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INSTRUCTIONS IN REGARD TO THE SPEED OF MOTOR TRUCKS, A STUDY IN STATUTORY INTERPRETATION

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The framing of proper instructions in automobile accident cases, especially in regard to speed, has been a difficult problem for the lawyers of Kentucky. Even the Court of Appeals has frankly admitted its own error in the formulation of what were to be model instructions for the guidance of lawyers and lower courts. The preparation of proper instructions in regard to the speed of trucks has been extremely difficult due to the fact that since 1932 Kentucky has had two statutes, side by side in the books, one prohibiting unreasonable and improper speed and stating certain rates of speed that shall, under given conditions, be prima facie evidence of improper driving, and the other absolutely prohibiting driving in excess of certain stated speeds. That difficulty still exists in an intensified form since both of these provisions were re-enacted in 1942 and now appear as subdivisions of KRS 189.390.

In order to understand the decisions which have approved or disapproved various types of instructions from time to time, and in order to determine the proper form of future instructions, it is necessary to review briefly the development of the statutory law in regard to the speed of motor vehicles.

Subsection (1) of KRS 189.390 regulates speed by establishing a general standard, that the speed shall be reasonable and prudent under the circumstances. This is followed by paragraphs (a), (b) and (c) which describe certain areas or places of operation and provide that speed greater than the rates therein specified shall be prima facie evidence of violation of the prescribed standard. This form of regulation, which is

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found in many other states, was adopted in 1910, replacing the arbitrary miles-per-hour limit formerly used. It has appeared, with some changes in figures and words, as Section 2739g-51 of all editions of Carroll's Kentucky Statutes from 1910 through 1936. As such it has always applied to passenger automobiles, and, except for a six-year period from 1932 to 1938, it has applied to trucks. In fact the section, as reenacted in 1920, applied expressly to trucks by the addition of three subdivisions classifying trucks according to rated capacity and providing that speeds in excess of stated rates should be prima facie evidence of unreasonable and improper driving.

In 1932, in an act relating exclusively to trucks and regulating their size, weight and equipment, there was a flat regulation of speed on an arbitrary mile-per-hour basis according to the gross weight of the truck and load and place of operation. This provision was codified as Section 2739g-86 of all subsequent editions of Carroll's Kentucky Statutes. In *Hopper v. Barren Fork Coal Co.*,¹ it was stated that this Act repealed by implication the special provisions of Section 2739g-51 relating to the speed of trucks. This was based on the conclusion that these two sections were necessarily conflicting and incompatible. The statement in the Hopper case was applied in *Nehi Bottling Co. v. Flannery*,² in holding an instruction given under Section 2739g-51 improper when applied to trucks. In subsequent cases, such as *National Linen Supply Co. v. Snowden*,³ and *Meriweather's Adm'x. v. Pickering*,⁴ the Court expressed or indicated doubt as to the rule stated in the Hopper and Flannery cases. But from 1932 until 1938, it was reversible error to instruct to the effect that the speed of a truck in excess of the rate provided in Section 2739g-51 constituted only prima facie evidence of negligence. It was proper to instruct that it was the duty of the driver to drive at a reasonable and proper speed and, if the evidence warranted, that a speed in excess of the flat mile-per-hour rate prescribed in Section 2739g-86 was absolute negligence.

This was followed in 1938 by the enactment of a somewhat comprehensive motor vehicle law which added many new provi-

¹ 263 Ky. 446, 92 S. W. (2d) 776 (1936).

² 264 Ky. 68, 94 S. W. (2d) 297 (1936).

³ 288 Ky. 374, 156 S. W. (2d) 186 (1941).

