

this Constitutional provision was enacted, the case of *Akron v. Roth*, 88 Ohio St. 456, 103 N.E. 465 (1912), was decided. The Court in that case said that not only need the case be one of "public or great general interest," but also that error has probably intervened. Some eight years later, (1920) the Court in ruling on a motion said, "overruled, the Court finding that the case is one of public interest, but no error has intervened." *Records of the Supreme Court*, Case Number 16,710, Journal 28, page 476, July 16, 1920.

This notation has not been repeated that we know of, but it is some indication that the Court considers the factor of probable error when passing on a motion to certify. It seems an inescapable conclusion that this was in fact, for the particular case, at least, an affirmance of the lower court, for the Supreme Court admittedly had jurisdiction, because the case was of "public or great general interest," but the Court refused it because it thought that there was no error in the case.

This suggests that a milder reform might be to use formal reasons, similar to these, in disposing of these motions. Thus perhaps the advantages sought after by the Ohio Bar Ass'n. in its resolution, without the attending disadvantages of binding precedent or excessive labor on the part of the Court would be attained. In giving these reasons, the Court would not be binding itself irrevocably to one position, for it would merely be an indication of how the Court reacts to a given question upon a cursory examination. And of course, the Court would not be faced by the task of writing an opinion on the case, but could dispose of the whole problem by designating a number of these reasons.

The problem clearly merits further study and thought by those connected with the profession with a view to evolving a plan which will satisfy both the judiciary and the bar.

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## Automobiles

### NEGLIGENCE — DOCTRINE OF ASSURED CLEAR DISTANCE AHEAD — STATUTE AS SUBJECTIVE TEST.

The defendant stopped his truck on the highway. The evidence tended to show that there was no negligence in parking the truck but that there was no tail light burning. The night was dark, rainy, and foggy; the deceased was driving between 30 and 35 miles per hour and had just met a car coming from the opposite direction. Under such circumstances the deceased collided with the rear end of the truck and

was killed. The court directed a verdict for the defendant on the ground that the deceased was guilty of contributory negligence as a matter of law in violating Section 12603 of the General Code which prohibits motor vehicles from being operated at a speed greater than will permit them to be brought to a stop within the assured clear distance ahead. *Gumley, Adm'r v. Cowman*, 129 Ohio St. 36, 1 Ohio Op. 318, 193 N.E. 627 (1934).

At common law the courts were not in accord on this question. Some states held that it was negligence as a matter of law to drive at a speed greater than would permit stopping within the range of the driver's vision. *West Constr. Co. v. White*, 130 Tenn. 520, 172 S.W. 301 (1914); *Spencer v. Taylor*, 219 Mich. 110, 188 N.W. 461 (1922); *Fisher v. O'Brien*, 99 Kan. 621, 192 Pac. 317, L.R.A. 1917F, 610 (1917). But the probable weight of authority required that the question of the driver's negligence be submitted to the determination of the jury, taking into account all the facts and circumstances. *Kaufman v. Hegeman Transfer & Co.*, 100 Conn. 114, 123 Atl. 16 (1923); *Morehouse v. Everett*, 141 Wash. 399, 252 Pac. 157 (1926). In 1921 the Court of Appeals for Ashtabula county adopted the former rule. *Webster v. Pollock*, 15 Ohio App. 102. But after that case Ohio courts have followed the latter rule. *Tresise v. Ashdown*, 118 Ohio St. 307, 160 N.E. 898, 58 A.L.R. 1476 (1928); *Spreng v. Flaherty*, 40 Ohio App. 21, 177 N.E. 528 (1931).

In 1929, however, Section 12603 of the General Code was amended to include the following: "and no person shall drive any motor vehicle in and upon any public road or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead." 113 Ohio Laws 283.

The violation of a statute intended to protect the safety of persons in the position of the plaintiff or defendant is negligence as a matter of law or negligence per se. *Schell v. Dubois*, 94 Ohio St. 93, 113 N.E. 664, L.R.A. 1917A, 710 (1916). Thus, the first Ohio case to deal with the amendment to Section 12603 held that the language of the statute "is a specific requirement of law, a violation of which constitutes negligence per se." *Skinner v. Penn. Rd. Co.*, 127 Ohio St. 69, 186 N.E. 722 (1933). Much reliance was placed on the case of *Bowmaster v. William H. DePree Co.*, 252 Mich. 505, 233 N.W. 395 (1930) which interpreted a similar statute of that state. The Michigan statute was passed in 1927 but her courts had previously held the rule that failure to stop within the assured clear distance ahead was negligence per se at common law.

