TORTS

THE ASSURED—CLEAR—DISTANCE—AHEAD STATUTE

After dark on December 23, 1936, Defendant's truck stalled on the highway facing west on the north side of the road.[1] Plaintiff, awhile later, while driving his car in the same direction, at an alleged speed of 35 M.P.H., collided with the Defendant's truck. Plaintiff brought his action in the Cleveland Municipal Court, charging the Defendant with negligence in violating Section 12614-3 and 6310-1 General Code, which require motor vehicles to have tail lights and prohibit parking on the highway proper. Defendant, in his answer, charged contributory negligence on part of Plaintiff in violating Section 12603, General Code. On trial Plaintiff sought to prove that the Defendant's truck was parked 30 feet beyond the crest of the hill, and that therefore he could not see Defendant's truck in time to avoid a collision; and further he contended that he was blinded by the lights of an oncoming car. Verdict by a jury was rendered for the Plaintiff, and Defendant appealed to the Appellate Court, where the judgment of the Municipal Court was affirmed by a divided court. The cause was certified to the Supreme Court for a review of the issue of contributory negligence, and it reversed the judgment of the Municipal Court and held the Plaintiff guilty of contributory negligence as a matter of law.

General Code, Section 12603, provides inter alia, "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."

This provision, if interpreted literally, would make the driver of an automobile an insurer against almost any collision in which he might become involved. For if the word, "assured," means absolute certainty, then the fact that a collision occurred would immediately lead to the conclusion that the distance ahead was not assured; and conversely, if in fact the distance ahead was assured, then there would have been no collision.

Obviously, it was not the intention of the legislature to set up an inflexible rule of conduct, and the Supreme Court, realizing this, made the statement in one of the earlier cases, that one who failed to comply literally with the terms of the statute may excuse such failure to comply by establishing that without his fault, and because of circumstances beyond his control, compliance with the terms of the statute was made im-

[1] Smiley v. Arrow Spring Bed Co., 138 Ohio St. 81, 33 N.E. (2d) 3, 20 Ohio O. 30 (1941).

possible.[2] However, in all of the cases the Court has said that the statute was a specific requirement of law, and a violation of it was negligence *per se*.[3] This would seem to imply that the statute would be interpreted strictly and few exceptions be granted, and as we shall see, this has certainly been the case.

The excuse for non-compliance with the statute is stated in general terms in the preceding paragraph and in order to find out precisely what facts in a given case, will justify non-compliance with the statute, it may be well to review the few cases which have come before the Supreme Court, and those cases in other states which our Supreme Court has cited with approval.

In the following situations the statute barred Plaintiff's recovery:

(a) When the night was foggy and rainy and the Plaintiff failed to see an unlighted freight train standing across the crossing in time to avoid a collision.

(b) Where under similar conditions, Plaintiff failed to see a slow moving truck, without tail lights, proceeding in the same direction as the Plaintiff.[5]

(c) Where the weather was clear but the truck collided with was negligently parked on the highway without lights.[6]

(d) Where the lights of an oncoming car blinded Plaintiff and caused him to collide with a negligently parked truck.[7]

(e) Where the object collided with was a truck, not clearly discernible because of its mud-bespattered condition.[8]

(f) When the Plaintiff was driving in the city in second gear behind a truck, which suddenly stopped, causing Plaintiff to collide with the rear end of the truck.[9]

In the following situations the statute did not bar Plaintiff's recovery:

(g) When Plaintiff was approaching the crest of a hill at a moder-

[2] Kormos v. Cleveland Retail Credit Men's Co., 131 Ohio St. 471, 6. Ohio O. 150. 3 N.E. (2d) 427 (1936).

[3] Gumley v. Cowman, 129 Ohio St. 36, 193 N.E. 627, 1. Ohio O. 318 (1934); Hess v. Kroger Grocery & Co., 40 Ohio Law Rep. 153 (app 1934).

[4] Skinner v. Pennsylvania R. Co., 127 Ohio St. 69, 186 N.E. 722 (1933); Capelle v. Baltimore & Ohio R. Co., 136 Ohio St. 203, 16 Ohio O. 215, 24 N.E. (2d) 822 (1940).

