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AUTOMOBILE RIGHT OF WAY IN MARYLAND†

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When Justice Holmes said "such words as 'right' are a constant solicitation to fallacy",[1] he was dealing with the problem of the constitutional power of a state to embody in a statute a custom prevailing in real property law for many decades and in no wise concerned with the subject presently under discussion. Yet one cannot but note how truly applicable this statement becomes when viewed in relation to our automobile right of way law. A fleeting glance at the numerous decisions in this field will at once serve to show how eminently sound his observation was, and indeed it may serve as the underlying theme of the whole of this article. The cases studding this portion of the law invariably turn upon the view of the Court as to one's "right" or "right of way" as created by statute.

The statutory right of way law as originally enacted in 1916 has been changed but slightly since it was first passed:[2]

> "Except as hereinafter provided, all vehicles or trackless trolleys shall have the right of way over other vehicles or trackless trolleys approaching at intersecting public roads from the left, and shall give right of way to those approaching from the right."

† This is the companion article to *Motorists and Pedestrians — A Study of the Judicial Process in Relation to the Statutory Right of Way Law in Maryland*, 11 Md. L. Rev. 1 (1950), by the same authors.

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[1] Jackman v. Rosenbaum Co., 260 U. S. 22, 31 (1922).

[2] Md. Code Supp. (1947), Art. 66½, Sec. 176. The Act of 1916 did not contain the words "trackless trolley", nor was the word "roads" preceded by "public".

We propose to consider this enactment first in the light of the time at which it became law, and then to follow the cases arising under it down to the present day, for it is believed that this is the most satisfactory method of analysis in this situation.

In 1916 there were 3,617,937 motor vehicles in use in the United States, and today there are some 40,988,831.[3] This tremendous national increase can safely be assumed to have a corresponding ratio of increase in Maryland, showing just how great a surge there has been in that field. An even more graphic picture is presented if we look at the number of miles of State roads here as of 1916 and then compare it to our 1949 figures. They increased from 191 to 4,558 in these 34 years.[4] Thus it was that at the time of the original enactment of this law there was no great nor pressing need for regulation of the passage of vehicles over the streets and highways. Those vehicles which were in existence were not the rapidly accelerating swift moving cars of today, but instead were so cumbersome and slow that the top speed laws on an open highway were 35 miles per hour.[5] Two things alone have remained more or less constant through the development of vehicular traffic from 1916 to date, namely the width of the streets and the distance from the curb lines back to the building lines. While the autos were gaining more and more speed and power, and increasing in number, these distances remained about the same. Some few streets were widened, but very few in proportion to the total number of streets in the State. So it is then, that when an attempt is made to study the cases first arising under the statute, it must always be born in mind that the case must be put in its proper context, both as to place and time, for that which would horrify as to speed and judgment

[3] AUTOMOBILE FACTS AND FIGURES (29th ed.), 1949. A breakdown of these figures shows that in 1916 there were 3,367,889 automobiles and 250,048 trucks registered in the United States. In 1949 there were 33,261,451 automobiles and 7,727,380 trucks so registered.

[4] Report of State Roads Commission 1908-1920; the 1949 figure was secured from the Traffic Division of the State Roads Commission.

[5] Md. Laws (1916), Ch. 687, Sec. 149. This same section provided that speeds of 12 m.p.h. in business parts of cities, towns, or villages, 18 m.p.h. in outlying parts of same, or 25 m.p.h. in open country, should be *prima facie* evidence of operating at a speed greater than was reasonable or proper. 35 m.p.h. was the maximum speed on any highway under any conditions.

in 1916-1920 would be equally amazing to us today should we find the same speed and judgment inveighed against as negligent and reckless.

The statute had a quiet existence for some 4 years after its passage, as only one case arose during that time, and it involved simply a determination that the right of way rule did not apply to trolley cars or other vehicles which operated solely on tracks.[6] This case contained no unusual features since the act had excluded such vehicles from its comprehension. It was not until 1920 that there was before the court a case which presented an opportunity for expression of the court's view as to the *raison d'etre* of the statute, and in the opinion, it said:

> "The mischief for which the Act was enacted as a remedy was this: That in the case of automobiles approaching each other along connecting roads running at an angle to each other in such a manner that unless one of them gave way to the other a collision would result, in the absence of some rule on the subject, there would be no way of promptly determining which should give way to the other, and the confusion incident to such situations was the cause of many accidents."[7]

In this statement, we find the first discussion by the court as to the meaning to be placed on the regulation. Its purpose seems clearly defined, but we note that here the court was dealing only with a situation wherein two cars were approaching each other on intersecting roads at lawful rates of speed, and there was to be decided only who must yield to the other. There was no problem there as to speed, visibility, or a reasonable ground for believing the other would stop. These variables all came into the picture a bit later to cloud that which was in 1920 a clearly delineated problem of logistics.

The instant case, being one wherein each vehicle reached the intersection at approximately the same time, was well suited to a discussion, such as set forth by the Court, of the effect and purpose of the law under such circumstances.

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[6] State v. Baltimore & Belair E. Ry., 133 Md. 411, 105 A. 532 (1919).
[7] Buckey v. White, 137 Md. 124, 129, 111 A. 777 (1920).

In view of the absence of great speed by one or the other, or poor visibility, there was neither the requirement of, nor the opportunity for, any extended discussion of the entire function sought to be performed by the regulation. As is well known, the Court refrains from discussing matters not germane to the issues involved, and here it would be making an unwarrantable assumption to say that because of its brief characterization of the statute in the light of the facts as they appeared, the Court regarded it as it would a Stop—Look — Listen sign at a railroad crossing, *i.e.*, as being a mandatory requirement that under all circumstances the car from the right be granted the first passage. Such a proposition was argued to the Court the same year in *Chiswell v. Nichols*,[8] where plaintiff was a passenger in a car struck on its right side by defendant, who was attempting to make a left turn from a road intersecting the one used by plaintiff's host. There the Court, in reversing a directed verdict for defendant, refused to recognize any such absolute right of precedence under any and all circumstances, and said:

> "It may be said, because of this statute and the rights conferred thereby, that the first and chief thought and care of the driver of a vehicle approaching an intersecting road should be given to those vehicles that might be approaching him from the right and, for the safety of those using the public roads, too much stress cannot be laid upon the importance of so doing. At the same time, the traveller is not, because of the statute . . . altogether relieved of the necessity of observing the condition of the road to his left, with a view of ascertaining whether or not the road is clear and free of persons and vehicles approaching from that direction. Especially is this true when a vehicle having the right of way . . . is to turn to its left. . . ."[9]