⁴ 273 Ky. 367, 116 S. W. (2d) 670 (1938).

sions and amended and re-enacted many sections of the 1936 Statutes. No express mention was made of Section 2739g-86 but Section 2739g-51 was reenacted. The first three subsections, which had originally referred to "passenger automobiles" but which by an apparent typographical error in the Act of 1926 then referred to "passing automobiles," were retained with some change in the rate of speed that was to be considered prima facie evidence of unreasonable and improper driving. Subsections (4), (5) and (6) of Section 2739g-51, which had provided a similar rule of evidence in regard to the speed of trucks, were omitted in the re-enactment. In *National Linen Supply Co. v. Snowden*,⁵ it was held that since the 1938 Act was later in time and since "passing automobiles" applied to all types of motor vehicles, it repealed by implication Section 2739g-86, which related only to trucks. There seemed to be some idea that the statutes might apply to different situations and conditions and that Section 2739g-86 might have some effect outside the scope of Section 2739g-51. But this idea was apparently abandoned in *Thomas v. Dahl*,⁶ which held that the re-enactment of Section 2739g-51 in 1938 had the effect of repealing Section 2739g-86 and that instructions in regard to the speed of trucks should be the same as those given in reference to the speed of passenger automobiles, and in terms of prima facie rather than absolute negligence. This was approved in *Miles v. Southeastern Motor Truck Lines*.⁷

The *Dahl* and *Miles* cases, which definitely held that Section 2739g-86 of the 1936 statutes was repealed by the Act of 1938, were not decided until after the enactment of the Revised Statutes in 1942. The Reviser of the statutes, as was his duty under the circumstances, copied both provisions into the Revised Statutes as separate parts of the same section. Section 2739g-51 of Carroll's Statutes, as reenacted in 1938, became Subsection (1) of KRS 189.390, and Section 2739g-86, of the old statutes, originally enacted in 1932, is now Subsection (3) of the same section. For convenience, the subsection numbers will be used in referring to these provisions. We now have two provisions of the Revised Statutes which, according to their language, purport

⁵ 288 Ky. 374, 156 S. W. (2d) 186 (1941).

⁶ 293 Ky. 808, 170 S. W. (2d) 337 (1943).

⁷ 295 Ky. 156, 173 S. W. (2d) 990 (1943).

to regulate the speed of trucks and which prescribe different rates of speed under identical driving conditions and provide different penalties for violation. One designates a rate of speed of "motor vehicles" that shall be prima facie evidence of unreasonable and improper driving and the other prescribes an arbitrary mile-per-hour limit for trucks, the violation of which is negligence per se. This is the same problem that was presented in 1932 and again in 1938 except then the apparent conflict could be solved by applying the rule that the last enactment expresses the will of the legislature. These provisions are parts of the 1942 Revision, enacted as a single act, and as such they speak as of the same date, KRS 446.130. The Revised Statutes of 1942 speak for themselves and the fact that Subsection 3 was impliedly repealed will not necessarily affect its validity.⁸ However, it is proper to consider Subsection (1) in the light of the decision in *National Linen Supply Co. v. Snowden*,⁹ since on the re-enactment of a statute which had previously been construed by the Court, it will be presumed the legislature intended to incorporate such interpretation into the re-enacted statute.¹⁰

Where there is an apparent conflict between two parts of a statute, the courts should, if it is possible, reconcile and harmonize them so that both may stand. The first method of reconciliation that comes to mind is the application of the rule that a particular statute, one concerned with specific subject matter, is to be construed as an exception to a general statute. As applied here, the regulation of the speed of trucks would be excepted from the operation of Subsection (1) and would be governed exclusively by Subsection (3). This is what the Court expressly refused to do in the *Dahl* case in regard to these same provisions, and it would be more difficult now since the ambiguous "passing automobiles" as used in the 1938 Act, under which the *Dahl* case was decided, has been changed to the more inclusive term "motor vehicles" as defined in KRS 189.010 (12). Other objections, then raised, still apply, as, for example, this interpretation would allow a truck weighing 5,000 pounds or

⁸ KRS 446.130; *Mannini v. McFarland*, 294 Ky. 837, 172 S. W. (2d) 631 (1943).

⁹ 238 Ky. 374, 156 S. W. (2d) 186 (1941).

