "direct-indirect" test could result in preventing other state legislatures from seeking additional revenue by taxation even upon that radio broadcasting which is intrastate. However, the gross receipts tax on the privilege of intrastate broadcasting is now in effect in New Mexico[24] and the high court in that state has supported the legislature's action on the subject.

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WARNING DEVICES AT CROSSINGS

In an action for personal injuries, the plaintiff stopped in reliance upon a wigwag provided by the defendant railroad company. After the wigwag had stopped oscillating and an electric car had passed, the plaintiff drove his car across the tracks. The plaintiff looked to the south upon reaching the first of four sets of tracks but did not see the train approaching from the north until about five feet from the point of collision. The defendant was clearly negligent in operating its electric car but it is contended that the plaintiff was contributorily negligent as a matter of law. Having been nonsuited in the court below, the plaintiff appeals. *Held,* that the driver's contributory negligence was a question for the jury and the judgment was reversed. *Spendlove v. Pacific Electric Ry. Co.,* 184 P. (2d) 873 (Cal. 1947).

"The decisions are not in accord as to the extent which a traveler may rely on the indication of safety which the silence of a signaling device at a crossing

21. Cited supra note 15.
22. Cited supra note 8.
23. 329 U. S. 249, 67 Sup. Ct. 274 (1946).
24. For a similar statute see Ariz. Code Ann. Sec. 73-1301 par. 2 subsec. (c) (8) (1939).

implies."[1] In one line of cases it is held that a traveler has no right to rely solely on the silence of the signal, and is, as a matter of law, guilty of contributory negligence in proceeding to cross the track without taking further precautions for his own safety.[2] It is to be noted that defendants frequently rely on cases involving unguarded crossings,[3] wherein a higher degree of care is required than at guarded crossings.[4] In Pennsylvania, the Supreme Court holds that failure to stop, look, and listen, even where the gates are open is negligence *per se*.[5] Generally, it is only where the driver exercised no care, and the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question of contributory negligence from the jury.[6] However, an exhaustive search revealed no case holding the driver negligent as a matter of law in which the driver stopped in reliance upon a warning device and was thereby assured that it was functioning properly, as in the instant case.

In probably a larger line of decisions the question of the driver's contributory negligence has been submitted to the jury where it is shown that some reliance has been placed in the warning device.[7] These courts take the view that the presence of warning devices modifies the "stop, look, and listen" rule that requires a person to cross a railroad at his peril, if he does so without first ascertaining if it is safe to proceed.[8] The traveler has the right to rely to some extent on the indication that no trains are approaching as evidenced by a silent signal, although he cannot rely entirely on such indication.[9] Where it has in fact been shown that the driver relied upon the warning device, the jury has usually been left to decide whether too much reliance has been used by the driver.[10] These courts take the

1. 53 A. L. R. 975.
2. Atchison, T. & S. F. R. Co. v. McNulty, 285 Fed. 97 (C. C. A. 8th 1922); cert. denied, 262 U. S. 746, 43 Sup. Ct. 521, 67 L. Ed. 1212 (1923); Headley v. Denver & R. G. R. Co., 60 Colo. 500, 154 P. 731 (1916); Jacobs v. Atchison, T. & S. F. Ry. Co., 97 Kan. 247, 154 P. 1023, L. R. A. 1916 D, 783 (1916); Koch v. Southern California Ry. Co., 148 Cal. 677, 84 Pac. 176, 4 L. R. A. (N. S.) 521 (1906).
3. Polfer v. Chicago Great Western R. Co., 130 Kan. 314, 286 Pac. 240 (1930); Koch v. Southern California Ry. Co., 148 Cal. 677, 84 Pac. 176, 4 L. R. A. (N. S.) 521 (1906); Lane v. Atchison, T. & S. F. Ry. Co., 151 Kan. 113, 98 P. (2d) 403 (1940).
4. Chrissinger v. Southern Pac. Co., 169 Cal. 619, 149 Pac. 175 (1915); Baltimore & O. R. Co. v. Goodman, 275 U. S. 66, 48 Sup. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645 (1927); Chase v. Maine Cent. R. R., 167 Mass. 383, 45 N.E. 911 (1897); Koster v. Southern Pac. Co., 207 Cal. 753, 279 Pac. 788 (1929).
5. Greenwood v. Philadelphia W. & B. R., 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614 (1889).
6. Seller v. Market St. Ry. Co., 139 Cal. 268, 72 Pac. 1006 (1903); Chrissinger v. Southern Pac. Co., 169 Cal. 619, 149 Pac. 175 (1915); Gregg v. Western Pac. R. Co., 193 Cal. 212, 223 Pac. 553 (1924); Koch v. Southern California Ry. Co., 148 Cal. 677, 84 Pac. 176 (1906).
7. 53 A. L. R. 978; 99 A. L. R. 733.
8. Aores v. Great Northern Ry. Co., 166 Wash. 17, 6 P. (2d) 398, Wessling v. Southern Pac. Co., 116 Cal. App. 447, 3 P. (2d) 22 (1931); Blount v. Grand Trunk Ry. Co., 61 Fed. 375 (C. C. A. 6th 1894); (Taft, J., ". . . failure to lower the gates modifies the otherwise imperative duty of travelers, when they reach a railway crossing, to look and listen, and the presence of such a fact in the case generally makes the question of contributory negligence one for the jury. . . ."); McClain v. Chicago, R. I. & P. Ry. Co., 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914 C, 699 (1913).
9. Pippy v. Oregon Short Line R. Co., 79 Utah 439, 11 P. (2d) 305 (1932); Weston v. Hines, 107 Kan. 625, 193 Pac. 340 (1920); Kindig v. Atchison, T. & S. F. Ry. Co., 133 Kan. 459, 1 P. (2d) 75 (1931).
10. Gregg v. Western Pac. R. Co., 193 Cal. 212, 223 Pac. 553 (1924); Lindekugel v. Spokane, P. & S. Ry. Co., 149 Ore. 634, 42 P. (2d) 907 (1935).