[5] Gumley v. Cowman, 129 Ohio St. 36, 193 N.E. 627, 1 Ohio O 318 (1934).

[6] Perkins v. Great Central Transportation Corp., 262 Mich. 616, 247 N.W. 759 (1933); Lindquist v. Thierman, 216 Iowa 170, 248 N.W. 504, 87 A.L.R. 893 (1933); Ellis v. Bruce, 217 Iowa 258, 252 N.W. 101 (1933); Hart v. Stence, 219 Iowa 55, 257 N.W. 97 A.L.R. 535 (1934).

[7] Kormas v. Cleveland Retail Credit Men's Co., (N. 2. supra); Wosoba v. Kenyon, 215 Iowa 226, 243 N.W. 569 (1932); Lindquist v. Thierman (N. 6. supra).

[8] Kormos v. Cleveland Retail Credit Men's Co., (N. 2. supra); Ellis v. Bruce, (N. 6. supra); Dalley v. Mid-Western Dairy Products Co., 80 Utah 331, 15 P. (2d) 309 (1932).

[9] Higbee v. Lindemann, 131 Ohio St. 479, 6 Ohio O. 154, 3 N.E. (2d) 426 (1936).

ate speed, in the daytime, the road being slippery, when the Defendant's car came over the hill from the opposite direction on Plaintiff's side of the road, and forced Plaintiff on the berm when he eventually skidded back on the road into Defendant's car.[10]

(h) Where Defendant was driving his car at night along a city street at a slow rate of speed and was suddenly forced over toward the curb by an oncoming motorist who pulled over onto the Plaintiff's side of the street, and caused the Plaintiff to collide with the Defendant's truck negligently parked without lights.[11]

(i) Where Plaintiff was driving his car at night at a speed of 12 M. P. H., when suddenly he saw a truck on the edge of the highway without lights and because there was an icy patch just to the rear of of the truck, he skidded and failed to stop in time. The rest of the road was dry and the patch of ice was indiscernible. The night was very foggy.[12]

In attempting to analyze these decisions and the two classifications of cases, it will be well to keep in mind the definition of the term "*assured—clear—distance—ahead.*" The courts have defined it in substance as follows: the *assured—clear—distance—ahead* is the distance between the front bumper of the Plaintiff's car and that point at which the driver can see a discernible object obstructing his path.

Applying then the definition to the cases we see that in cases (a) and (b) fog, rain, and snow provide no excuse for not complying with the statute. The reason is this: fog, rain, etc., cut down the Plaintiff's assured clear distance and therefore he should drive slower. The same reason applies when the road is slippery from rain or ice, for although the assured clear distance is not cut down, the driver's ability to *stop* within the assured clear distance is impaired. Note that in both situations the element which cuts down the assured clear distance or impairs the driver's capacity to stop, is not one which suddenly and unexpectedly comes on the scene.

In case (d) we see that lights of oncoming cars blinding the Plaintiff is no excuse for non-compliance. The effect of this is to reduce the driver's assured clear distance to practically nothing and he should therefore stop immediately. And in this situation, the element which caused the decrease in the assured clear distance did not come upon the scene suddenly or unexpectedly, at least not so within the meaning of the statute as the courts have interpreted it.[13]

[10] Hangen v. Hadfield, 135 Ohio St. 281, 14 Ohio O. 144, 20 N.E. (2d) 715 (1939).
[11] Matz v. Curtis Cartage Co., 132 Ohio St. 271, 8 Ohio O. 41, 7 N.E. (2d) 220 (1937).
[12] Diederichs v. Duke, 234 Mich. 136, 207 N.W. 874 (1926).
[13] Note 7, *supra.*

In case (e) we have the problem of the discernibility of the object obstructing the Plaintiff's path, and it is sufficient to say that the object collided with was difficult to discern, will not invoke an exception to the statute unless the object was quite small and impossible of perception until too late to avoid striking it, and a mud-bespattered truck is not such an object.