In this language, we see that the Court did not intend to allow the statute to make any great inroads on the common law rules of the road — and no doubt wisely so, for in the final analysis that which is the most eminently

[8] 137 Md. 291, 112 A. 363 (1920).
[9] *Ibid.*, 306.

desired end for such regulation is the safety and well being of the public using the roads. One could scarcely quarrel with any attempt to reach such a millennium. The Court here recognized that the statutory language was going to be difficult of strict construction in itself, because of those cases bound to arise under it wherein injustice would be done to one or the other parties if the rule were to be rigidly or inelastically applied. To forestall such a situation, we find the Court early in the game erecting a wall about the statute in certain cases by holding, that while the one on the left, who should have yielded the right of way failed to do so, still he was not, without more, to be held judicially negligent. Thus by delimiting the statutory right to those factual situations where both cars arrived at the intersection at the same time, the Court found a method by which the beneficial effects of the law could be nurtured without at the same time producing inequitable results in the other cases where it would be manifestly unfair to apply the same type of test for negligence *vel non*.[10]

While admitting that there is some justification for the complaint that such a judicial program breeds uncertainty and tends to encourage litigation on the part of the unfavored driver in the hopes of going to a sympathetic jury, still it must be noted that this is a peculiarly difficult situation for the court to solve, and in an attempt to reach a satisfactory and workable solution in all types of cases, this result emerged. The cases themselves serve to point up the extremely fine line which must be drawn between apparently analagous cases, and prediction as such is never simplified under such circumstances. Yet it is believed that such an approach is, under the circumstances, the one best suited to achieve proper judicial results under the statute.

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[10] *Cf.*, Hopper McGaw v. Kelly, 145 Md. 161, 169, 125 A. 779 (1924), where in an accident which occurred due to the vision of both drivers being obstructed by a street car, the Court said:

> "While it is the settled rule in this state that the mere violation of a statute or ordinance does not of itself support an action for damages, it is also well settled that where such a violation is the proximate cause of an injury, a right of action does accrue to the party injured."

Two years later the Court decided *Taxicab Co. v. Ottenritter*,[11] which decision has come to be the rock upon which unfavored plaintiffs ever since have attempted to build their cases. Plaintiff testified that he was driving South on Monroe Street at 15 miles per hour in a zone where 15 miles per hour was the speed limit, and when he got to the building line of Presbury Street, he looked to his right. He stated that he could see for half a block to the right, and there was no traffic approaching him. He continued across, and when he was three quarters of the way across he was struck at the right rear by defendant who was driving East on Presbury. The plaintiff's car was turned over by the force of the blow. A pedestrian who appeared as a witness for plaintiff stated that defendant was going 30 miles per hour, and that when plaintiff was about half way across the street, the defendant was still 75 feet West of the intersection. Defendant claimed he was going 8 miles per hour, well within the speed limit, that when he got to the intersection, he saw plaintiff coming from his left and when he saw plaintiff was not going to stop, he stopped himself. He stated that plaintiff kept on and struck the left front of his car with the right rear of plaintiff's car. The jury found for plaintiff, and on appeal the Court, after outlining the facts of the accident, answered defendant's contention that a verdict should have been directed for him on the ground that plaintiff, in failing to give defendant the right of way, was guilty of contributory negligence as a matter of the law. It said:[12]

> "It was not necessary for the plaintiff to look as far as his eye could reach to his right before proceeding across the intersecting street. His duty in that respect was performed if he looked sufficiently far to his right to discover that there was no traffic approaching from that direction within a distance that would be traversed by a vehicle driven at a speed permitted by the law. He was not required to look always to his right while crossing the street, as he had to avoid endangering travel ahead of him, or approaching from his

[11] 151 Md. 525, 135 A. 587 (1926).
[12] *Ibid.*, 530.

> left. . . . While it was incumbent upon the plaintiff to respect the rule giving the right of way, at street intersections, to vehicles approaching from the right, yet if the way for a safe distance was clear of traffic coming from that direction, he should not judicially be declared negligent in not providing against the possibility of collision with a car which could not come into dangerous proximity to his own unless it were unlawfully operated. . . . *It could hardly be said that the driver of the cab had the right of way, if he could not exercise it except by violation of the speed laws of the state.*"[13]

This decision was seized on immediately by unfavored plaintiffs who saw in it the means of clearing from their path to recovery the hitherto embarrassing and discouraging spectre of a defense based on the right of way statute. This language was perfectly suited to achieve such an end, and even though plaintiff had no guarantee that the jury would find for him, he was secure in the knowledge that in most cases he would stand a chance of having a jury pass on the question of his contributory negligence *vel non* in violating the rule.

The case has, however, other aspects which we believe should be pointed out here, for they have played a very major role in much of the litigation following it. It should be noted that while the Court had before it facts and figures as to distances and speeds, it never made any direct reference to them, but contented itself with speaking of "a distance that would be traversed by a vehicle driven at a speed permitted by the law",[14] and "if the way for a safe, distance was clear of traffic . . .".[15] It would probably be a safe assumption that the Court had reference to plaintiff's testimony that he could see half a block to his right, or to witnesses' testimony that defendant was 75 feet west of plaintiff when the latter was half way across the street. Yet, even with this assumption, does the Court's language lay down any concrete requirement as to maximum or minimum distances required before one could say that the way was clear for a "safe distance"? A re-reading will readily

[13] Italics supplied.
[14] *Supra*, n. 12.
[15] *Supra*, n. 11, 531.

show that it does not. The Court has applied the test of reasonable care to the situation here just as it did in the pedestrian cases where pedestrian was struck between intersections[16] and has carefully avoided any flat commitment as to what constitutes compliance with the rule it sets out.

Perhaps the fate of Mr. Justice Holmes' attempt to set out "once for all",[17] a rule governing the degree of care required to be exercised in traversing a railroad grade crossing, was responsible for this reticence, but whatever the reason, no flat ruling was forthcoming. Later developments in the automotive industry, however, have more than vindicated their stand, because the "safe distances" which would then have been reasonable with cars capable of a top speed of 25 or 30 would be far too short to be reasonable today. The very fact that the speed laws have increased from 15 to 25 in those years is mute testimony as to what changes would have had to be made in the legal rule to accompany the technical developments of the machine. Nonetheless, though no figures were quoted, we find here the birth of a troublesome idea that by proving distances and speed, a formula for right of way cases can be worked out. The Court has seldom accepted such formulas[18] but has decided the cases on the negligence basis long ago established, which is flexible enough to be easily adaptable to new techniques both in mechanical and judicial fields. Thus the "safe distance" of 1926 expands to remain the "safe distance" in 1950 though in feet it no longer resembles itself at all.

