

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MARIANO CRAME, DEFENDANT AND APPELLANT.

G.R. No. 10181. March 02, 1915

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal from a judgment of the Court of First Instance of Manila convicting the accused of the crime of serious physical injuries through reckless negligence. The information under which he was tried and convicted is as follows:

"That on or about the 10th day of February, 1914, in the city of Manila, Philippine Islands, the said Mariano Crame, being then and there the chauffeur of a motor vehicle, did then and there unlawfully, with reckless imprudence and in violation of the regulations, conduct and drive the said motor vehicle along Calle Herran in said city, without using reasonable care and diligence to prevent injury to persons and property and without paying any attention to the pedestrians occupying and crossing said street, thus colliding with, running over, and by his neglect and imprudence in the management and lack of control thereof, causing the said automobile guided and conducted by the said accused as aforesaid, to knock down, drag, and run over the body of one George B. Coombs, a private in the United States Army, who was then and there occupying and crossing the said Calle Herran, thereby causing injuries, wounds, and bruises upon the person of the said George B. Coombs, which said injuries, wounds, and bruises have deranged the mental faculties of the said George B. Coombs and have incapacitated him, the said George B. Coombs, from further performance of his duties as a soldier of the said United States Army."

It appears from the evidence that on the night of the 10th of February, 1914, between 11 and 12 o'clock, the accused, Mariano Crame, a duly-licensed chauffeur, was driving an automobile, in which, at the time, were Thomas M. Bill, a sailor belonging to the United States Navy, and Indalecio Rabonsa, an apprentice to the accused who, at the time of the accident, was sitting at his side on the front seat. The automobile was passing from Santa Ana to Manila and, at the time of the accident, was going in a northwesterly direction. At the same time there were two automobiles on the way from Manila to Santa Ana, one belonging to Mr. Stuart, driven by himself, and the other a machine without passengers driven by a chauffeur by the name of Miranda. The automobile driven by Stuart was a modern Cadillac with high-powered electric lights. The accused states that this fact, added to the other fact that he was near the Damas Bridge at the time, induced him to reduce the speed of the automobile at that point so that he was, at the time of the accident, going only about 10 miles an hour. He asserts that he suddenly saw the form of a man in front of his automobile and that, on seeing him, he altered the course of the machine as much as possible in order to avoid a collision; but that he was unable to do so, the right side of the machine hitting the man and knocking him to the ground. He asserts that, at the time it struck the man, the machine was almost at a standstill, it coming to a complete stop within about 6 feet of where the injured man lay.

Crame, Rabonsa, and Bill placed the injured man in the automobile and carried him to the hospital. Afterwards they went to the police station at Paco and gave an account of the accident. Immediately thereafter Crame also went to the office of the superintendent of automobiles of the Bureau of Public Works and reported the accident.

Relative to the injuries resulting to Coombs from the accident, it appears that he received a heavy blow in the lower part of the back of the head which caused ecchymosis and coagulation of blood. As a result of the blow he was rendered unconscious and has since remained in a state of great mental debility, with severe pains in the head, almost complete loss of memory, being unable to remember anything that occurred during the accident and, at times, forgetting the names and countenances of his most intimate friends. He cannot be left alone and requires continual attendance. He is described by the physician who examined and treated him as an incurable and hopeless imbecile.

The learned trial court convicted the accused of the crime of producing serious physical injuries by imprudencia temeraria, setting forth as the grounds of the conviction the following reasons:

"First, in that [before the occurrence] the accused, having seen the soldier Coombs crossing the street at a certain distance in front of the automobile, did not reduce the speed of the automobile sufficiently, nor attempt to stop the machinery entirely, if that was necessary, to avoid an accident. Second, in that it does not appear that the accused sounded his horn or whistle or used his voice to call the attention of the person who was crossing the street or notify him that he should stop and avoid being struck by the automobile. Third and last, in that the accused was driving in the center, or rather, a little to the right of the center of the street instead of on the left side thereof."

Discussing these points the court said:

"With reference to the first ground of negligence, the accused alleges that he was unable to stop his machine suddenly ; but to this it may be answered that if he had begun to stop the machine the first moment that he saw the soldier the accident would undoubtedly have been avoided. * * * What the court desires to say is that with a speed of only 12 to 20 miles an hour, if the accused had begun to reduce speed in time, there is no doubt whatever that the accident would have been avoided and he would have been able easily to stop his machine in time.