¹⁰ *Falender v. Hankins*, 296 Ky. 396, 177 S. W. (2d) 382 (1944); *Caywood v. Coleman*, 294 Ky. 858, 172 S. W. (2d) 548 (1943); *Ray v. Spiers*, 281 Ky. 549, 136 S. W. (2d) 750 (1940).

less to operate through a residential area at a greater speed than would be prima facie proper for a passenger automobile. Subsection (4) excepts from the provisions of Subsection (1) certain vehicles of the truck type. It can hardly be said that the legislature did not intend Subsection (1) to apply to trucks and then expressly excepted certain vehicles of this type from its provisions. Or, as was pointed out in the *Dahl* case, the specific mention of certain vehicles as being excepted from the operation of Subsection (1) indicates "that the legislature did not intend to except cars of any other kind." It seems clear that Subsection (1) must be interpreted as applying to trucks.

We might consider the possibility of construing Subsection (1) as applying to both trucks and passenger automobiles with Subsection (3) as an addition thereto providing an absolute maximum speed limit for trucks only. This sounds practicable, but when applied to the statute we find that, since the limits prescribed in Subsection (3) are never greater, and generally lower, than the corresponding figures in Subsection (1), this interpretation would have the effect of entirely excluding trucks from the operation of Subsection (1). This, as we have seen, cannot be done without violating all the canons of statutory construction. If such an interpretation were possible, it would force us into untenable positions as, for example, a speed of 31 miles an hour by a heavy truck in open country would be an absolute violation and negligence per se, but a speed of 46 miles an hour by the same truck under the same conditions would be only prima facie evidence of negligence as provided in Subsection (1). In a residential area, 25 miles an hour would be a prima facie violation, but 20 miles an hour would be an absolute violation. Attention should be called to the fact that these subsections provide different penalties and that the heavier penalty may be invoked in case of a violation of the subsection which provides for the lower speeds.

If these two subsections could be "separated from their antecedents and origins" and looked at apart from their histories, it might be possible to say that Subsection (3) is the punitive statute applicable to trucks and Subsection (1) is the punitive statute applicable to other motor vehicles but also provides the rule of evidence of negligent driving to be used in civil

actions involving all types of motor vehicles. If this somewhat fanciful interpretation were adopted in order to save a part of the statute, instructions in civil actions in regard to the speed of trucks would be given under the prima facie evidence rule provided in Subsection (1).

The only practical solution is to follow the course established by the Court of Appeals on two separate occasions and clearly marked by many decisions. After the enactment of Subsection (3) in 1932, and again after the re-enactment of Subsection (1) in 1938, the Court found that these two provisions were conflicting and irreconcilable, and that one must fall in order that the other might stand. In the enactment of the Revised Statutes, it was anticipated that situations of this kind would arise and a method of solving the difficulty was provided. KRS 446.130 provides in part:

“ in cases of conflict between two or more sections or of a latent or patent ambiguity in a section, reference may be had to the Acts of the General Assembly from which the sections are indicated to have been derived, for the purpose of applying the rules of construction relating to repeal by implication or for the purpose of resolving the ambiguity.”

In referring to the Acts of the General Assembly for the purpose of applying the rules of construction relating to repeal by implication, it is impossible to escape the conclusion that the enactment of Subsection (1) in 1938 repealed the prior and conflicting speed laws now appearing as Subsection (3).

As has been held in all cases involving truck accidents since 1938, it is believed that the instruction in regard to the speed of trucks should be the same as that given in respect to passenger automobiles. This solution, however, will not end all the difficulties with these instructions. There is a common conception, as indicated by the signs along the highways, that the mile-per-hour figures in KRS 189.390 (1) are arbitrary speed limits. Trial courts, as shown by the many remanded cases, have not entirely avoided this error. The real problem is in framing an instruction that will inform the jury that a stated mile-per-hour speed creates a presumption of negligence but is not the conclusive and final test. The instruction must not follow the words of the statute since any mention of prima facie evidence violates “the fundamental rule that the jury should not be told specifi-

cally upon whom the burden rests or that a presumption of law is against one of the parties."¹¹

The Court of Appeals, in *Nowak v. Joseph*,¹² suggested that the instruction in regard to speed, when proper, should be incorporated into a general instruction defining all the pertinent duties of the driver and prepared a model instruction suitable to the facts of that case. The paragraph in reference to speed reads as follows:

"To drive his car at a speed no greater than 15 miles per hour, unless you believe from the evidence that the speed of defendant's car, though greater than 15 miles per hour, was not unreasonable and improper driving, considering the traffic and use of the street at that time and place, in which event this duty was not incumbent upon him."