So *Taxicab Co. v. Ottenritter*[19] set a new style of approach in right of way cases, and yet it was in reality no more than a logical extension of the rule earlier laid down in the *Chiswell*[20] and *Hopper McGaw*[21] cases, namely that while the right of way statute does offer an area of protection to the one on the right when both reach the intersec-

[16] Discussed in Due and Bishop, *Motorists and Pedestrians*, 11 Md. L. Rev. 1 (1950).

[17] B. & O. v. Goodman, 275 U. S. 66 (1927), requiring the driver of a motor vehicle to get out and look to see if the way over railroad tracks were clear. This rule was disregarded by many state courts as impractical.

[18] Legum v. Hough, 63 A. 2d 316 (Md. 1949), discussed *infra*, n. 57.

[19] 151 Md. 525, *supra*, n. 11.

[20] 137 Md. 291, *supra*, n. 8.

[21] 145 Md. 161, *supra*, n. 10.

tion more or less simultaneously, it does not operate *via* extension to give such priority where the one on the right is a considerable distance away when the unfavored driver reaches the intersection.

The Court's next encounter with the right of way statute came in the *Friedman* cases in 1930 and 1931.[22] Here again the plaintiff, the unfavored driver, sought to recover damages sustained when she ran into defendant's truck at the intersection. The unusual phase of this case was that the defendant was over on the wrong side of the street when the accident occurred. The plaintiff, in reply to the defendant's argument that her failure to yield the right of way was a bar to her recovery, said that the proximate cause of the accident was the defendant's failure to keep to the right of the center of the street as required by statute. The trial court refused defendant's request for a directed verdict, but the jury found for defendant after hearing the whole case. On appeal, the Court said in discussing the right of way legislation:[23]

> "The purpose of the statute was to regulate the use of public highways by vehicles passing over them, by prescribing certain rules designed to insure the safety of all persons in the lawful use thereof, and by punishing any violation of such rules, but it contains nothing which can support the inference that it was intended to create a cause of action in a civil proceeding, inuring to a traveler on such highways against another violating those rules, unless such violation was the direct and proximate cause of any injury to such traveler. In other words the mere violation of the rules prescribed by the section will not constitute actionable negligence, unless it is the direct and proximate cause of injury to the person charging negligence."[24]

Again we find the Court saying that the statute was designed to regulate the use of highways by prescribing rules of precedence, yet the statute will be unavailing if the proximate cause of the accident is not that which

[22] Friedman v. Hendler Creamery Co., 158 Md. 131, 148 A. 426 (1930); 160 Md. 526, 154 A. 93 (1931).
[23] 158 Md. 131, 142, 148 A. 426 (1930).
[24] *Cf.*, n. 10.

violates the statute. The argument was that the proximate cause was defendant's being on the wrong side of the street where plaintiff did not expect him to be, although plaintiff had not intended to turn into the street occupied by defendant. Had she obeyed the statute and yielded the right of way to defendant, she would not have been forced to try to turn right after finding that she was unable to stop in time to avoid the collision which would occur if she kept going straight ahead. The reasoning is very close here, and leads up to the second appeal in the case after a new trial. There the Court was faced with an argument that it was improper to instruct the jury that because of the statute all vehicles approaching a street intersection from the right have the right of way. The opinion reads in part:[25]

> "In view of the former decisions of this Court . . .[26] it is clear that a vehicle approaching an intersection from the right does not have an absolue right of way in every instance, because that question must be determined by the circumstances in any given case."

The Court here simply points up for us the conclusion to which we are inescapably drawn, that such has to be the result in these very close cases of fact. It is difficult at best to resolve these situations other than by sending them to the jury, and the Court seems to feel that such solution is in all respects a most practical one from any point of view.[27] Thus the *Ottenritter* case, while certainly a leading one in the field and followed in many subsequent cases[28] as

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[25] 160 Md. 526, 530, 154 A. 93 (1931).

[26] Citing Taxicab Co. v. Ottenritter, 151 Md. 525, *supra*, n. 11.

[27] See Feinglos v. Weiner, 181 Md. 38, 41, 28 A. 2d 577 (1942), where the Court said:

> "Counsel often overlook one important fact in the trial of automobile cases, and that is, that on every jury are some men who drive automobiles, most of them carefully, and many of them well. Given the facts accurately, they know whether a collision or injury was the fault of one or the other or both, or neither of them."

[28] See Jackson v. Leach, 160 Md. 139, 142, 152 A. 813 (1931), another case of an unfavored plaintiff who looked to his right when he was 60 feet from the corner and saw no traffic for 180 feet, but was struck on right side as he crossed the street. The Court said:

> "It is contended that, if plaintiff had looked to his right when he reached the intersection, he must have seen the Jackson car in time to have avoided the collision. But a like contention was unsuccessfully made in Taxicab Co. v. Ottenritter. . . . In that case . . . we said that

authoritative in like situations, represents but the culmination of many factors which, when combined factually in a case for decision, call for a result which is not to be achieved by rigid application of the statutory rule, but rather by means of the time honored rule of reasonable care.[29]

There is presented another phase of the problem of right of way in *Paolini v. Western Mill & Lumber Co.*[30] For the first time, the Court made use of a mathematical formula to arrive at the speed of one of two vehicles involved in an accident. The cases from *Ottenritter* on have all contained references to comparative speeds, distances and time, but until the *Paolini* case was decided the Court had never done more than toy with the idea that these ratios of speed and time to distance could be used to advantage by one side or the other. Here we see how such use is possible, and also how easy it is for error and mistake to creep in.

The plaintiff's testimony was that he was driving West on Laurens Street at about 8 or 10 miles per hour on a

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plaintiff's duty in that respect was performed if he looked sufficiently far to his right to discover that there was no traffic approaching. . . ." The quotation from the Ottenritter case continued as in n. 12, *supra*. The decision was based solely on that case as authority. So too in Jersey Ice Cream Co. v. Bach, 161 Md. 285, 292, 157 A. 277 (1931), in a similar case where there was testimony that defendant was exceeding the speed limit and struck plaintiff on the right rear when plaintiff was half way across the street, the Court granted plaintiff's prayer that if the jury find that plaintiff was actually crossing the street intersection at a time when defendant was so far away that no one would reasonably anticipate a collision, then plaintiff was not judicially to be declared negligent in not waiting for defendant to pass. On appeal, the Court quoted extensively from the Ottenritter opinion, saying, among other things:

"As we said in Taxicab Co. v. Ottenritter, . . . it is an incorrect assumption that, as between vehicles approaching a street intersection, the one coming from the right has an absolute right of way, regardless of its distance from the intersection when the other vehicle entered it from the left, and regardless also of the relative rates of speed at which the two were moving."

