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MOTORISTS AND PEDESTRIANS—A STUDY OF THE JUDICIAL PROCESS IN RELATION TO THE STATUTORY RIGHT OF WAY LAW IN MARYLAND

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"The truth is", said Justice Holmes in *The Common Law*, "that the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow".[1]

It is quite apparent that time has not sapped these words of their vitality, and an examination of any branch of the law today will reveal the present continuation of those processes of adoption and retention to which the Justice referred. In the immediate field of inquiry, it will be noted that this language has as much, if not more, applicability than one might find in the more fully developed and older branches of the law, this being so perhaps because of the fact that slight variations are much more noticeable when they occur in a relatively new field of the law with its attendant paucity of decisions than when they occur with the same frequency in an older field thoroughly studded with decisions.[2]

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[1] HOLMES, THE COMMON LAW (1881).

[2] It was not until 1916 that there was any statutory provision as to a right of way rule in Maryland. The rule was originally enacted in Md. Laws (1916) Ch. 687, and remains practically unchanged today.

In view of the fact that under the statutory right of way provisions there generally arise two separate types of cases, namely those dealing with pedestrians injured by automobiles, and those concerning the collision of two automobiles at an intersection, it has been decided to treat each separately. To that end then, the present article will deal with the pedestrian accident phase.[2a] We consider here only those cases arising under the statutory right of way provisions, including those cases containing a discussion of said provisions, and this article is not intended to serve as a general discussion of any and all types of accidents involving the pedestrian-automobile set-up.

"All pedestrians shall have the right of way at street crossings in the towns and cities of this state, except where traffic is controlled at such crossings by traffic officers, or traffic control devices. Between street crossings in such towns and cities, vehicles shall have the right of way."[3] This is the statutory language applied to that portion of the right of way law as it applies to pedestrians, and while many of the cases mentioned hereafter were decided prior to 1947, still there has been so little change in the statutory wording that it has been decided to refer throughout to this 1947 provision whenever reference to the statute is required to be made.

At the outset of this discussion it should be noted that aside from the problem of what constitutes a street crossing, and those other ancillary matters as to whether or not the accident occurred in a city or town, or whether the street crossing was controlled by traffic officers, or devices, there seems at first glance to be little room for judicial interpretation of this provision. A study of the cases arising under this provision, however, shows quite clearly that the most troublesome part of the whole statute, so far as interpretation is concerned, is the phrase about which the entire statute is erected, namely, "right of way". By many persons, pedestrians as well as motorists, this phrase adopted by the legislature, was thought to confer on them

[2a] The companion article to follow will deal with the phase of the collision of two automobiles at an intersection.

[3] Md. Code Supp. (1947) Art. 66½, Sec. 181 (a).

a privilege or right which it became their duty to enforce even at the risk of harm to another, and we find them frequently asking the courts to vindicate them for having insisted on being accorded what they considered to be their "right of way". Time and again we find our Court of Appeals reiterating for the benefit of those litigants whose etymological view of the phrase was not fluid enough to admit of any construction save that of an *absolute* right, that the right thus granted by the legislature was not absolute, even though unqualified in any manner by the words of the statute.[4] The problem then comes to this, what legally recognized preference is conferred on the parties concerned, that is pedestrian and motorist, by the statute? It must, *a fortiori,* be conceded that the language of the statute does not seem to present any solution, for no qualifications are there listed, and to answer the *query* thus posed we must turn to a consideration of those decisions stemming from this legislative enactment.

The Court in 1925 had before it the case of a pedestrian who had been knocked down by a truck while crossing the street in the pedestrian crossing at an intersection, and it took that opportunity to discuss generally this very problem. After setting forth the section of the act relating to pedestrian right of way the Court said:[5]

> "Section 163 required that the truck should give pedestrians the right of way at street crossings, and the effect of such statutory requirement is that drivers of automobiles, when approaching street crossings and passing over the way used by pedestrians must slacken the speed of the automobile and have the same under such control as to be able to avoid a collision with a pedestrian, either by stopping the automobile or diverting its course. . . . The plaintiff had the right to assume that the driver of the truck would obey the law, and that, if the speed and direction at which he

[4] See Crunkilton v. Hook, 185 Md. 1, 42 A. 2d 517, 521 (1945): "We hold that an operator of a motor vehicle has no right to assume that the road is clear, but must be reasonably vigilant . . . and must anticipate the presence of pedestrians upon it"; and Bush v. Mohrlein, 62 A. 2d 301, 302 (Md. 1948): ". . . the right of way, is not an absolute privilege . . . the statute gives only a relative right dependent upon the particular circumstances. . . ."

[5] Merrifield v. Hoffberger, 147 Md. 134, 140, 127 A. 500 (1925).

> and the automobile were moving, if continued by both, would bring them in contact, the driver of the automobile would so slacken the speed of his truck, or divert its course, as to avoid the collision, because this he was bound to do. . . . Vehicles may have the right of way on a portion of a street or highway set aside for them, but at crossings all drivers, particularly of motor vehicles, must be highly vigilant and maintain such control that on the shortest possible notice they can stop their cars so as to prevent injury to pedestrians."