This instruction, although it would probably be considered sufficient, seems to put the emphasis on the evidence of violation of the statute rather than on the violation itself. The violation which establishes the negligence is the unreasonable and improper speed under the circumstances. The speed in terms of miles per hour is only prima facie evidence creating a rebuttable presumption which should be subordinate to the real prohibition of the statute. There may be a violation of the statute, although the speed is much less than the rates prescribed in Subsection (1).¹³ Conversely, one may drive at a greater speed and be guilty of neither negligence nor violation of the statute.¹⁴

There was some change in the statute as re-enacted in 1942. The word "proper" has been changed to "prudent" and the jury is now admonished to consider the condition of the highway as well as its use. These changes should be incorporated in future instructions. In the instruction setting out the duties of the driver of a truck, it is suggested that the instruction in *Nowak v. Joseph* be slightly re-arranged so as to read:

"To drive his truck at a speed no greater than was reasonable and prudent having regard for the traffic and for the condition and use of the highway and not to exceed a speed of _____ miles per hour unless you believe from the evidence that the speed, though greater than _____ miles per hour, was not unreasonable and improper driving."

¹¹ *Gorman v. Berry*, 289 Ky. 88, 158 S. W. (2d) 5 (1941); *Utilities Appliance Co. v. Toon's Adm'r.*, 241 Ky. 823, 45 S. W. (2d) 478. 275 Ky. 470, 121 S. W. (2d) 939 (1938).

¹² *Tate v. Shaver*, 287 Ky. 29, 152 S. W. (2d) 259 (1941); *Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90 (1915).

¹³ *Kappa v. Brewer*, 207 Ky. 61, 286 S. W. 831 (1924); *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861 (1916).

The general instruction on the duties of the driver, of which the paragraph on speed is only a part, will, of course, include the statement that the failure to observe any of the duties warrants recovery if, and only if, the failure was the proximate cause of the injury. The form of the statement suggested in *Nowak v. Joseph* should be followed. However, in cases where the pleadings and evidence are sufficient to warrant an instruction on behalf of the defendant, as in case of contributory negligence, last clear chance, or unavoidable accident, the form of the instruction suggested in *Nowak v. Joseph* should be changed so as to include a reference to this defense.¹⁵ However, instructions, without express reference to other instructions on defenses, have been approved where it is reasonably clear to the jury that they are alternatives.¹⁶

A failure to instruct in the manner suggested is not necessarily reversible error. It is not the duty of the court on its own motion to give all the law of the case in a civil action, or to instruct on every issue pleaded and proved. "All that is required is that the instructions shall be correct as far as they go. If additional instructions are desired, they should be requested."¹⁷ A party objecting to an instruction need not supply the omission nor correct the error. If the court, on its own motion, instructs on certain issues, an erroneous prejudicial instruction is reversible error. Where the pleadings and evidence warrant an instruction in regard to speed, and an instruction is offered, "it is error not to properly instruct on the point although the offered instruction cannot be given because not correct in form."¹⁸

The statute was not intended to create a presumption of negligence as to accidents having no relation to traffic and an instruction which follows the statute should not be given in respect to automobile accidents and injuries not related to traffic and highway conditions and which "would have occurred re-

¹⁵ *National Linen Supply Co. v. Snowden*, 288 Ky. 374, 156 S. W. (2d) 186 (1941).

¹⁶ *Wight v. Rose*, 209 Ky. 803, 273 S. W. 472 (1925).

¹⁷ *Murphy v. Harmon*, 291 Ky. 504, 165 S. W. (2d) 11 (1942); *Kappa v. Brewer*, 207 Ky. 61, 263 S. W. 831 (1924).