"Relative to the second ground of negligence, or the failure, in order to prevent the injury, to sound the horn and arrest the attention of the soldier who was crossing the street, there is nowhere in the case any proof or even an allegation in favor of the accused. He testified as a witness in his own behalf, but he never mentioned having sounded the horn, nor did he give any reason why he did not do so.

"In regard to the third ground of negligence, the accused and his witnesses sought to establish the fact that, at the place where the accident occurred, the automobile could not pass along the left side of the street because the street-car rails are upon that side, and if he had attempted to pass upon the left side of the rails the automobile would have been thrown into the ditch, as the street upon that side of the street-car tracks is very uneven and as a result the chauffeur and his passengers would have been exposed to a greater danger than the one that they tried to avoid. The court, nevertheless, is of the opinion that this claim is not sustainable in view of the fact that, at the place where the accident occurred, as has already been said, there are two street-car tracks. One of those tracks, it is true, is very close to the extreme left side of the street, but the other is located about the center of the street. The accused should not have been required to drive his automobile upon the left side of the farther track; but it is evident that he could have passed between this track and the track in the center of the street. If the accident had occurred under such circumstances the court would have said that it was an unavoidable accident. But as the collision occurred outside of the track in the center of the street and on the right-hand side of the street, the court believes that the accused is the cause of said accident.

"The court, in company with the prosecuting attorney, the attorney for the accused and Mariano Crame himself, examined the place where the accident occurred and, from a careful examination of the place, compared with the testimony of the seaman Bill and the witness Stuart, the court is convinced that the place where the soldier was hit is not the place indicated by the accused—that is, between the Damas Bridge and the McKinley Junction, just opposite a wooden post, but at the place marked in the plan Exhibit A by the witness

Stuart."

We are satisfied from an examination of the record that the conclusions of the trial court are more than sustained. The accused did not see the soldier whom he ran down until it was too late, although the street at that point was brilliantly lighted; he did not sound his horn or give notice of his approach in any other manner; he did not apply the brake or make any effort whatever to stop; he was traveling on the wrong side of the street at the time of the collision.

In defense of the accused, counsel says:

"At what distance did the accused see the soldier? From the testimony of the accused and the witness Rabonsa, which is all the proof there is in the record in this respect, it is inferred that neither the chauffeur nor his companion saw the soldier at a sufficient distance to permit them to lose time in useless or at least doubtful maneuvers; Rabonsa says that he saw the soldier first at the very moment of the accident; Stuart saw him only as he was falling to the ground; and the accused says that the soldier appeared suddenly in front of the machine and that he, the accused, in the face of imminent danger of a collision changed the direction of the automobile in order not to have the center of the machine strike the soldier, but that he was unable to avoid hitting him with the rear part of the machine, thereby partly turning him and making him fall to the ground; that thereupon the accused, in order to prevent the rear wheel from striking the soldier, again changed the direction of the machine, thereby avoiding by these two maneuvers the passage of the machine over the body of the soldier."

This argument is, in our judgment, not a strong one. The fact that the accused did not see the soldier until the machine was very close to him is strong evidence of inattention to duty. The street at the place where the accident occurred is wide and unobstructed. There is no building on either side of the street. There is no place from which a person desiring to cross the street can dart out so suddenly and unexpectedly as to give a chauffeur no opportunity to protect him. The street at the point where the accident occurred was well lighted by electric lights placed on both sides of the street. Besides, it is in close proximity to McKinley Junction and there are a number of electric lights in and about the waiting station located at that point. Under such circumstances there is no reason why the accused did not see the soldier long before he had reached the position in the street where he was struck down. It is claimed by the accused himself that the soldier was near the center of the street when the collision occurred. In that event he must have walked in plain sight of the oncoming machine for many feet before he arrived at the place where he was struck. He could not have risen out of the ground nor could he have darted suddenly into the street from a side street or door. He was walking in an open, level, and thoroughly lighted street for many feet before he was hit by the automobile; and the fact that the accused, under such circumstances, did not see him is strong evidence that he was negligent.