[29] It should be noted here, however, that in one later case the court's language seems to go further than any hitherto found, in reading into the statute, as written, a qualification which all the prior cases treated, not as a qualification, but rather as a separate matter, divorced from the statute, due to the fact that the cars did not reach the intersecion at the same time, thus making the statute inapplicable. In the case of Billotti v. Saval, 165 Md. 563, 566, 168 A. 890 (1933), the Court said:

"The plaintiff had no inflexible and absolute privilege to proceed, since, *under the rule*, due regard must be had to the distance of plaintiff's automobile from the intersection as compared with the distance of the truck coming from the left, when seen, and the respective rates of speed at which the two vehicles approached the intersection." (Italics supplied.)

[30] 165 Md. 45, 166 A. 609 (1933).

rainy day, and when he got to the East curb line of Stricker Street, the defendant was 70 feet South of Laurens Street. He further stated that defendant was speeding. The defendant testified that he was going North on Stricker Street at about 10 miles per hour and when he reached the building line on the South side of Laurens Street, plaintiff was 75 feet East on Laurens Street coming fast. In its opinion the Court said:[31]

> "At the building line of Laurens Street, where defendant's driver first saw plaintiff on Laurens Street, 60 or 75 feet East of Stricker Street, he was, as we have said, 8 or 10 feet from the South line of Laurens Street. As this street is 39 feet wide, it is 19½ feet from its South line to the middle of it. The truck driver was therefore about 30 feet from the place where the collision occurred when he saw the plaintiff's car 60 or 75 feet West (sic) of Stricker Street. He said he was going 8 or 10 miles per hour. At that rate of speed he covered about 30 feet while plaintiff in his car covered a little more than twice that distance. Consequently, by the defendant driver's own evidence, the plaintiff was not going much more than 20 miles per hour. . . ."

No one could find fault with the calculations themselves, but when we examine the premises upon which they are founded, then another query is posed. The results are perfectly sound, *provided that* the ciphers on which they are based are accurate representations of existing fact — and there is the rub. That few persons, especially those involved in an accident, can accurately gauge either distance or speed, let alone a combination of both, is perhaps but obvious. Day after day in Court we see witnesses in perfect good faith contradicting themselves on just these points, making their testimony no more than a guess or at best an estimate of speed or distance. Yet the formula used by the Court is based on just this same type of testimony. Let us see just what the results would have been in this case had defendant's guess as to speed or distance been slightly different. The speed limit in Baltimore City in

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[31] *Ibid.*, 53.

1933 was 20 miles per hour.[32] Had defendant testified that he was going 15 — 18 miles per hour, with all other facts remaining the same, then by his testimony, it would be shown that since plaintiff went twice as far as defendant in the same period of time, that the plaintiff was going 30 or 35 miles per hour, thus exceeding the speed limit. Or had he testified that he was at the curbline when plaintiff was 75 feet away thus having defendant travel only 20 feet while plaintiff went 70 feet — then again plaintiff's speed would be three times defendant's 10 miles per hour again over the speed limit. It is suggested that defendant could quite conscientiously give such testimony which might or might not be true in fact, and plaintiff would have great difficulty disproving it. In view of the difficulties of applying any such formulas to the facts before it, it is not surprising to find that only in two other cases has the Court made use of this apparatus, and with somewhat peculiar results as will be noted *post*.[33]

This case was followed by one in which plaintiff, a guest in the defendant's car, was injured when the car in which he was riding was struck on the left rear by another car at an intersection.[34] The plaintiff and defendant had been

[32] Md. Laws (1933), Ch. 281, Sec. 194(3).

[33] Askin v. Long, 176 Md. 545, 6 A. 2d 246 (1939); Legum v. Hough, 63 A. 2d 316 (1949), discussed *infra, circa*, ns. 43 and 69. For an illustration of the Court's use of the same technique discussed *infra*, where the Court never mentions distances *per se*, but the result of its decision can only be achieved by use of the same formula, see Hess v. Loftus, 173 Md. 284, 288, 195 A. 556 (1938). There plaintiff testified that as he reached the curb line of the intersecting street, while going 18 m.p.h. he saw defendant 150 feet away on his right. Thinking that he had time to cross he continued but was struck when only ¾ of the way across the 40 foot intersection. The Court in reversing a directed verdict for defendant said:

> "Again, if the jury should find the facts offered on the part of the plaintiff, there is legally sufficient testimony tending to prove that the driver of the automobile in which plaintiff was a guest drove across Preston Street in the reasonable belief of an ordinarily careful and cautious person that the automobile of the defendant . . . was so far away from the intersection that the automobile in which the plaintiff rode could proceed and cross the street in safety before the automobile of the defendant would reach the intersection. The driver of the automobile in which the plaintiff was riding is not negligent as a matter of law in failing to guard against the possibility of a collision with an automobile which would have to be operated at an unlawful rate of speed to make the passage of the intersection unsafe, unless the driver was aware of the unlawful rate of speed in time to avoid its consequences in the exercise of a reasonable degree of care and caution."

[34] Warner v. Markoe, 171 Md. 351, 189 A. 260 (1936).

in Baltimore visiting several night clubs prior to the accident, and from the opinion it seems obvious that there had been considerable drinking, though there is no testimony that defendant's servant and chauffeur had done any drinking. The accident occurred as the defendant's car, being driven North at a rate of 50 or 60 miles per hour, and never stopping for an intersection, was struck by another car coming from the left unseen by anyone in defendant's car. It was contended by defendant that even admitting he had been going 50 or 60 miles per hour, still the proximate legal cause of the accident was the failure of the other car to yield the right of way at the corner, and that such failure should exonerate defendant in spite of his speed. The court disposed of this case by an application of its doctrine as enumerated in the *Ottenritter* case, saying:[35]

> " '. . . so the general rule *applicable, under ordinary circumstances,* was that all vehicles shall have the right of way over other vehicles approaching at intersecting public roads from the left.' *It is a rule that applies only in appropriate circumstances,* that is, when the two drivers come to the crossing in such proximity in point of time as to require accommodation of one to the other. . . . Determination of the right of way, thus left to the drivers, in each instance, commonly involves the exercise of some judgment, the driver from the left being required to yield to avoid *apparent chances of collision*. . . But one which comes from the right at such a speed as 60 miles an hour in disregard of other traffic, creates a different situation, adding a difficulty and hazard which the driver cannot trust the ordinary accommodation at crossings to render safe for his passengers.[36]

Here we have perhaps the most excellent example of why the Court cannot in good conscience apply the statute as a rule of thumb in total disregard of any or all other circumstances. One's sense of justice and fair play would

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[35] *Ibid.*, 357.