We find in this language a positive command as to the motorist, that at a street crossing he be highly vigilant, and that he be able to stop on the shortest possible notice. Nothing is here mentioned about the correlative duty of care on the part of the pedestrian who is crossing. It is simply pointed out that it was his right to assume that the driver would obey the law and slacken speed for the plaintiff in the cross-walk. There was no intimation that the pedestrian would be guilty of contributory negligence as a matter of law, if, under the same circumstances he assumed that the driver of the vehicle would reduce his speed, even after it should have been apparent to the pedestrian that the driver was not in fact going to obey that requirement. The lack of any extended discussion of the possibility of contributory negligence on the part of the pedestrian was not a thing to cause comment at that time, because in the prior cases involving similar factual situations the Court had contented itself with a brief mention of such eventuality. In one of these cases the only reference to the duty of the pedestrian in crossing the street was made after the Court had laid down the doctrine that a pedestrian at a street crossing may assume that a vehicle will not be driven on the wrong side of the street, when it said in reference to such pedestrians,[6] . . . "although, of course, they must use due care according to the circumstances".

A later case, *Panitz v. Webb*, was concerned with an accident at a street crossing controlled by traffic signal, where the pedestrian was crossing on a green light and was struck by motorist making a right hand turn with the same

[6] Brown v. Patterson, 141 Md. 293, 302, 118 A. 653 (1922).

light in his favor. The Court pointed out that the presence of the traffic signal expressly took the case out from under the statute, and held that the rights of the parties were to be determined by common law, and that under such law they were relative and reciprocal rights. "Each was bound to anticipate the presence of the other, and to take cognizance of the physical properties of the machine operated by defendant's agent, as well as of the fact that the invitation given by the traffic signal was to both of them."[7]

Should there have been no further decisions or cases arising under the statute, it would not be inconceivable that reasonable minded men would believe that in this right of way law there were areas of absolute right on the part of both parties. Certainly such was the view, some two years later, of the defendant who had struck a pedestrian who was crossing the street in the middle of the block. Predicated upon the belief that at such a place the statute gave the motorist an absolute right and required the pedestrian to cross at his peril, the defendant submitted a prayer that the court instruct the jury that the plaintiff was *prima facie* guilty of contributory negligence if, at the time of the accident he was "walking in the south driveway of Roland Avenue in about the middle thereof at night time", or "was at or near the center of said south bound driveway between street crossings". This prayer was rejected by the trial court and in considering it on appeal the Court of Appeals, in *Nelson v. Seiler,* said:[8]

> "The inference is that this is the legal consequence of the provision of the law (Code, art. 56, sec. 209) that between street crossings vehicles shall have the right of way. It is not clear that the prayer supposes the plaintiff to be between street crossings, but taking both prayers to intend to place him there, his being so, while it is one of the facts to be considered on the question of negligence, is not sufficient standing alone to establish negligence *prima facie,* to establish it, that is, in the absence of any other facts. No statute gives the fact that effect, and it would not logically follow, for a pedestrian has a right to cross the streets

[7] Panitz v. Webb, 149 Md. 75, 83, 130 A. 913 (1925).
[8] Nelson v. Seiler, 154 Md. 63, 76, 139 A. 564 (1927).

> between crossings, and it is conceivable that a man might be injured while crossing with care and without contesting the right of way there. There are statements in the authorities that negligence is *prima facie* shown by this one fact but it seems to us inaccurate. The question is one of ordinary care only, entirely for the jury, and we think it would be going too far for the court to give the fact *prima facie* effect."

Here, for the first time, we see the clear delineation by the Court of the rights of both parties. What had at first appeared to be a clearly drawn rule of the road, now became not a rule at all but rather a mere guide post pointing disputants to the test of "ordinary care under the circumstances". This is stated in so many words by the Court in its opinion. Consider the effect of this decision on the statute. Is it not "judicial repeal"? Does the statute retain any meaning in the face of such construction by the Court? We have on one hand the legislative enactment that "between street crossings . . . vehicles shall have the right of way",[9] and if this is to be accorded any effect there must be some sort of positive preferential treatment given the motorist by the courts when he is involved in an accident with a pedestrian who is not crossing at the cross walk. Can it be said that he is given such preference in any way when the Court says, as it did here, "the question (of the negligence *vel non* of a pedestrian in crossing in the middle of the block) is one of ordinary care only. . . ."[10] It is submitted that *this* test would be applied in the absence of a statute (as in *Panitz v. Webb*[11] where Court held presence of traffic control took case out from the statute) and if we apply the same test with, as well as without, a statute, where then is any preference to be found? The Court was never troubled with this matter, for it simply refused to consider that any such problem was raised in the first instance. If such a postulate is to be accepted, it is then possible to follow through with the other cases arising under the Act, and give as much or as little effect to it as

[9] *Supra*, n. 3.
[10] *Supra*, n. 8.
[11] *Supra*, n. 7.

is desired, and such was the solution here. Apparently no litigant ever raised the points mentioned, and it has never become necessary for the Court to formulate a reply. Nonetheless, it is suggested that here can be found the precursor of a policy of disregarding the words of the statute whenever it became necessary to do so, in order that the desired result be achieved in decision. In the *Nelson* case it was impossible for the Court to use the argument that the situation was controlled by the common law rule of right of way since the case was certainly within the statute; and yet, in overruling the defendant's objection here that the trial court improperly rejected a prayer drawn upon the theory that the statute as passed made the act of crossing in the middle of the block *prima facie* evidence of contributory negligence it reached a result which it is submitted could only be justified under the common law rule of relative and reciprocal rights, though the Court based its result on the statute.