The accused intimates in his testimony that a carromata was approaching him just before the accident occurred and that it obscured his vision to such an extent that he did not see the soldier until the very moment of meeting the carromata. This story is not corroborated by any other witness in the case. No one else speaks of the presence there of a carromata and no one offers this as a reason why the soldier was not seen in time to avoid the accident. Moreover, if the soldier were crossing the street the carromata would have obscured him for a moment only and there would have been abundant time to observe him before he reached the carromata and after he had passed it. Besides, it is the duty of automobile drivers in meeting a moving vehicle on the public streets and highways to use due care and diligence to see to it that persons who may be crossing behind the moving vehicle are not run down by their automobiles. There is nothing in this story of the accused which, if true, relieves him from the charge of negligence under the other facts and circumstances disclosed by the evidence. It is to be noted, also, that counsel for the accused lays no stress on this portion of his story and does not make it the basis of an argument in his behalf.

As we have said, the testimony and the exhibits show that the accident occurred at or near the McKinley Junction, where there is a waiting station, a kiosko, and a hydrant, where many persons habitually wait to transfer and where, as a matter of fact, even up to midnight, many persons stroll about waiting for cars. The defendant was aware of these facts. Moreover, he testified himself that the street at that place was not level, that the rails of the street-car track made it difficult for automobiles to cross or pass over them and that keeping to the extreme left-hand side of the street would endanger the safety of the automobile and the passengers. All of these are facts which require care and diligence on the part of an automobile driver; and such a place should be approached guardedly, with the machine under control and with ability to stop with reasonable quickness.

It appears clearly established by the evidence that the accused was driving on the right-hand side of the street when the accident happened. According to the law of the road and the custom of the country he should have been on the left-hand side of the street. According to the evidence there was abundant room for him to drive upon what may properly be called the left-hand side of the street and still be free from danger or risk. Instead of that he chose to take what appears from the evidence to have been almost the extreme right-hand side of the street. Thomas M. Bill, who was a passenger in the automobile which ran down the soldier, testified that the automobile at the time of the accident was traveling on the right-hand side of the street. A. R. Stuart, who was driving an automobile approaching the place of the accident from the opposite direction, testified that the victim was struck at the point marked "A" on the plan introduced in evidence and that the automobile was located at the point marked "B," a point indisputably on the right-hand side of the street; that the automobile, when it stopped after the collision, was not standing parallel with the street but at an angle with the center line of the street, having turned toward the left-hand side of the street after it had run down the soldier. He also testified that, if he had continued upon what was to him the left-hand side of the street, he would have run over the body of the soldier. The testimony showing that the accused was driving on the right-hand side of the street is corroborated by the fact that the witness Rabonsa, who testified on the trial that the accused was driving on the left-hand side of the street, first declared, in his statement to the prosecuting attorney, that, at the time of the accident, the automobile was being driven on the right-hand side of the street.

While it is true that the law does not draw an inference of negligence from the mere showing that there was a collision between a man and an automobile on a public street but that negligence must be proved, nevertheless, we believe it to be the rule that testimony that plaintiff, while driving on the right-hand side of a wide road, was overtaken by an automobile which struck the hind wheel of his wagon, establishes a case of negligence. (*Salminen vs. Ross*, 185 Fed., 997.) And a bicyclist has the burden of disproving his negligence when he rides up behind another who is walking where he has a right to walk and, without giving any warning, strikes him with his vehicle. (*Myers vs. Hinds*, 110 Mich., 300.) And we have held in the case of *Chapman vs. Underwood* (27 Phil. Rep., 374), that where, in an action to recover damages for having been run down by defendant's automobile, it appeared that the automobile, at the time the injury was produced, was being driven on the wrong side of the street, the burden of proof was on defendant to establish that the accident occurred through other causes than his negligence.

There is no evidence in the case which shows negligence on the part of the injured soldier. The mere fact that he was run down by an automobile does not signify that he was negligent. At the time he was struck he was, speaking from the direction in which the accused was driving the automobile at the time, on the right-hand side of the street where he had a right to be and where the law fully protected him from vehicles traveling in the direction in which the accused was driving at the time of the injury. The rule which requires travelers to look out for trains at railroad crossings by stopping, looking and listening before they pass over the tracks does not fix the measure of care which a pedestrian attempting to cross a street must use in looking out for automobiles. Negligence and contributory negligence are matters to be proved, and the burden is on the one alleging injury from negligence to