As for cases (c) and (f), the former represents a situation where the statute clearly applies, the latter, however, shows that when the object which obstructs the driver's path is within his assured clear distance at all times, the driver must, at his peril, drive at such a speed that he can stop in time to avoid colliding with the object. But, if, as in many states, the driver of the truck was under a duty to signal before stopping, it might plausibly be argued that the collision was due to the failure of the driver of the first car to give a signal rather than the failure of the second driver to stop within the assured clear distance ahead.

On the other hand in the cases where the Plaintiff was excused from complying with the statute the factor which seems to distinguish them is the fact that the element which cut down the assured clear distance, or prevented the driver from stopping within the assured clear distance, was one which came upon the scene suddenly and without warning.

For example in case (g) the Defendant's auto coming over the hill on the wrong side of the road, was an element which suddenly cut down the driver's assured clear distance; it was unexpected and came without warning.

Similarly in case (h) the Plaintiff's being forced over toward the curb by the negligence of the oncoming motorist, placed an obstruction in his path which suddenly cut down his assured clear distance.

And again in case (i), the icy patch on the road, though not a sudden element, was at least hidden and unexpected, and thereby impaired the ability of the Plaintiff to stop his car within the assured clear distance.

However, it is important to note that no absolute test of the driver's liability can be applied, and that the problem is a relative one under the circumstances. If the party is forced toward the curb by an oncoming motorist, he may recover,[14] if he runs into a car proceeding in the same direction which is negligently stopped without warning he may not.[35] If a party approaches the crest of the hill and collides with a car coming in the opposite direction on the wrong side of the road he may recover;[16] if instead, he collides with a truck negligently parked,

[14] Note 11, *supra.*
[15] Note 9, *supra.*
[16] Note 10, *supra.*

he may not.[17] If recovery is granted, many Ohio cases may be cited for the proposition that a party is not expected to anticipate that others will violate the law;[18] if recovery is denied, a more or less literal construction of the statute is relied on. The statute does not always bar recovery, nor will it as long as negligence and not absolute responsibility is the test, and yet there is a decided tendency in the latter direction; doubtful cases will involve a question of the degree to which the statute may be carried. For this no absolute test can be applied. A. E. H.

WILLS
PROBATE PRACTICE

Claim for Funeral Expenses

Decedent, during his lifetime, contracted with a funeral director for funeral services. The funeral director took complete charge. He buried the deceased in the casket, grave vault, and clothes, which had been selected by him, and performed other services including transportation to the cemetery. A charge of $654.95 was made against the estate. The executor rejected the claim and tendered $350 citing Section 10509-121, Ohio General Code, which provides that an executor may allow $350 for funeral expenses and that the Probate Court must approve the allowance of any sum in excess of such amount. The funeral director refused tender and filed suit in the Municipal Court of Columbus[1] which allowed the claim. The Court of Appeals affirmed the decision of the Municipal Court and held that the statute does not require the approval of the Probate Court to the allowance of a claim of a funeral director in excess of $350 founded on a contract made with the decedent in his lifetime.[2]

The problem of "burial of the dead" has involved an excessive amount of litigation in Ohio and the ability to contract before death for funeral expenses to be paid, from the estate, after death has been

[17] Note 6, *supra*.

[18] Hangen v. Hadfield (N. 10 supra); Hess v. Kroger Grocery & Co., (N. 3 supra); Sidle v. Baker, 52 Ohio App. 89 (1936); Cleveland Ry. v. Goldman, 122 Ohio St. 73, 170 N.E. 641 (1930); Juergens v. Bell Dist. Inc., 135 Ohio St. 335, 21 N.E. (2d) 90 (1939) Goldberg v. Jordan, 130 Ohio St. 1, 196 N.E. 775 (1935) Swoboda v. Brown, 129 Ohio St. 512, 196 N.E. 274 (1935). In the majority opinion of the principal case, Judge Hart says that while this is true of negligence in general, it has little, if any application to the requirements of the statute in question.

[1] Ohio G.C. sec. 10509-133, allowing suit on rejected claim if filed within two months.

[2] Schroyer v. Hopwood, 65 Ohio App. 443 (1940).