One possible *rationale* might exist, and that is an argument that the Court was not refusing to give effect to the statute since the statute deals with primary negligence only, and that the Court was free to graft onto it such requirements as are legally sound with reference to the problem of the contributory negligence of the plaintiff. Using such an argument as a touchstone, it would logically follow that the *Nelson* case[12] was not one to cause any comment. The problem of contributory negligence was handled in the usual manner, by the application of the time tested rule of "ordinary care under the circumstances", and it was in the sole province of the jury to decide whether or not the plaintiff had acted without the requisite degree of care in crossing the street in the middle of the block. Such a line of reasoning seems to lose sight of the fact that it is substance and not form to which the courts most often claim to give obeisance. Certainly an argument predicated on the hypothesis that such a statute deals only with primary, as opposed to contributory, negligence, would have its foundation grounded on fallacy, for it is more

[12] *Supra*, n. 8.

than elementary that primary negligence is the concern of the *plaintiff* in all these cases, and unless some positive preference is given to the defendant, in the form of judicial rulings as to the contributory negligence of the plaintiff, then there is no such area of right, qualified or otherwise, available to the motorist when he is involved in an accident with a pedestrian while the latter is crossing at a point other than the crosswalk. To follow a policy of letting all such cases go to the jury is to disregard the statutory directive that, "between street crossings . . . vehicles shall have the right of way".[13]

Whether or not any such considerations were presented to the Court in the next three years it is impossible to say, but we do find definite evidence which points to the fact that in some later cases there was an awareness of the incongruity of the position taken in the *Nelson* case,[14] and we find a desire to give at least lip service to the statute. In 1930, the Court had before it the case of a child playing in the middle of a block, and, chasing across the street after a ball, was struck by the defendant's right front fender. There was evidence that the child never looked to see if the street was clear before running across the street. The only witness adverse to the defendant was in a house some 100 feet away, and all she could testify to was that she thought that defendant was speeding.[15] The plaintiff came to the Court of Appeals, appealing from a directed verdict below, and in affirming this ruling, the Court dwelt briefly on the same type of question as was raised in the *Nelson* case.[16] It was contended by plaintiff that the question of contributory negligence of the child was for the jury under the same type of reasoning as was availed of in the *Nelson* case,[17] but this time the Court viewed the problem from another angle, and would not go along with the plaintiff's contentions. It said in part:[18]

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[13] *Supra*, n. 3. See State v. Belle Isle Cab, *infra*, n. 55.
[14] *Supra*, n. 8.
[15] Slaysman v. Gerst, 159 Md. 292, 150 A. 728 (1930).
[16] *Supra*, n. 8.
[17] *Ibid.*
[18] *Supra*, n. 15, 300.

> "It is also to be remembered that this accident took place between street intersections at approximately the middle of the block, at which place, under the Code, art. 56, sec. 209, automobiles are given the right of way over pedestrians. . . . It does require that between street intersections pedestrians *yield the right* of way to vehicles.[19] The difference between accidents at, and those between, regular crossings is that in the latter the rule of ordinary care requires the motorist to exercise less and the pedestrian more care to avoid injury."

Here then appears to be language which narrows considerable the broad statement that the question of the contributory negligence of one crossing the street in the middle of the block is, "one of ordinary care only, entirely for the jury. . . ."[20] Yet, when viewed objectively it is to be noticed that still there is here no intimation that the statutory right of way given to the motorist between street crossings is of any definitive character. The Court here does state that the statute gives the motorist the right of way in such situations, but the important thing, and the matter of most grave concern to the motorist, namely, how far the Court will go in vindicating him should he exercise this grant of right of way, is left unanswered. He is told that, while the rule of ordinary care is still applicable to him in such a situation, still because of the statute he may exercise less care to avoid injury to a pedestrian in the middle of the block than he must at an intersection. Such a rule is not one easily capable of application, and indeed it smacks of the comparative negligence rule adopted by a few states[21] but never applied in Maryland.[22] It seems strange that in this case the Court, in affirming the lower court's action in directing a verdict for the

[19] Italics supplied.

[20] *Supra*, n. 8.

[21] Missouri Pac. R. Co. v. Davis, 197 Ark. 830, 125 S. W. 2d 785 (1939); Savannah Electric Co. v. Crawford, 130 Ga. 421, 6 S. E. 1056 (1908).