[36] This type of treatment of the statute has not escaped the notice of the court for in Askin v. Long, *supra*, n. 33, 548, Sloan, J., said:

> "It must be admitted that under the cases cited [including Warner v. Markoe] the question [as to right of way] though by statute made one of law, usually resolves itself into one of fact."

suffer indeed if the Court had held the defendant responsible for this accident which he could by no stretch of the imagination have foreseen, and yet that result would inevitably have come about had the statute been held to apply in this situation. It is obvious then that while the statute itself is silent as to its area of applicability, it would be overlooking realities for the Court to hold slavishly to it in those situations which would make it productive only of injustice. However, it is not to be forgotten that in trying to produce equitable results, the Court increases the odds against one's being able to predict the outcome of such litigation. If the statute were to be inexorably applied, there would be no prediction problem whatsoever, but as it is applied only in "appropriate circumstances",[37] and not otherwise, the prediction becomes correspondingly complicated.

The Court seems to have been aware of this feeling, for in a case some three years later,[38] it took considerable pains to outline its position, and to bolster it with other authorities in accord. After citing several cases previously referred to herein,[39] it quoted at some length from the standard text on the subject:[40]

> "The occasion for applying the rule concerning the right of way of vehicles approaching from the right arises only when the two vehicles approach the intersection so nearly at the same time, and at such distances and speeds, that a collision is probable unless one of them slows up.
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> "In that situation, the regulations, properly construed require that the vehicle on the left must give way to the one on the right. The test of whether a collision would be likely to occur is the judgment of a man of ordinary prudence in the same situation, exercising due care, and the rule does not warrant drivers of vehicles in taking close chances.
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> "If both cars reach the crossing at the same time, the one approaching from the right is entitled to the

[37] *Supra*, n. 34, 357.
[38] Bode v. Coal Co., 172 Md. 406, 191 A. 685 (1937).
[39] See *supra*, ns. 11, 22, 28, 29, 30, 34.
[40] II, BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, Sec. 993.

> right of way, and the other must, if necessary, stop and permit it to pass in safety, and, if the driver approaching an intersection from the left sees a vehicle coming from the right, at such a rate of speed, and at such a point on the intersecting street, as will bring the car approaching from the right into collision with his own, if he proceeds along his respective line of approach at his respective rate of speed, the two vehicles must be deemed to be approaching such intersection simultaneously."[41]

After the *Ottenritter* case of 1926, the course for decisions in right of way litigation, while not a perfect blueprint, nevertheless became channellized as well as could be expected, considering the various complicating factors and circumstances which played a part in all such matters. It had come to be accepted that the unfavored driver might well be successful in the prosecution of his suit when he showed that the defendant was, in the language of the *Ottenritter* case, so far from the intersection when the plaintiff entered it that the defendant's car "could not come into dangerous proximity to his (plaintiff's) own unless it were unlawfully operated".[42] This state of affairs continued until 1939 when the court decided *Askin v. Long,*[43] a case ranking second only in importance to the *Ottenritter* case both as to its immediate effect and subsequent impact on this phase of the law. Just as some of the prior cases had contained elements of speed or recklessness which made it inequitable for the Court to apply the statutory right of way rule in its strict form, and resulted in developing a technique whereby these cases were judged under the common law or reciprocal rights theory, the *Askin* case contained elements which made it inequitable in the eyes of the court to allow recovery in a situation which, from the record, appeared to be but another of the *Ottenritter* type.[44]

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[41] *Ibid.*, pocket supp. (1949), cites Wlodkowski v. Yerkaitis, 57 A. 2d 792 (1948), discussed *infra, circa* ns. 60-65, as supporting his statement:

> "The rule in a number of jurisdictions is that ordinarily a vehicle which first reaches or enters an intersection has the right of way over a vehicle approaching from the left."

[42] 151 Md. 525, *supra*, n. 11, 531.

[43] 176 Md. 545, 6 A. 2d 246 (1939), *supra*, ns. 33, 36.

[44] *Circa* ns. 11 to 18, *supra.*

The accident occurred at 39th Street and Greenway, both very wide streets intersecting at an acute angle of about 60 degrees. Plaintiff was going East on 39th Street, and he testified that as he got to the intersection of Greenway, he looked to his right and "saw this car approaching around 200 to 225 feet down Greenway, and I had plenty of time to go on and I started across the intersection and when I got half way through I heard the screech of brakes and he hit into me. . . ."[45] He further stated that he was going about 20 miles an hour as he approached Greenway. Defendant testified that he was going 20 to 25 miles an hour North on Greenway, and at 39th Street he looked to his right and saw nothing, and then he looked to his left and saw a truck "approaching me about — I had about 10 feet to stop when I saw the truck and I could not stop in 10 feet".[46] He stated that both he and plaintiff arrived at the corner at about the same time, and he hit the right rear of plaintiff's truck. There was testimony that defendant left skid marks of 14 or 15 *paces*, "indicating", said the Court, ". . . that, while (defendant) was more than 10 feet away when he became aware of the (plaintiff's) truck in the intersection, he did not see it until the danger of collision was imminent."[47] In the course of the opinion, the Court quoted several questions and answers of plaintiff on cross-examination as follows:[48]

> " 'Q. Where were you when you first saw this automobile?
>
> 'A. I was just entering from the other side to go through the intersection to the other side.
>
> 'Q. Where was the other automobile when you first saw it?
>
> 'A. I guess 120 or 125 — when I first got there he was about 200 feet;' where he first saw it, it was 200 feet away.
>
> 'Q. Had you reached the intersection or just where were you?

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[45] *Supra*, n. 43, 548.
[46] *Supra*, n. 43, 550.
[47] *Ibid.*
[48] *Supra*, n. 43, 548.

'A. At that time I was going over my intersection because I slowed the truck down.

'Q. How far was he away from you at that time?

'A. I guess 120 feet.

'Q. You said when you first saw him he was 200 feet away?

'A. Yes, sir, when I went to make the intersection he was coming towards me. . . .

'Q. How far was he away?

'A. About 120 feet when I was going over the intersection. . . .

'Q. Where was the car when you first saw it 200 feet away?