¹⁸ *Murphy v. Harmon*, 291 Ky. 504, 165 S. W. (2d) 11 (1942); *Wight v. Rose*, 209 Ky. 803, 273 S. W. 472 (1925).

ardless of the condition and use of the highway and in the absence of any traffic whatever.’¹⁹

No instruction in regard to speed should be given unless speed is made an issue by the pleadings. A general charge of negligence is sufficient unless it is connected with allegations of specific acts of negligence, in which case the pleader is restricted to the specified acts in his proof and submission to the jury.²⁰ Although the pleadings are sufficient, no instruction should be given in regard to speed unless there is evidence of excessive and improper speed sufficient to authorize submission to the jury.²¹ This requirement is not satisfied by evidence that the truck was moving or that it was being driven at any certain rate of speed less than that prescribed in KRS 189.390 (1), unless there is sufficient evidence that this speed was unreasonable and improper under the circumstances.²² In some of the recent opinions there are statements that proof of speed less than the rates prescribed in KRS 189.390 (1) creates a presumption that the speed was reasonable and proper. Such a presumption is not warranted by the statute and is not proper.

Excessive speed, in itself, is not a tort. It is necessary to establish causation, and unless there is sufficient evidence that the excessive speed was the proximate cause of the injury, no instruction should be given in regard to the speed.²³ Under this rule, evidence that the excessive speed merely increased the injury is not sufficient. In *Murphy v. Homans*,²⁴ in discussing a peremptory instruction, it is stated that the test is whether the speed played any part in the accident and whether “the accident would have resulted regardless of the rate of speed.” This test tends to be misleading in a case involving the collision of two moving objects since by a slight variation in the speed of either the collision might have been avoided. In determining the issue of proximate cause, only the speed in excess of a reasonable and

¹⁹ *Newton v. Weatherby's Adm'x.*, 287 Ky. 400, 153 S. W. (2d) 947 (1941), and see *Hopper v. Barren Fork Coal Co.*, 263 Ky. 446, 92 S. W. (2d) 776 (1936).

²⁰ *Lang v. Cooper*, 262 Ky. 407, 90 S. W. (2d) 382 (1936).

²¹ STANLEY, INSTRUCTIONS TO JURIES, Secs. 18, 19.

²² *Standard Oil Co. v. Thompson*, 189 Ky. 830, 226 S. W. 368 (1920).

²³ *Lieberman v. McLaughlin*, 233 Ky. 763, 26 S. W. (2d) 753 (1930); *Knecht v. Buckshorn*, 233 Ky. 329, 25 S. W. (2d) 727 (1930).

²⁴ 286 Ky. 191, 150 S. W. (2d) 14 (1941).

proper rate should be considered. If the relative positions of the plaintiff's and the defendant's automobiles were the same and if the accident would have occurred although the defendant were driving at a reasonable rate of speed, the excessive rate is not the cause of the injury and no instruction should be given in regard to speed.²⁵ Proof of speed in excess of the rate prescribed in KRS 189.390(1) creates a presumption of unreasonable and improper driving and hence of negligence, but it has been said that evidence of such speed also creates a presumption that the speed was the proximate cause of the injury "so as to make it incumbent upon one who is operating his car in excess of such speed to show the same did not produce the injury."²⁶ This presumption does not seem to be proper and is probably the result of confusing care and causation.

Where a plaintiff who was negligent relies on the last clear chance doctrine, evidence on, and hence an instruction in regard to, the defendant's speed before he discovered or should have discovered the plaintiff's peril is improper.²⁷ This follows the approved doctrine "that one guilty of contributory negligence cannot base his right of action upon the antecedent negligence of the one causing the injury."²⁸ This rule does not apply where there is conflicting evidence of the plaintiff's negligence.²⁹ Generally speed is not an issue when the injury is directly due to mechanical failure or other cause classed as an "unavoidable accident." In an action by a guest to recover for injuries due to the locking of a wheel on the truck in which he was riding, the court should instruct the jury to find for the defendant if they believe the accident was the result of some defect in the truck unknown to the defendant. *Helton v. Prater's Adm'r.*³⁰ is a

²⁵ *Knecht v. Buckshorn*, 233 Ky. 329, 25 S. W. (2d) 729 (1930); *Lieberman v. McLaughlin*, 233 Ky. 763, 26 S. W. (2d) 753, and see *Denunzio v. Donahue*, 204 Ky. 705, 265 S. W. 299 (1924) and *Louisville & N. R. Co. v. Mitchell's Adm'x.*, 276 Ky. 671, 124 S. W. (2d) 1025 (1939).