[22] See Webb Pepploe v. Cooper, 159 Md. 426, 151 A. 235 (1930); Edwards v. State, 166 Md. 217, 170 A. 761 (1934); Hendler Creamery Co. v. Miller, 153 Md. 264, 138 A. 1 (1927); Sillik v. Hoeck, 168 Md. 639, 178 A. 852 (1935); Universal Credit Co. v. Merryman, 173 Md. 256, 195 A. 689 (1938); all cases of pedestrian suits against motorists where defense was that of contributory negligence. In no case is the rule of comparative negligence ever adverted to.

defendant, failed to clarify its position any further than it did, for certainly the situation was hand-tailored for some affirmative statement as to the duty imposed by the statute on a pedestrian crossing in the middle of the block; but it was not until it had considered the next case of the same *genre* that we can find an affirmative statement with reference to just such a matter.[23] There the Court was dealing with a case wherein the defendant was speeding in a car with poor brakes. Plaintiff was crossing Charles Street from east to west in the middle of the block at midnight in a well illumined section. Plaintiff testified that he looked north and south and saw nothing, and that he was almost all the way across the street when he was struck without warning by the defendant. Defendant admitted that he was speeding, that he had poor brakes, and that he never sounded his horn because he never saw the plaintiff until just a second before he struck him. He said that his headlights were on. The Court in holding plaintiff guilty of contributory negligence as a matter of law, said that the plaintiff must have done one of two things. He either failed to look at all, or he looked and saw the defendant coming, but tried to beat him across the street. In its comment on this latter possibility the Court went straight to the heart of the problem, and dealt fully with it.[24]

> "The plaintiff's attempt was all the more culpable because the statutory rule of the road was that vehicular traffic between street crossings shall have the right of way over pedestrians. . . . While this statutory provision *is not alone sufficient to establish contributory negligence*. . . .[25] yet it serves to give character to the plaintiffs act, and is a pregnant circumstance, because the statutory rule imposed upon such pedestrians an added degree of responsibility, and so, of care, in looking for approaching automobiles . . . between intersecting streets. The statute is a legislative recognition of the danger of vehicular traffic to pedestrians in passing across the streets of cities and towns,

[23] Webb-Pepploe v. Cooper, 159 Md. 426, 151 A. 235 (1930).
[24] *Supra*, n. 23.
[25] Italics supplied.

> and an effort to diminish the number of injuries and fatalities from this source by giving the pedestrian the right of way at street crossings . . . and by conferring on vehicular traffic the right of way over pedestrians crossing such streets between the public crossings."

A study of this statement is revealing, in that we see now that the Court has taken a definite position on the matter of the impact of the statute on the question of contributory negligence. The Court will refuse to go along with any doctrine which would call for the interposition by the judiciary of an absolute bar to recovery by any plaintiff who was guilty merely of crossing a street at a place other than at a street crossing, but at the same time it points the way towards acceptance of a doctrine less strictly phrased, but reaching practically the same result. The plaintiff here failed to yield the right of way as required by the statute, and it would be difficult to imagine a less attractive position than the one occupied by the defendant, and yet withal, the result was that recovery was denied. To hold that the primary negligence of the defendant driver was not sufficiently made out here would seem to be an untenable position in the light of the facts set out in the opinion, and if we accept as a *fait accomplit* the primary negligence of the driver, then the resulting reversal of a failure to direct a verdict below can only be explained by reference to the plaintiff's acts which were of such a clear and undisputed nature as to amount to contributory negligence in and of themselves.

In our study of the plaintiff's actions in this connection it must be born in mind that the Court, in directing a verdict for the defendant, must view the evidence with the construction most favorable to plaintiff's right to recover.[26] Let us examine then, the acts of the plaintiff which were considered sufficiently culpable to warrant the Court in holding that they did in fact make him contributorily negligent as a matter of law. The plaintiff testified that he had gotten out of a car on the east side of Charles Street,

[26] Barker v. Whittier, 166 Md. 33, 170 A. 578 (1934).

which at that point is about 40 feet wide. It was midnight, but the street was well lighted, and as he looked to both his right and left he could see no cars coming towards him. He then proceeded to cross and was almost across when he was struck by a car coming from his right. He claimed that the car did not have its lights on at this time. Those are the facts as set forth by the plaintiff, and if we look at them in their most favorable light, as the Court had to do, what is the result? The plaintiff makes out a case of due care in every act which transpired save only for his act of crossing in the middle of the block. That was the only act of his which could be said to have led to the injury since he was prudent enough in the other matters therein mentioned. The Court must have realized its dilemma here for it stuck to the rule as enunciated in the *Nelson* case[27] that it is not contributory negligence as a matter of law for one to cross in the middle of the block—since, the Court argued, a pedestrian has a right to cross a street at a place other than the intersection, provided he uses due care and does not contest the right of way there. However, it was another matter to justify a defendant's directed verdict here for one would be hard put to it to find any other factors on which to base it beyond the fact that the plaintiff was crossing in the middle of the block. Nonetheless, the Court made use of a very convenient judicial device to circumvent this difficulty when it declared that one who testifies that he looked and failed to see something that he was bound to see had he in fact looked, will be presumed not to have looked; and on the strength of this as a basis for contributory negligence found for the defendant, reversing, without new trial, the verdict for plaintiff below when lower court had refused to direct a verdict for the defendant.