'A. He was 120 feet — he was coming at such a rate of speed. . . .

'Q. Where was your car with respect to 39th and Greenway when you first saw the other car 200 feet away?

'A. I was right here at this building line (the space from building line to curb is 25 feet).' "

The Court in reversing without new trial a verdict for plaintiff below had this to say about the plaintiff's testimony:[49]

"What he evidently resorts to is to build up a case of defendants' negligence by his statements of distances, which will not stand close analysis. One cannot tell whether he first saw the defendants' car at 200 feet or 120 feet, or was unaware of its nearness until he heard the screeching of its brakes. . . . The plaintiff does not testify as to the speed of the defendants' car, but he tried to leave the impression that it was traveling at a much greater speed than permitted by law, and that such violation was the proximate cause of the collision. . . .

". . . the plaintiff's evidence was so inconclusive, contradictory, and uncertain as to not be accepted as the basis of a legal conclusion. . . ."

Then the Court turned to the right of way rule invoked by both parties to end its opinion:[50]

[49] *Supra*, n. 43, 549.
[50] *Supra*, n. 43, 552.

> "The rule was designed to prevent collisions and accidents. When there is a collision at such a place, and the unfavored driver sues, he must show not only negligence on the part of the defendant, without which the accident would not have happened, but also that he was careful and cautious. His care and caution must be determined by the facts, and not by the mere assertion that he was careful, but by what he did to guard against and prevent collision with favored traffic."

On its face, the *Askin* case was one which at first blush would appear to be but another link in the chain of cases beginning with *Ottenritter* and continuing through *Jersey Ice Cream Co. v. Bach*[51] to *Warner v. Markoe*[52] all decided in favor of the unfavored plaintiff, who testified he entered the intersection when defendant was so far away that no danger of collision existed, and holding that the right of way rule was not absolute, since the question could only be determined by the facts and circumstances in each case. However, here the unfavored plaintiff met rebuff, and violently. This situation was not considered to be like the preceding cases because here the plaintiff's testimony was "so inconclusive, contradictory and uncertain as to not be accepted as the basis of a legal conclusion".[53] Why is this so? Does the series of questions and answers presented above prove *so conclusively* to those who are familiar with the slips of the tongue and unintended contradictions at trial, especially on cross-examination, that the plaintiff's testimony is not worthy of regard. That these questions and answers show confusion on the part of the plaintiff is true; that they indicate he was having as many words as possible put in his mouth by counsel for defendant is obvious to all; but is it so obvious that his testimony was so unworthy of credence as not to form a basis of a legal conclusion? The Court stressed the plaintiff's error in guessing correctly the number of feet away the defendant was when first seen. While speculation of course never alters results, it would be interesting to inquire as to the probable results in this case if the court

[51] 161 Md. 285, *supra*, n. 28.
[52] 171 Md. 351, *supra*, n. 34.
[53] 176 Md. 545, *supra*, n. 43, 551.

had chosen to find flaws in the defendant's testimony relative to how far he was from the plaintiff when he first saw him. There was testimony by a policeman that defendant left a 14 or 15 pace skid mark. Obviously in the short time it would take defendant to apply his brakes and for the brakes to catch, his car would have moved forward several feet, and this added to the 35 or 40 foot skid mark noted above, would tend to indicate that the defendant was in error in his estimates of both distance and speed. However, the court approached the case from another tack and passed over this suggested possibility with the remark that ". . . while (defendant) was more than 10 feet away when he became aware of the (plaintiff's) truck in the intersection, he did not see it until the danger of collision was imminent."[54] The court was presented here with a choice of believing either the plaintiff or the defendant with attendant results. Why should the court turn away from the *Ottenritter* case as it did? There seems to be more than a little to be said on behalf of the plaintiff, and it is submitted that the court had to make a choice in this instance of following the *Ottenritter* doctrine and holding for the plaintiff, or of distinguishing the case on its facts, thus taking it out of that category. It was admitted that both parties had unobstructed views of each other for some 200 feet before the collision,[55] and should recovery be allowed to the unfavored plaintiff, it would seem that many of the rules hitherto built up in this field would be destroyed. The court had then to find some *deus ex machina,* as they so successfully had managed to do in a preceding case,[56] by means of which they could achieve a workable solution. The solution was, of course, to characterize the plaintiff's testimony as inconclusive and thus deny him recovery on the strength of what one could argue was equally inconclusive testimony on the part of the defendant.

The court must have felt that this case was not the type of case in which an application of the *Ottenritter* doctrine

[54] *Supra,* n. 43, 550.
[55] *Supra,* n. 43, 547.
[56] Webb-Pepploe v. Cooper, 159 Md. 426, 151 A. 235 (1930), discussed in Due and Bishop, . . ., 11 Md. L. Rev. 1 (1950).

would secure desirable results, and so recovery was denied. Thus another point on the line was pricked out in the *Askin* case, and yet to be able to tell just where *Ottenritter* ends and *Askin* takes up, remains somewhat of an enigma. We find a subsequent case, apparently closely allied to this one on its facts, in which the court, instead of following the *Askin* case, allowed recovery by the unfavored driver,[57] thus casting considerable doubt as to just what rule will be applied in such situations. Two possibilities are ever present; either the *Ottenritter* or the *Askin* case can be chosen as controlling — and who can say which the court will choose?[58]

Subsequent cases reflect the Court's awareness of this troublesome problem, and the result seems to have been an attempt to mark out anew just what its present position is in the field.[59]

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[57] Legum v. Hough, 63 A. 2d 316, *supra*, n. 18.

[58] In Gudelsky v. Boone, 180 Md. 265, 269, 23 A. 2d 694 (1942), they chose the Askin result, in reversing without new trial a verdict for the unfavored driver, who turned left in front of approaching defendant when defendant was over 100 feet away, saying:

> "There is no doubt that appellant's truck in driving straight through the green light was in the favored position and had the right of way, and the driver of that truck was the favored driver and the appellee was the unfavored driver. . . . The primary cause of the collision was the violation of the right of way of appellant's heavy truck by the appellee. The defendant's prayer for a directed verdict . . . should have been granted."