establish it and upon the other alleging immunity because of contributory negligence to establish it, unless it is shown by the plaintiff's testimony. The injured soldier cannot be held to have been negligent except upon evidence establishing that fact. The beggar on his crutches has the same right to the use of the streets of the city as has the man in his automobile. Each is bound to the exercise of ordinary care for his own safety, and the prevention of injury to others, in the use thereof. (*Millsaps vs. Brogdon*, 32 L. R. A. (N. S.), 1177.) This is especially true when we take into consideration the assertion of the accused that, by reason of the position of the street-car tracks, he was unable to take the left-hand side of the street, which is the side which the law requires him to take, but that it was necessary for him to pass in the middle of the street or a little to the right of the middle in order to make a safe passage for the automobile and its passengers. We have held in the case of *Chapman vs. Underwood* (27 Phil. Rep., 374), a case in which the defendant's chauffeur was driving on the wrong side of the street at the time the accident, which was the basis of the action, occurred, that "defendant's driver was guilty of negligence in running upon and over the plaintiff. He was passing an oncoming car upon the wrong side. The plaintiff, in coming out to board the car, was not obliged, for his own protection, to observe whether a car was coming upon him from his left hand. He had only to guard against those coming from the right. He knew that, according to the law of the road, no automobile or other vehicle coming from his left hand should pass upon his side of the car. He needed only to watch for cars coming from his right, as they were the only ones under the law permitted to pass upon that side of the street car."

We regard it as clear from the record that the accused was driving much faster than he claims he was or else he was negligent in not watching the street for foot passengers, or, in the handling of his automobile. It is a matter of common knowledge that an automobile being driven at 10 miles an hour can be stopped, if necessity requires it, within 10 or 15 feet at the most. That rate of speed is extremely low for an automobile and, with such a speed, it can be stopped almost instantly. If, therefore, the accused was going at the rate of 10 miles an hour only and saw the soldier 20 feet ahead of him, he could, without difficulty, have stopped the automobile and avoided the accident. As a necessary consequence, the accused was either driving at a rate of speed much higher than that stated or else he was negligent in not stopping his car. Furthermore, if he did not see the soldier until too late to stop, the burden is on him to show why he did not. There is something wrong when a chauffeur runs over a man who is in plain view of the automobile for a long distance before the point of the accident is reached. No negligence on the part of the injured person has been shown. Whichever way the case is looked at, whether from the viewpoint of the failure to see the soldier in time to avoid the accident or failure to stop or give warning by horn or whistle, it is clear that the learned trial court was right when it held that the accused was guilty of negligence.

There is no competent evidence to show that the soldier was drunk at the time of the accident; but, even if he was drunk, it is of little consequence in the decision of this case, it not having been shown that such drunkenness contributed to the accident. Whatever his condition he could easily have been seen by the automobile driver if he had been vigilant, as he should have been, in passing over the streets of a city and especially in passing a place where many people generally congregate and where the street is much used by people on foot. It is not shown that the soldier's drunkenness, if he was in that state, in any degree contributed to the accident or that the accident would have been avoided if he had been sober. We have held in the case of *Wright vs. Manila Electric Railroad and Light Co.* (28 Phil. Rep., 122) :

"Mere intoxication is not negligence, nor does the mere fact of intoxication establish a want of ordinary care. It is but a circumstance to be considered with the other evidence tending to prove negligence. It is the general rule that it is immaterial whether a man is drunk or sober if no want of ordinary care or prudence can be imputed to him, and no greater degree of care is required to be exercised by an intoxicated man for his own protection than by a sober one. If one's conduct is characterized by a proper degree of care and prudence, it is

immaterial whether he is drunk or sober. (Ward vs. Chicago etc., Ry. Co., 85 Wis., 601; Houston & T. C. Ry. Co. vs. Reason, 61 Tex., 613; Alger vs. Lowell, 3 Allen, 402; Central R. & Bkg. Co. vs. Phinazee, 93 Ga., 488; Maguire vs. Middlesex R. Co., 115 Mass., 239; Meyer vs. Pacific R. R. Co., 40 Mo., 151; Chicago & N. W. Ry. Co. vs. Drake, 33 111. App., 114.)"

The judgment appealed from is affirmed, with costs against the appellant. So ordered.

Arellano, C. J., Torres and Johnson, JJ., concur.