We see then, that while the Court will not go so far as to subscribe to the doctrine mentioned above (that of holding the plaintiff guilty of contributory negligence for crossing in the middle of the block) it has laid down its policy in this matter in different words, and yet the net

[27] *Supra*, n. 8.

result seems to be the same in either case. It will refuse to hold one remediless for merely crossing in the middle of the block without more, but on the other hand it extends to the defendant in such a situation an unspoken promise that it will manage to find those other facts which, when taken in conjunction with "the pregnant circumstance" of crossing in the middle of a block, will complete the picture of contributory negligence. It is only fair to point out here, that the Court does not play any favorites in its application of this doctrine for in later cases where the plaintiff was crossing at an intersection and was struck by a motorist, it has held that the advantage or preference which is given to the pedestrian by the statute does not absolve him from the duty of observing due care for his own safety.[28]

A much more troublesome matter presents itself to us when we consider the implications of language used by the Court in the case of *Thompson v. Sun Cab Co.*[29] There in a suit filed by a pedestrian, plaintiff failed to place himself in the intersection cross walk where he would have enjoyed whatever preference the statute gives to those crossing at such a point. Furthermore the plaintiff failed to look where he was going because of a heavy rain, and as he was hurrying across the street without looking, he was struck by the cab. Following the course charted in its prior decisions the Court found for the defendant saying that the plaintiff should have looked and would then have seen the approaching vehicle in time to avoid it by waiting for it to go by. Had the decision rested here there would be no occasion for comment, as it followed along in the footsteps of prior opinions.[30] However, there is in this

[28] See Chasanow v. Smouse, 168 Md. 629, 178 A. 846 (1935) where the court refused to allow the pedestrian to invoke the sanction of the statute to counter-balance his own contributory negligence in crossing at an intersection without looking out for approaching traffic; *cf.*, Sheriff Motor Co. v. State, 169 Md. 79, 179 A. 508 (1935) where plaintiff prevailed on theory that even if he had looked, defendant was so far away that it was reasonable to assume that defendant would wait for the plaintiff to cross. The Court said: ". . . the statute gave the plaintiff a preference, but it did not absolve him of the duty of due care. Concededly it was his duty to look before stepping off . . ."

[29] 170 Md. 299, 184 A. 576 (1936).

[30] *Supra*, n. 28.

opinion some very troublesome language when it is read in conjunction with the whole problem under present consideration. The Court in discussing the possibility of an inference of negligence on the part of the cab said:[31]

> "An inference of negligence as the cause of an injury cannot be indulged from the mere fact that a pedestrian is knocked down by a taxicab in a place where the taxicab *had an equal, if not superior, right, with the pedestrian, to be.*"[32]

Bear in mind that in writing this opinion, the Court specifically considered this to be a case where the plaintiff was not crossing at a pedestrian crosswalk,[33] and thus the right of way preference should be given to the motorist.

Here, once again, the basic conflict between the plain language of the statute and the interpretation placed thereon by the Court comes into focus, and brings us back to the rhetorical question previously posed as to the problem of the continued vitality of the statute. Can there be said to be given to the motorist any preference whatsoever "between street crossings", if, as the Court states here, he has only "an equal, if not superior right with the pedestrian, to be there"? It is indeed difficult to understand why such a qualification as this was placed upon the statute. Under common law, the rights of pedestrian and motorist were relative and reciprocal, and there such a statement as noted above would be quite in keeping with the realities of the situation, but with the passage of the statute the common law as to right of way was at least "qualified".[34] The passage of the statute was, as the Court had previously pointed out,[35] "a legislative recognition of the danger of vehicular traffic to pedestrians in passing across the streets of cities and towns, and an effort to diminish the number of injuries and fatalities from this source by giving the pedestrian the right of way at street crossings . . . and by

[31] *Supra*, n. 29, 307.
[32] Italics supplied.
[33] *Supra*, n. 29, 304.
[34] Wlodkowski v. Yerkaitis, 57 A. 2d 792, 794 (Md. 1948) where the Court referring to the statutory right of way treated as to automobiles on intersecting streets, said: "The statutory rule qualifies the common law rule . . . but does not abrogate it."
[35] *Supra*, n. 23.

conferring on vehicular traffic the right of way over pedestrians crossing such streets between the public crossings". No question exists but that it was the intention of the legislature to make a change in the common law of reciprocal rights for the pedestrian and motorist in the streets, and the proposed change called for the investiture of a preference upon pedestrian under one set of facts, and upon the motorist under another. This preference, termed "right of way" by the legislature was given by the statute, obviously with an eye towards better regulating the conduct of each of these parties. Is it not judicial legislation for the Court to disregard this mandate of preference, and to say that between intersections a motorist has only "equal, if not superior rights, with the pedestrian"?[35a]

The Court had further opportunity to develop its views as to the correlative duties and rights of the pedestrian and motorist, at and between crossings, in the next few years. In 1936, it had before it the case of a pedestrian plaintiff who was crossing the street some 150 feet north of the crosswalk.[36] The defendant was driving north on this same street, and was passing another vehicle going in the same direction. It so happened that the defendant passed the other vehicle just at the time the plaintiff was crossing the street. The plaintiff managed to cross safely in front of the car on the right of the defendant, but could not avoid defendant's car since the defendant in passing had moved over to the left of the center of the road. In its discussion of this matter, the Court had to consider the interrelation between the violation by the plaintiff of the right of way provision applicable to him, and the violation by the defendant of the rule requiring motorists to keep to the right of the center of the road.[37] It said:[38]