In the opinion of the Court of Appeals, *Gumley Adm'r v. Cowman*, 48 Ohio App. 300, 40 O.L.R. 230, 17 Ohio Abs. 255, 1 Ohio Op. 450 (1934) the judge stated: "We are aware of the fact that this conclusion of law would leave the driver of an automobile, injured by his running into an obstruction in the road, without any remedy for injuries by reason of negligence on the part of the other person. . . ." But the Supreme Court in affirming the decision stated: "This court entertains no such view as to the intention of the Legislature in enacting this amendment . . . . under proper circumstances the questions of proximate cause and negligence on the part of such driver must be submitted to the jury . . . . the present legislative requirement establishes a subjective test whereby a driver is prohibited from operating any motor vehicle . . . . at a rate of speed greater than will permit him to bring it to a stop within the distance at which he can see a discernible object obstructing his path." Other cases would agree that a jury question as to the visibility of the object may arise. *Kadlec v. Al. Johnson Constr. Co.*, 217 Iowa 299, 252 N.W. 103 (1933). But it is difficult to reconcile the statement that the language of the amendment "is a specific requirement of law, a violation of which constitute negligence per se," *Skinner v. Penn. Rd. Co.*, supra, with the statement that it establishes a subjective test. No case has been discovered in which the term "subjective test" has been used in this connection, and the exact meaning of it does not seem to be clear.

Exceptions are being made, and certainly they should be made, to the rule as laid down in the *Skinner* case. The Ohio Court of Appeals has held that the "assured clear distance ahead" applies only to the lane in which the driver is traveling; and if he is forced to go into another lane and strikes an unlighted truck, it is not negligence as a matter of law. *Schaeffer-Weaver Co. v. Malloun*, 45 Ohio App. 1, 38 O.L.R. 247, 186 N.E. 514 (1933). Also it would seem to be implicit in the wording of Section 12603 that the rule would not apply where the object with which the automobile collides moves into the automobile's path. The court may decide to relax the rule where the driver's vision is interfered with by the lights of an approaching automobile, although the Michigan court has refused to do so. *Ruth v. Vroom*, 245 Mich. 88, 222 N.W. 155, 62 A.L.R. 1528 (1928).

At present there is a bill (Sub. S.B. No. 133) passed by the Senate and pending in the House to amend Section 12603 by inserting in place of the paragraph quoted above the following: "In all cases where the driver of a motor vehicle on public thoroughfares is driving within the speed limit allowed by law, the question of assured clear distance shall

be a matter of fact to be submitted to the jury for its determination." In this form the bill says nothing about being able to stop within the assured clear distance ahead. Although the intent of the author of the bill seems to be plain to one who knows the history of the statute, it may be questioned whether, for the sake of clarity, he should not have included another sentence.

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## Bankruptcy

### FRAUDULENT TRANSFER BY INSOLVENT DEBTOR—RIGHTS OF CREDITORS TO SUE AFTER ADJUDICATION OF BANKRUPTCY AND APPOINTMENT OF A TRUSTEE

In *Winter's National Bank and Trust Company v. Midland Acceptance Corporation*, 47 Ohio App. 324, 191 N.E. 889 (1934, previously annotated on another point, "Chattel Mortgages and the Bulk Sales Act," 7 Ohio Bar May 6, 1935), a creditor brought his action to set aside a conveyance alleged to be in violation of the Bulk Sales Act, Section 1102, General Code, after the adjudication in bankruptcy and the appointment of the trustee. The latter, on the following day, filed his intervening petition. In their opinion the court said, "The right to institute the action which the plaintiff (creditor) sought to prosecute was, by the adjudication of Gessaman, the bankrupt, and the appointment of a trustee, vested in the representative of all of Gessaman's creditors, the trustee," and so dismissed the plaintiff's suit.

This raises the problem of under what circumstances a creditor may sue to set aside allegedly fraudulent transfers by an insolvent debtor.

When a creditor sues prior to bankruptcy to set aside a fraudulent conveyance, his right is not interfered with by the filing of a petition in bankruptcy and the subsequent appointment of a trustee unless the latter intervenes. *Walker v. Connell*, 54 Sup. Ct. 251, 24 Am. B.R. (n.s.) 229 (1934). A similar result would seem to follow when the creditor sues subsequent to bankruptcy but prior to the appointment of the trustee. *Frost v. Latham*, 181 Fed. 866 (1910). And where a trustee was not appointed after a debtor had been adjudicated a bankrupt, a creditor has been permitted to sue in his own name. *Guarantee Title and Trust Co. v. Pearlman*, 144 Fed. 550, 16 Am. B.R. 461 (1906). However, the trustee, after he is appointed, may intervene and collect the assets for the benefit of the estate. *Matter of Vadner*, 42 Am. B.R. 465 (1918); *In Re Rogers*, 125 Fed. 169, 11 Am. B.R. 79 (1903). After the