²⁶ *Wight v. Rose*, 209 Ky. 803, 273 S. W. 472 (1925); *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861 (1916).

²⁷ *Braden's Adm'x. v. Liston*, 258 Ky. 44, 79 S. W. (2d) 241 (1935).

²⁸ *Louisville and Nashville R. R. Co. v. Mitchell's Adm'x.*, 276 Ky. 671, 124 S. W. (2d) 1025 (1939).

²⁹ *Short Way Lines v. Sutton's Adm'r.*, 291 Ky. 451, 164 S. W. (2d) 809 (1942).

³⁰ 272 Ky. 574, 114 S. W. (2d) 1120 (1938); *Schilling v. Heringer*, 252 Ky. 624, 67 S. W. (2d) 979 (1934).

similar case. In both of these cases there was evidence of unreasonable speed at the time of the mechanical failure. But in another and more recent guest case, where the upset was due to a blow out, a judgment in favor of the defendant was reversed because "it excused the defendant from liability regardless of the rate of speed he might have been driving" since "it is almost common knowledge that a blowout at a reasonable rate of speed will not cause a car to overturn."³¹ When the defense is based on an emergency, it is proper to instruct in regard to unreasonable speed since this defense is not available to one who was negligent prior to and at the time of the emergency.³²

There are situations where it may be proper to give a general instruction in regard to speed by stating the duty to drive at a speed no greater than is reasonable and prudent and to omit any reference to a mile-per-hour rate. In order to warrant an instruction to the effect that any certain mile-per-hour speed is prima facie evidence of negligence, there must be evidence identifying the place of operation as one described in paragraphs (a), (b) or (c) of KRS 189.390(1).³³ Even if there is sufficient evidence of the place of operation to justify an instruction under the proper paragraph of KRS 189.390(1), no instruction should be given unless there is more than a scintilla of evidence that the truck was travelling in excess of the speed prescribed. In a case involving the application of paragraph (c) it was said that evidence of speed "from 45 to 50 miles per hour" is sufficient to warrant an instruction in regard to speed in excess of 45 miles per hour.³⁴ But in a later case, *Miles v. Southeastern Motor Truck Lines*,³⁵ the Court was not satisfied with this ruling and reexamined the record and found that the witness testified "between 45 and 50 miles an hour, something like that" and

³¹ *Murphy v. Harmon*, 291 Ky. 504, 165 S. W. (2d) 11 (1942).

³² *Miles v. Southeastern Motor Truck Lines*, 295 Ky. 156, 173 S. W. (2d) 990 (1943); *Golubic v. Rasnick*, 239 Ky. 355, 39 S. W. (2d) 513 (1931); *Evans, The Standard of Care in Emergencies* (1942) 31 Ky. L. J. 207.

³³ *Patton v. Gannett*, 296 Ky. 533, 177 S. W. (2d) 888 (1944); *National Linen Supply Co. v. Snowden*, 288 Ky. 374, 156 S. W. (2d) 186 (1941); *Southern Oxygen Co. v. Martin*, 291 Ky. 238, 163 S. W. (2d) 459 (1943); *Cundiff v. Nave*, 240 Ky. 47, 39 S. W. (2d) 471 (1931); *Sharp v. Rawls*, 234 Ky. 438, 28 S. W. (2d) 493 (1930).

³⁴ *Southern Oxygen Co. v. Martin*, 291 Ky. 238, 163 S. W. (2d) 459 (1941).

³⁵ 295 Ky. 156, 173 S. W. (2d) 990 (1943).

expressed doubt that this was sufficient to warrant the instruction. The Miles case held that evidence that the truck was going "45 or 50 miles" was not sufficient to show the speed to be greater than 45 miles per hour, other testimony indicating a lower rate of speed, and that it was improper to incorporate in the instruction any reference to a mile per hour rate of speed.