> "The mere fact, however, that a pedestrian crosses a street between intersections, . . . or that a motorist crosses the center line of a street, . . . is not necessarily negligence; it is what either does or both do under

[35a] See State v. Belle Isle Cab, *infra*, n. 55.
[36] Ebert Ice Cream Co. v. Eaton, 171 Md. 30, 187 A. 865 (1936).
[37] Md. Code Supp. (1947) Art. 66½, Sec.
[38] *Supra*, n. 36, 35.

such circumstances that determines the question of negligence.

"It has been held by this court, contrary to some text writers, that it is not *prima facie* evidence of negligence for a pedestrian to cross a street between intersections, but that 'the question is one of ordinary care only, entirely for the jury. *Nelson v. Seiler,* 154 Md. 65, 77.' "

Here again is language quite reminiscent of that in the *Webb-Pepploe* case[39] above. We find the reiteration of a refusal to bar plaintiff's recovery merely because he was crossing the street in the middle of the block. Before any such bar can be interposed the Court wants evidence of plaintiff's negligence. You will ask then, is it not *some evidence* of negligence that the pedestrian crosses in the middle of the block? Our reply is that in light of all the decisions of the Court of Appeals it is not that *type* of evidence which will justify a court in holding plaintiff guilty of contributory negligence as a matter of law, nor is it even *prima facie* evidence of negligence on the plaintiff's part. A brief reconsideration of three cases will serve to make this clear, for in each one of them there was before the Court the problem of whether or not the act of crossing in the middle of the block would be considered to be contributory negligence as a matter of law, and in each the answer was in the negative. You will recall the language used. In the *Nelson* case it was:[40]

"It is not clear that the prayer supposes the plaintiff to be between street crossings, but taking both prayers to intend to place him there, his being so, while it is one of the facts to be considered on the question of negligence, is not sufficient standing alone to establish negligence *prima facie,* to establish it, that is, in the absence of any other facts . . . ,"

and in the *Webb-Pepploe* case:[41]

"While this (violation of the statutory provision giving right of way to motorist between intersections)

[39] *Supra,* n. 23.
[40] *Supra,* n. 8.
[41] *Supra,* n. 23.

> is not alone sufficient to establish contributory negligence . . . yet it serves to give character to the plaintiff's act. . . ."

and finally in *Ebert Ice Cream Co. v. Eaton*:[42]

> "The mere fact, however, that a pedestrian crosses a street between intersections . . . is not necessarily negligence, it is what (he) does under the circumstances that determines the question of negligence."

In these cases we find set forth the policy of the Court of Appeals in this matter. In each case where the defendant has requested a directed verdict on the grounds that the violation by plaintiff of the statute amounted to contributory negligence as a matter of law, the request has been rejected.[43] There is no requirement in the substantive law of evidence that there be more than *some* evidence to support a verdict. When we examine this rule closely we find that what it really amounts to is that it is a denial of due process to render a verdict against defendant *without any evidence* to support such result.[44] However, the courts do not, beyond the "scintilla of evidence" rule,[45] require that there be any certain amount of evidence presented, before the jury, or court, will be justified in rendering a verdict based on such evidence. If there be evidence of negligence on the part of the defendant, and if there be no evidence of negligence on the part of the plaintiff—or if the only evidence of negligence on the plaintiff's part be that type of

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[42] *Supra*, n. 36.

[43] The Webb-Pepploe v. Cooper decision was based not on the fact that plaintiff crossed in middle of block, but that he failed to look while crossing.

[44] For cases holding that the jury will not be allowed to infer facts from evidence which is so light and inconclusive that no rational mind could infer from it the fact sought to be established see: Treusch v. Kamke, 63 Md. 279 (1885); Baltimore Transit Co. v. Worth, 188 Md. 119, 52 A. 2d 249 (1947); Garozymski v. Daniel, 57 A. 2d 339 (1948); Goldman v. Johnson Motor Lines, 63 A. 2d 622 (1949). *Cf.*, Drahley v. Gregg, 75 U. S. 242, 8 Wall. 242, 19 L. Ed. 409 (1868); Geschwendt v. Yoe, 174 Md. 342, 198 A. 720 (1938); Gohlinghorst v. Metropolitan Life Ins. Co., 177 Md. 157, 8 A. 2d 919 (1939); holding that if there is any evidence, however slight, legally sufficient as tending to prove plaintiff's case, the case may not be taken from the jury.