[59] The role of Askin v. Long in these cases is a difficult one to appraise, and one is hard put to it to place the case in any particular category, because we find it cited in support of many different propositions of law, namely: that the general right of way rule, although made one of law by the statute "usually resolves itself into one of fact", with the result that the rule has come to be regarded as a mere cautionary guide rather than a peremptory command, and affords little protection to the traveling public, Greenfeld v. Hook, 177 Md. 116, 131 (1939); that where the failure to yield the statutory right of way amounts to the sole and proximate cause of the accident, the case should be withdrawn from the jury on the grounds of the contributory negligence of the unfavored driver, Wagner v. Page, 179 Md. 465, 474 (1941); that when the unfavored driver sues the favored driver, he must show not only negligence on the part of the other, but that he himself was careful and cautious, Gudelsky v. Boone, 180 Md. 265, 269 (1942); that while the chief care of a driver is to his right, still he is not by the statute relieved of the necessity of seeing that the way to his left is clear of vehicles, and that the question of right of way is usually one of fact although governed by statute, Clautice v. Murphy, 180 Md. 558, 564 (1942); that if a witness testifies to having looked and not having seen what, if the witness had looked, she must have seen, the conclusion is that either she did not look or did in fact see the car approach the point of the accident, Wallace v. Fowler, 183 Md. 97, 103 (1944); that where the witness says one thing at one time and another at another time, his testimony will be too inconclusive, contradictory, and uncertain for the basis of a legal

In *Wlodkowski v. Yerkaitis*[60] the Court traces the history of right of way from the common law rule that "the first driver to enter the intersection has the right of way",[61] through the statutory rule as enacted in Maryland, stating that the purpose of the rule was to direct the order of precedence as between vehicles approaching an intersection in such manner that if both continue, a collision will result. It notes that the statute "does not specify how near a vehicle approaching from the right must be to the intersection in order to have the right of way",[62] pointing out at the same time that, conversely, it does not specify "what must be the proximity of the vehicle from the left to the point of possible collision in order that the approach of one at a greater distance from the right may be disregarded".[63] It then concludes:[64]

> "We recognize that it would be difficult to prescribe such limitations (as to distance) upon the rule in view of the diversity of circumstances to which it might be applied, and we would not be justified in enforcing the rule according to any specific measure of distance,

conclusion, State v. Carroll-Howard Sup. Co., 183 Md. 293, 299 (1944); that where an intersection is not a "stop" intersection, "the taxi driver's failure to look to the left would be evidence of negligence, even though he had the right of way over a vehicle coming from the left", Belle Isle Cab Co. v. Pruitt, 187 Md. 174, 184 (1946); that a vehicle from the right does not have an absolute right of way regardless of its distance from the intersection when the other vehicle is seen, and that the statutory rule is a mere cautionary guide which qualifies but does not abrogate the common law rule, and that the question whether a vehicle coming from the right is near enough to the intersection to have the right of way over the one from the left is to be determined by the circumstances of each case, Wlodkowski v. Yerkaitis, 57 A. 2d 792, 795 (1948); that the Court of Appeals has made it clear that the statutory right of way rule must not be ignored, that the first thought of a driver should be for those on his right, and too much stress cannot be laid on looking to the right, and further, that while the Court has continually held the right of way rule gives only a relative right dependent on the facts of each case, still, where the evidence unquestionably shows that the unfavored driver violated the rule and the violation was a contributing cause of the accident, the case should be withdrawn from the jury on the grounds of his contributory negligence, Bush v. Mohrlein, 62 A. 2d 301, 303 (1948); that when both vehicles approach an intersection so that if one does not stop, an accident will occur, the one on the left should yield the right of way to the one on the right, though the one on the right does not have an absolute right of way in all situations that may arise, Graff v. Davidson Transfer and Storage Co., 65 A. 2d 566, 568 (1949).

[60] 57 A. 2d 792 (1948), *supra*, ns. 41, 59.

[61] *Ibid.*, 794.

[62] *Ibid.*

[63] *Ibid.*

[64] *Ibid.*

which the legislature has not found it expedient to adopt.

"Inasmuch as a vehicle approaching from the right does not have an absolute right of way in every instance, regardless of its distance from the intersection when the other vehicle enters from the left, the statutory right of way rule is regarded as a cautionary guide, rather than a peremptory command. The statutory rule qualifies the common law rule giving the right of way to the first arrival at an intersection, but does not abrogate it. . . . *The question whether a vehicle coming from the right is sufficiently near the intersection to have the right of way over a vehicle coming from the left must be determined from the circumstances in each particular case.*"[65]

This language is definitive of the Court's position today, and illustrates quite graphically the view held with relation to the right of way statute.

This case also contains the first extended discussion of contributory negligence in such situations. The difficulty arises over the question of whether or not the violation of the statute should be treated as negligence as a matter of law, or whether the violation is to be regarded only as evidence of negligence, leaving it to the jury to determine whether or not it is enough to hold the violator remediless in his action. There is no question but that this decision is a delicately balanced one, and it is not made any easier by reason of the fact that the matters involved in the trial are ones usually quite factually familiar to the jury as well as to the judge.[66] It is all too apparent that in the face of these facts the decision as to whether or not the case should be withdrawn from the jury is not an easy one, and from the way it was handled on appeal, we find this view reflected in the opinion:[67]

"No absolute rule declaring what constitutes contributory negligence can be formulated to apply to all cases, because, like primary negligence, it is relative and not absolute, and it necessarily depends upon the

[65] Italics supplied.
[66] *Supra*, n. 27.
[67] *Supra*, n. 60, 795.

> circumstances of each particular case. Unless the action of the plaintiff relied on as amounting to contributory negligence is established by clear and uncontradicted evidence, the case should not be withdrawn from the jury, and where the nature of the act relied on to establish contributory negligence can be determined only from all the circumstances surrounding the accident it is within the province of the jury to characterize it. Where there is a conflict of evidence as to material facts relied on to establish contributory negligence, or the act is of such a nature that reasonable minds, after considering all the circumstances surrounding the happening of the accident, may draw different conclusions as to whether it constituted contributory negligence, the court should not withdraw the case from the consideration of the jury. . . . We specifically hold that where, in an action for damages resulting from an automobile collision at a street intersection, the evidence is conflicting, or more than one inference may be reasonably drawn therefrom, the question of contributory negligence is one of fact for the jury."[68]

Legum v. Hough[69] followed shortly thereafter, and presented anew the case of a suit by the unfavored driver against the favored driver, alleging that when he was 8 feet from the curb line of the cross street, he saw defendant 120 feet away on his right. He said he thought he had time to cross, and he proceeded to do so without ever looking to his right again, as he was watching two pedestrians on the sidewalk about 25 feet beyond the intersection. He was struck on the right front of his car when he was about two-thirds of the way across the street. The lower court re-

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[68] Accord, see Bush v. Mohrlein, 62 A. 2d 301, 303 (1948), where the Court, finding, despite unfavored plaintiff's testimony that he looked to his right before he entered the intersection and saw nothing, that both drivers reached the crossing at about the same time, said:

> "While we have consistently held that the Maryland right of way statute gives only a relative right dependent upon the circumstances of each particular case, we also hold that where the evidence unquestionably shows that the unfavored driver violated the statutory rule, and the violation was a contributing cause of the accident, the court should withdraw his case from the jury on the grounds of his contributory negligence. Askin v. Long. . . ."