view that the silence of a signaling device is an implied invitation to pass.[11] The court took the unusual view in the instant case that it could be inferred that the driver relied on the warning device to determine when it was safe to proceed, and the fact that he looked to both sides before proceeding does not negative that inference.

As stated in the instant case, it is generally held that the same quantum of care is not required when the railroad has provided warning devices and thereby encouraged travelers to relax their vigilance.[12] However, the driver is not entirely relieved from the duty of using ordinary care for his own safety, but is only partially relieved.[13] Nor are the warning devices an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions.[14] Usually, if reasonably prudent men would disagree as to whether the plaintiff exercised ordinary care, the case should be submitted to the jury.[15] In so holding, these courts generally refuse to hold that the plaintiff is not contributorily negligent as a matter of law.

The instant case reveals a fact situation in which the driver stops in reliance on the wigwag and proceeds after the warning has ceased oscillating, and a train has passed. The same set of circumstances prevailed in the case of *Startup v. Pacific Electric Ry. Co.*[16] Neither case was distinguished from those cases in which the driver approaches a crossing and finds the wigwag motionless. Cognizance was taken of this characteristic by Judge Traynor, who concurred in judgment but disagreed as to the negligence of the driver. In his opinion, "Such a driver is in a different position from a driver who finds the wigwag silent . . . when he approaches the tracks and crosses them without looking for approaching trains. The former is assured by the operation of the wigwag that it is functioning and will warn of approaching trains, whereas the latter, having no such assurance, must anticipate the possibility that the wigwag is not functioning." In *Jacobs v. Atchison, T. & S. F. Ry. Co.*,[17] the court made a distinction between cases in which human intelligence guarded a crossing and one in which an electrical, mechanical device was provided. It was there stated that an electric bell, which at most can be nothing but a warning of an approaching train to those who listen, cannot be classed with a gate thrown across a street to prevent passing over railroad tracks, nor can it be classed with a flagman. Likewise, courts have reasoned that the driver may well regard the present of a flagman with his stop sign under his arm as a greater indication of safety than the absence of a flagman.[18]

11. Crawford v. Southern Pac. Co., 3 Cal. (2d) 427, 45 P. (2d) 183 (1935); Aores v. Great Northern Ry. Co., 166 Wash. 17, 6 P. (2d) 398 (1931).
12. Toschi v. Christian, 24 Cal. (2d) 354, 149 P. (2d) 848 (1944); Startup v. Pacific Electric Ry. Co., 29 Cal. (2d) 866, 180 P. (2d) 896 (1947).
13. Will v. Southern Pac. Co., 18 Cal. (2d) 468, 116 P. (2d) 44 (1941); Sheets v. Southern Pac. Co., 212 Cal. 509, 299 Pac. 71 (1931); Atchison, T. & S. F. R. Co. v. Hicks, 165 P. (2d) 167 (Ariz. 1946).
14. McClain v. Chicago, R. I. & P. Ry. Co., 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914 C, 699 (1913).
15. Bollinger v. Schaff, 113 Kan. 124, 213 Pac. 644 (1923); Gregg v. Western Pac. R. Co., 193 Cal. 212, 223 Pac. 553 (1924).
16. Startup v. Pacific Electric Ry. Co., 29 Cal. (2d) 866, 180 P. (2d) 896 (1947).
17. Jacobs v. Atchison, T. & S. F. Ry. Co., 97 Kan. 247, 154 Pac. 1023, L. R. A. 1916 D, 783 (1916).
18. Toschi v. Christian, 24 Cal. (2d) 354, 149 P. (2d) 848 (1944).

By analogy courts could reason that an oscillating wigwag as in the instant case is a greater indication of safety than a motionless wigwag.

There seems to be a growing tendency to permit the traveler to place more reliance upon warning devices at railroad crossings. Especially is this true in cases such as the instant case, and the *Startup* case wherein the driver stops in response to the signal, and proceeds after the "all clear" indication is given. It is not often that a malfunctioning warning device will operate as did the "wigwag" in the instant case, but when that unusually dangerous peculiarity is present, it is submitted that the courts should rule as a matter of law that the driver is not contributorily negligent.

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