[45] See Consolidated Gas Electric Light & Power Co. v. State, 109 Md. 186, 72 A. 651 (1909) where it was held that in order to require that an issue be submitted to the jury, there must be something more than a mere scintilla of evidence.

evidence which the court refuses to recognize judicially and therefore does not take the case from the jury—the case goes to the jury for verdict, and if they do not consider the plaintiff's contributory negligence to be satisfactorily made out by defendant in his case, they may find for the plaintiff. It is more than demonstrably clear that crossing in the middle of a block without more is not considered to be sufficient evidence of negligence on the part of the plaintiff to justify the Court in taking the case from the jury.[45a]

There is a great temptation here to state that failure of the pedestrian to yield the right of way to the motorist between intersection (and *vice versa*) is not *any* evidence of negligence at all, but that there must be proven on the part of the person attempting to establish negligence some other independent facts which themselves, and apart from the violation of the statute, go to make out a case. However, while this thesis might have been argued with some success prior to 1946, it was at that time definitely rejected by the Court in *Brown v. Bendix.*[46] There the plaintiff was a pedestrian who had alighted from a bus at an intersection. The bus was still discharging passengers when the plaintiff walked in front of it to go across the street. Defendant was passing the bus at this time and struck plaintiff as she stepped out from the left front of the bus. The evidence was undisputed that the motorist failed to stop or yield the right of way to her in accordance with the statutory requirement, but despite this dereliction on the part of the defendant he argued strongly that it was not *any evidence* of negligence whatsoever. His contention was that the Court had repeatedly refused to hold that the mere violation of the right of way statute by a pedestrian amounted to contributory negligence *per se,* and that it should not now take the position that a violation of the same statute on the part of the defendant without more could be said to be that type of evidence which would justify a finding of

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[45a] See n. 55, *infra.*
[46] 187 Md. 613, 51 A. 2d 292 (1946).

primary negligence on his part. In refusing to give effect to this argument the Court said:[47]

> "It should have been obvious to the automobile driver that the bus was stopped to discharge passengers, and that some of them might attempt to cross. It was his statutory duty to stop and yield the right of way. Failure to do so is *at least some evidence of negligence.*"[48]

It is submitted that this language is, when considered in the light of all the prior decisions on this subject, a distinct departure from the course previously followed by the Court in these pedestrian accident cases, and presages a doctrine not formerly recognized by the Court of Appeals. *Nicholson v. Kreezmer* typifies the Court's earlier position in refusing to create a *prima facie* case for the pedestrian plaintiff from the defendant's violation of the statute. The case is short and can be set out most conveniently for study in the Court's own words:[49]

> "Nicholson, on a foggy night, with drizzling rain, was crossing Paca Street at the regular place for pedestrians and when he was almost across he was unexpectedly struck by the motor truck. There was no evidence of the movement of the truck before the collision, none that it was driven fast or otherwise improperly, and none that it was lacking in lights. There was testimony that the truck ran on 50 feet after the collision, but that might have been due to surprise and consequent delay in stopping. A finding of negligence would have to be made from the mere fact of the collision. And that is not enough, for collision even at crossings might occur on foggy nights without negligence."

With that opinion the Court affirmed a directed verdict for defendant.

The marked contrast between the *Nicholson* and the *Bendix* cases is to be noted. It has been pointed out that with the passage of time more and more qualifications and refinements have been wound round the statute under

[47] *Ibid.*, 619.
[48] Italics supplied.
[49] Nicholson v. Kreczmer, unreported in 178 Md. 680, but reported in full in 13 A. 2d 596 (1940).

consideration until what once appeared to be a clear legislative mandate as to the right of precedence at and between street crossings has now taken on so many complexities as to make it well nigh impossible of definitive description, and it may well be that the cases cited herein will serve as the most irrefutable illustration of that process.

A glance at the *Nicholson* case will shed light on the legal problem facing the Court. There the situation concerned itself with a pedestrian who was struck while admittedly at a pedestrian cross walk. There was no evidence at all of any contributory negligence on the part of the plaintiff, and the only evidence of negligence on defendant's part was that he went some 50 feet after the accident. With these facts before them, the Court sustained a directed verdict for defendant on the grounds, not of contributory negligence, but rather that there was *no* evidence of negligence on the part of the defendant. The plaintiff was in the favored position so far as the street crossing was concerned, and the defendant did strike him while he was in this favored position, and yet the Court said that *without more* there was no evidence of negligence on the part of the defendant. Why should this type of case be decided any other way than all other negligence actions wherein it is incumbent upon the plaintiff to make out some act or acts of the defendant which act or acts were tortious or negligent as to the plaintiff? Certainly no rule is more firmly established in our law of torts than that before plaintiff can secure a judgment (other than default) he must make out his case against defendant. It now remains to decide just what is needed in the automobile-pedestrian case at an intersection before that case will be said to be made out. The Court is in effect saying that the protection or privilege given in so many words by the statute to the pedestrian at an intersection will not be enough standing alone to amount to any of that type of evidence of primary negligence which it is permissible for the jury to consider, or on which they might base a verdict for the plaintiff. No other explanation of this case is possible since it is to be remembered that there was a directed verdict here on the

ground of lack of primary evidence of negligence on defendant's part. It is suggested that this is the very point which the *Bendix* case so successfully clarifies, and yet it must be noted that almost thirty years intervened between the passage of the original statute and this positive recognition of the legislative mandate.