DISSENTING

CARSON, J.,

I dissent. The facts, clearly disclosed by the record as I read it, are that at 11 o'clock at night a drunken soldier suddenly and unexpectedly lurched, stumbled, or stepped out into the middle of the road in front of an automobile driven by the defendant, and was unavoidably struck by the right side of the machine and seriously injured; that just prior to the accident, the defendant was running his machine along the road from Santa Ana to Manila, at a reasonable rate of speed, with his car under proper control; and that when the drunken soldier suddenly appeared in the center of the street, the defendant did everything which could reasonably be expected of him in an effort to avoid an accident.

It must be remembered that this is a criminal prosecution in which the accused has been sentenced by the court below to a term of imprisonment on a charge of criminal negligence, and that in this as in all other criminal cases the burden rested upon the prosecution to establish the guilt of the accused by affirmative proof and beyond a reasonable doubt. It is not a question of determining, by a preponderance of the evidence, the civil liability of the defendant, and yet it seems to me that this court and the court below have construed all the evidence so as to give the benefit of any possible doubt which might rise therefrom, in favor of the prosecution and against the accused.

Three witnesses who approached the injured man just after the accident testified that he smelled strongly of liquor, and a police officer who came up just before he was put in the ambulance which was called to take him to the hospital, reported and testified that at that time the man still smelled strongly of liquor.

There is not a scintilla of evidence in the record to put in doubt the testimony of these witnesses, and yet the court denies to the accused the reasonable presumption of innocence in his favor, which rises out of the probability that the accident was due to the careless and negligent conduct of this man, more or less under the influence of liquor, rather than to any negligence or misconduct on the part of the chauffeur.

As may be seen from the carefully prepared opinion of the trial judge and also from the prevailing opinion in this court, there is not a scintilla of evidence in the record which even tends to show that there was any, the slightest negligence on the part of the accused, except the mere fact that his machine actually struck the more or less intoxicated soldier, the admitted fact that he did not sound his horn, and the somewhat inconclusive evidence on which the court finds that at the moment when the accident occurred, he was on the wrong side of the road. On the contrary, all the evidence goes strongly to show that he was traveling at an admittedly reasonable rate of speed in view of the time, place, and more or less deserted condition of the street; that he had perfect control of his machine; that it was in perfect order; and that he is an expert and experienced driver.

The weight of the evidence discloses that just before the accident he was traveling at about the rate of 10 or 12 miles an hour, and none of the witnesses for the prosecution or the defense puts the rate of speed at more than 20 miles an hour. The time was 11 o'clock at night; the place was the open stretch of road between the built-up

portions of Manila and the town of Santa Ana, near the street-car junction with the McKinley track, where a platform and waiting station, well off the road, are furnished by the street-car company to accommodate soldiers and other passengers who may be compelled to wait at the junction near by; there was not a single foot passenger on the deserted street over which the car was running, save only the more or less intoxicated soldier who suddenly stumbled, lurched, or stepped out in front of the car.

I am of opinion that it would be too much to ask, as held in the prevailing opinion, that under such circumstances the running speed of defendant's automobile should have been so slow that he could have come to a dead stop in the few yards' space over which he had to run before coming up with the foot passenger who suddenly and unexpectedly appeared in front of his machine. Foot passengers owe some duty to themselves, and it is to my mind utterly unreasonable to require the driver of an automobile on a lonely suburban road, at night, to run at so slow a speed that he will always be able to bring his machine to a dead stop in time to avoid injury to any man under the influence of liquor, who may suddenly step out into the middle of the street in front of the machine. And yet that, I take it, is the true construction which must be placed upon the holding of the prevailing opinion in this regard.

As to the admitted failure by the defendant to sound his horn, it may fairly be doubted whether under all the circumstances any attempt should have been made to sound a horn, with the risk of confusing the foot passenger; and it may well be that the wisest course under the circumstances was to do just what the accused did—that is to say, to try to run around the unexpected pedestrian, without confusing him by the sounding of a horn at such close range. Certainly there is nothing in the record which would justify us in attempting to make a ruling, beyond a reasonable doubt, that the accused should have sounded his horn; and still less ground is there for a holding that he is criminally responsible for a failure to adopt that course rather than another, in the fraction of a second allowed him to make up his mind.