Evidence of speed in excess of the rates prescribed in KRS 189.390(1) creates only a presumption of negligence, but in the absence of rebutting evidence, the court should give a peremptory instruction to find for the plaintiff, or, if other matters are in issue, instruct that the driver was negligent.³⁶

In addition to the regulations now found in KRS 189.390, the statutes have, from time to time, limited speeds under certain driving conditions such as approaching or traversing intersections, bridges, sharp curves or steep descents. There were also prescribed speed limits on meeting or passing a person or beast on the highway or meeting another automobile. These were arbitrary mile-per-hour limits, sometimes as low as 3 miles per hour, and a violation was negligence per se. These special regulations have disappeared from the statutes or have been replaced by the general requirement of care and control.³⁷ However there is still an arbitrary speed limit of 10 miles per hour in passing a school bus stopped on the highway³⁸ and a limit of 15 miles per hour on meeting or passing another vehicle on a highway the surface of which is less than 14 feet wide. Violations of either of these regulations will be negligence per se.

Speed while traversing sharp curves or steep grades is now regulated by KRS 189.390 (1) (b) with speed in excess of 25 miles per hour prima facie evidence of unreasonable and improper driving. A sharp curve means a curve of not less than thirty degrees.³⁹ A steep grade is a grade exceeding seven per cent.⁴⁰ The jury must not be allowed to guess as to whether a

³⁶ Pickering v. Simpkins, 271 Ky. 288, 111 S. W. (2d) 650 (1937). See also Hornek Bros. v. Strubel, 212 Ky. 631, 279 S. W. 1087 (1920) and Knecht v. Buckshorn, 233 Ky. 329, 25 S. W. (2d) 727 (1920).

³⁷ KRS 189.310 (meeting cars or animals); 189.350 (meeting or passing cars); 189.410 (approaching curves or obstructions); 189.420 (mountain driving).

³⁸ KRS 189.370.

³⁹ KRS 189.010 (7).

⁴⁰ KRS 189.010 (9).

grade or curve falls within the statutory definition nor to rely on "indefinite proof of witnesses who may also be guessing."⁴¹ A description of a curve as a "sharp curve" is too general and obviously the mere opinion of a witness and in the absence of conclusive or uncontradicted proof that it was not less than thirty degrees, the instruction should be given under paragraph (c) and not under the more restrictive paragraph (b).⁴²

In conclusion, it should be pointed out that there are parts of the present statute which are not entirely clear and which may give rise to some question in the future. The areas described in paragraphs (b) and (c) of KRS 189.390 (1) overlap. This is due to the omission from the Act of 1926 and subsequent acts of the phrase "or residence portion" from paragraph (c). It is clear that this paragraph was intended to regulate speed in areas not specifically covered in the preceding paragraphs and it has been so applied. The Court has referred to this paragraph as the one regulating speed in "the open country," but this is not exact as it provides only a rule of evidence, but one which is applicable to all areas outside of closely built-up business or residential sections of incorporated cities. This is the only part of the statute which can be applied to speeds through congested business or residential areas of unincorporated villages or towns. Formerly the word "town" appeared in what is now paragraphs (a) and (b) but this was omitted in the 1942 Revision. Paragraph (c) is also ambiguous in its reference to a "straightaway, unobstructed highway." "Straightaway" as used here does not necessarily mean straight but is used here to differentiate the paragraph from paragraph (b) which applies to speed on sharp curves. The adjective "unobstructed" may give more trouble since it is defined in KRS 189.010 (11) in such a way that it would impair the practical operation of this paragraph by making the 45 mile limit inapplicable to main highways under normal traffic conditions. "Unobstructed highway," as defined in the statute, is a "straight, level, first-class road upon which no other vehicle is passing or attempting to pass, and upon which no other vehicle or pedestrian is approaching in the opposite direction closer than three hundred yards."

⁴¹ National Linen Supply Co. v. Snowden, 288 Ky. 374, 156 S. W. (2d) 186 (1941)

⁴² Patton v. Gannett, 296 Ky. 533, 177 S. W. (2d) 888 (1944).

This definition was enacted at a time when there were special regulations of speed on passing or meeting of vehicles or persons and it was a necessary part of those regulations. The term "unobstructed" was at that time made a part of what is now paragraph (c) in order to prevent a conflict with those special provisions. But since the special regulations are no longer a part of our statutes, the term, and its statutory definition, are unnecessary. A literal interpretation would result in there being a gap in the statute with no prima facie rule of evidence applicable to much of the driving outside incorporated cities.