The facts in the *Nicholson* case were strikingly similar in many ways to those in the *Bendix* case, and yet the results were diametrically opposed. In the *Bendix* situation the plaintiff walked out in front of a bus which had stopped at the corner to discharge passengers, and she was struck by the defendant just as she stepped out from the front of said bus. In fact it might be pointed out that here the case was not as strong for the plaintiff as it was in the *Nicholson* case, because here the plaintiff could not have looked where she was going, while the other plaintiff's case was silent as to this point. We have then two plaintiff's crossing at intersections, and the evidence as to the negligence on the part of the defendants was as sketchy in the one case as in the other. In both cases, the trial court directed a verdict for the defendant on the grounds that there was no evidence of negligence on the part of the defendant, and yet the Court in the *Bendix* case reversed this action of the lower court while the decision below in the *Nicholson* case was allowed to stand. Before going on here it must be noted that there was present in the *Bendix* case one additional element lacking in the other situation and that was the presence of another part of the right of way statute passed in 1943,[50] dealing with the duty of a motorist approaching a vehicle stopped at an intersection to allow a pedestrian to cross, but it is not believed that this section, whether applicable or not to the case would have changed the result. In the final analysis, the Court had to decide whether or not it was evidence of negligence that the defendant should strike plaintiff while the latter was in

[50] Ch. 1007 of Acts of 1943 as codified by Md. Code Supp. (1947) Art. 66½, Sec. 181 provides: "(b) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at any intersection to permit a pedestrian to cross the roadway driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle".

the cross walk. The Court answered this in the negative in the *Nicholson* case, but in 1947 an affirmative view was taken, and we think rightly so.

It is contended that in the *Bendix* case, there was laid down, as noted above, a doctrine which, it is felt, most nearly corresponds to the effect sought after by the legislature in the matter of pedestrian right of way. The Court is here giving effect to the statute by making the pedestrian's right of way at an intersection actually of some legally recognizable value. In this case alone, the fact that the plaintiff did have such a right swung the scales in her favor, the Court saying when speaking of the defendant's actions,[51] "It was his statutory duty to stop and yield the right of way. Failure to do so is at least some evidence of negligence." This is the first direct out and out setting forth of the benefits of the statute that has been noted to date. Certainly it is a total departure from the theory of the *Nicholson* case, and it is submitted that if such a view of these cases is to be taken in the future there will be much closer harmonization between the results desired by the legislature and the results secured in the courts.

A more difficult matter will be presented in the situation where the accident occurs in the middle of the block, for there the motorist will be asking that he be accorded his right of precedence or privilege, and the solution must be then approached in a negative manner. It has been pointed out before[52] that in such situations a very different type of question is presented than when the accident occurs at the crossing. At the crossing the pedestrian has the right of way, and to defeat his claim the motorist must show that he was himself free from any negligence or that plaintiff was guilty of contributory negligence in the accident. The Court has repeatedly held that where the pedestrian has the right of way (at the crossing) the question of his contributory negligence is for the jury,[53] and the practical

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[51] *Supra*, n. 46, 619.

[52] *Circa*, n. 39, 40.

[53] Brown v. Patterson, 141 Md. 293, 118 A. 653 (1922); Legum v. State, 167 Md. 339, 173 A. 565 (1934); Vizzini v. Dopkin, 176 Md. 639, 6 A. 2d 637; Wintrobe v. Hart, 178 Md. 289, 13 A. 2d 365 (1940).

result is that the jury never finds the plaintiff guilty of such contributory negligence but rather finds for the plaintiff. To allow these cases to go to the jury is to give the plaintiff pedestrian that advantage which he so greatly desires, and which in the final analysis the statute in so many words gives him. In the other situation where the plaintiff pedestrian is struck in the middle of the block the Court is presented with another problem. The question here is not one dealing with primary negligence, but rather it is concerned solely with the question of contributory negligence of the plaintiff. Should the Court follow a strict rule, which they have many times rejected,[54] namely that the act of crossing in the middle of the block is *prima facie* evidence of contributory negligence? Certainly in the face of the oft repeated rejection of this doctrine, there seems little likelihood that it will be presently adopted, but until some method be devised of giving preference to the motorist when he is involved in a between crossings accident, we submit that the problem of pedestrian right of way will be but half solved. The plaintiff being allowed to go to the jury on the question of contributory negligence in suits where the accident occurred at an intersection is certainly being accorded whatever protection or privilege the legislature had in mind when it passed the statute, and thus half of the problem is answered. However, when we turn to the privilege of the motorist between intersections, it is submitted that he secures little protection by letting a jury decide whether or not the plaintiff contributed to the accident by his actions of crossing in the middle of the block plus whatever other evidence the motorist has adduced at trial. One can not truly state that the entire matter has been brought to a solution until some other statutory method is devised to give effective preference to the motorist.[55]

[54] *Supra*, n. 8, and n. 36.

[55] In State v. Belle Isle Cab Company, 71 A. 2d 435 (Md. 1950), decided and available to the authors only after this article was written and at the printers, the Court of Appeals, with a dissent by Judge Markell, held that the motorist is "not bound to anticipate" that a pedestrian will cross the street between intersections. The authors are informed that the case will be separately noted in this Review, but wish to direct attention to its close relevance to much of what has been covered by this article.