It is of interest that this case contained the same element of untrustworthiness as in the Askin case, thus making it an ideal vehicle for the same doctrine.

[69] 63 A. 2d 316, *supra*, ns. 18, 57.

fused defendant's motion for directed verdict, and this was affirmed on appeal. The sole question on appeal was as to the contributory negligence of the plaintiff, and the Court stated,[70] "For present purposes we must consider the evidence in the light most favorable to appellee (plaintiff). Unless his failure to yield the right of way was a negligent and contributing cause of the collision, as a matter of law, the issue would be one for the jury."

The Court relied on the *Ottenritter* case here, holding that the unfavored driver "should not judicially be declared negligent in not providing against the possibility of collision with a car which could not come into dangerous proximity to his own, unless it were unlawfully operated".[71] It continued:[72]

> "The limited effect thus given to the right of way rule has not escaped criticism. In Askin v. Long . . . Judge Sloan, speaking for the Court, said: 'It must be admitted that, under the cases cited, the question, though by statute made one of law, usually resolves itself into one of fact.' . . . Nevertheless, although a more stringent rule, comparable to the 'stop, look and listen' rule, has been applied in cases where traffic is controlled by lights . . . or by stop signs, . . . *the rule announced in the Ottenritter case is still the law of Maryland, in the case of uncontrolled crossings.*"[73]

The opinion could very well have rested there had there not been strong reliance by appellant on the *Askin* case as being controlling here. The Court distinguished the case, on the ground that in the *Askin* case the plaintiff had variously estimated the distance of the favored vehicle when he first saw it, from 200 to 45 feet, and that while plaintiff had been unable to estimate the speed of the other car, there was evidence that it was not operated over the speed limit.[74] Since there was no direct evidence of excessive speed on the part of the defendant (plaintiff having inferred speed

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[70] *Ibid.*, 317.
[71] *Ibid.*
[72] *Ibid.*, 318.
[73] Italics supplied.
[74] See *circa*, ns. 30-33, for discussion as to the inconclusiveness "in fact" of such testimony.

of defendant rather than showing it), and "no credible testimony as to the distance of the favored vehicle when the unfavored vehicle began to cross, no inference could be drawn that it was safe for the unfavored vehicle to proceed".[75] Those facts, the Court felt, were the delineating factors to be stressed. In the instant case the plaintiff was 8 feet from the intersection when he first saw the defendant 120 feet away, and at that time the plaintiff had only some 50 feet to traverse before clearing the intersection, and, the Court says, if both had been traveling at the same rate of speed, the plaintiff would have been 75 feet past the intersection when the defendant reached it. "We cannot say as a matter of law that it was his (plaintiff's) duty to stop under such circumstances."[76]

One is inclined to wonder why the New York case[77] set forth in *Bush v. Mohrlein*[78] only a few days before the *Legum* trial was not more persuasive with the Court here. The facts seem to be similar to those in the *Legum* case in that in the New York case "the unfavored driver saw a car approaching on an intersecting street at a distance and at a speed which threatened a collision, but, without looking again, proceeded in his course until a collision occurred . . ."[79] The New York Court in its opinion said:[80]

> "It would be our duty, under any circumstances, to enforce such reasonable observance of this rule which the Legislature has adopted for the safety of travelers, and certainly that duty is not rendered any the less commanding when we consider the number of accidents now being caused by heedless management of automobiles. . . . This plaintiff invited his own disaster, and he is entitled to no relief from the courts."

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[75] 63 A. 2d 316, *supra*, n. 18, 318.

[76] The same might be said of the only remaining case in this field, Graff v. Davidson Transfer and Storage Co., 65 A. 2d 566 (1949). This too is of the Ottenritter type where favored driver was so far away when other driver entered the intersection that a collision could not have taken place if favored driver were driving within the speed limit. The proximate cause of the collision then was not the failure of unfavored driver to yield the right of way, but rather the excessive speed on part of the otherwise favored driver.

[77] Shirley v. Larkin Co., 239 N. Y. 94, 145 N. E. 751.

[78] 62 A. 2d 301, *supra*, n. 68.

[79] *Ibid.*, 303.

[80] *Supra*, n. 77, 96, 752.

Despite the fact that such language would seem to apply to the *Legum* case, the court never referred to it in that opinion, and the unfavored plaintiff's recovery was affirmed.

We have attempted here to present but one of the myriad of facets in this field of negligence law. Even then, in the deliberately narrow scope of this article, summation is difficult. Perhaps the only answer lies in an appreciation of the thought expressed most clearly once again by Mr. Justice Holmes when many years ago he presented a general view, not of just one field of the law, but a synthesis of the entire Common Law:[81]

> "The life of that law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its forms and machinery, and the degree to which it is able to work out desired results, depend very much upon its past. . . .
>
> "The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances; and as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them. They are, however, facts of a special and peculiar function. Their only bearing is on the question, what ought to have been

[81] Holmes, THE COMMON LAW (1881).

> done or omitted under the circumstances of the case, not on what was done. Their function is to suggest a role of conduct."

Such was his introduction to *The Common Law,* and it will serve excellently to sum up that which has gone before in this Article.

The touchstone for the problem of prediction in these cases is pointed out to us as experience. We cannot by any means reject logic, but we see that for Justice Holmes "experience was the starting point where logic began; and where different logics clashed, experience was used as a touchstone for the selection of the relevant logic".[82] In order to predict with any hope of accuracy the result of a given set of facts, we must view them in the light of the present, not failing, however, at the same time to take into account the results of prior cases on similar facts. Things are reasonable, for example, in the realm of speed today which would have been patently unreasonable several years ago. These factors, together with those other variations due to technical and mechanical developments in the automotive field, present public policy, and past as well as present legislation must all be grouped together and studied with more than passing curiosity before attempting to answer any posed questions in this field. Certain it is that no specific rule can be laid down which will solve all the problems which will arise.

In each new case, the lawyer must use the tests of logic and experience to appraise his case in the light of what the Court of Appeals was seeking to accomplish, through the application of its logic and experience in the cases we have here reviewed.

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[82] Max Lerner, THE MIND AND FAITH OF JUSTICE HOLMES (1943), p. 46.