As to the finding of this court that the accused was driving faster than appears from the undisputed testimony of all the witnesses, or that he was recklessly negligent of the safety of the injured man, based, not on any testimony in the record, but on the mere fact that his machine actually struck the soldier, I can only say, in the first place, that I doubt whether common experience sustains, beyond a reasonable doubt, a holding that an automobile must have been traveling at more than from 10 to 20 miles an hour, if the driver could not have stopped his machine in time to avoid running into an intoxicated man who stepped suddenly into the street in front of him; and in the second place, I venture to doubt that there is any ground upon which to base a holding in a criminal case, that the driver under such circumstances is criminally liable if, suddenly confronted by this sudden emergency, and using his best judgment, he attempts merely to slow down and run around the pedestrian, rather than devote all his attention to an attempt to come to a dead stop.

There is nothing in the record, as I read it (other than mere conjecture and imperfectly supported inferences from presumptions as to time and space within which automobiles may be brought to a stop), which even tends to establish the existence of negligence or misconduct on the part of the accused, unless it be the testimony of the witnesses to the effect that he was not running at the extreme left of the road when the accident occurred.

In this connection I venture to assert, however, that there is no evidence in the record which in any wise sustains the finding in the prevailing opinion that the accused was running on "almost the extreme right-hand side of the street" at the time of the accident. On the contrary, I think that at most it discloses, as found by the trial judge, that he was "in the center, or rather, a little to the right of the center of the street instead of the left side thereof." The trial judge, together with counsel, made a personal visit to the scene of the accident, and based his conclusion upon the result of his personal view of the scene of the accident, aided by the testimony taken at the trial. I am convinced that there is absolutely nothing in the record which justifies a finding that the accused was running any

farther to the right than is indicated in the findings of the trial judge. The accused offered a very reasonable explanation of his presence well out toward the middle of the road in the fact that the street-car track runs close to the left side of the road at the place where the accident occurred.

Now, while the rule of the road imposes a general duty upon drivers of automobiles to keep to the left when passing other vehicles and in densely crowded streets or highways, there is no such rule imposing the duty upon the driver of an automobile to keep upon the extreme left of a country road or a suburban street (on a stretch where "there is no building on either side of the street"), without regard to the condition of the road or street, and without regard to the presence or absence of other vehicles or pedestrians on the highway. I venture the assertion that where the street is more or less deserted, and when it appears that there is no danger of collision with other vehicles, the usual, normal, and, indeed, the proper place on the road for a fast or moderately fast moving vehicle is well toward the center, provided only the driver is at all times prepared to move toward the left sufficiently to avoid collisions with other vehicles. Foot passengers travel in either direction, along either side of a country or suburban road, indifferently, and in truth their safety is consulted by the driver who keeps well toward the middle of the road, or in the middle of the road. That it is the uniform practice of all drivers of automobiles to tend toward the middle of the ordinary country or suburban roads of these Islands is, I believe, a matter of common knowledge to all persons who have had any experience in this regard. From my own observation and experience I would deem it a wholly unreasonable and unnecessary regulation which would compel an automobile driver to keep on the left side of country or suburban roads, regardless of the condition of those roads, and of the state of traffic, and at the risk of a term in the penitentiary in the event that while running "in the middle of the road, or slightly toward the right," a lonely foot passenger should unexpectedly step or stumble out into the middle of the road in front of the machine.

I thoroughly agree with the writer of the prevailing opinion that there should be no hesitation on the part of the courts in visiting the full rigor of the law upon drivers of high-powered machines, who are proven guilty of reckless negligence resulting in the death or injury of foot passengers. But this desire to suppress reckless driving should not lead us to forget that drivers of automobiles have rights which the law is bound to respect. They are not outlaws, excepted from the rule that throws the mantle of innocence about every citizen charged with the commission of an offense until and unless the evidence establishes his guilt beyond a reasonable doubt. They are engaged in honest business, arduous, and in its very nature dangerous at times, despite their utmost care and diligence; and though some of them are guilty of reckless negligence which properly and naturally arouses the indignation and resentment of the public, that is no reason for visiting the sins of the guilty upon the innocent.

The accused, an old and experienced driver, was running his machine with an apprentice at his side, and that very fact tends to confirm the testimony of the various witnesses who, as I understand their testimony, are all agreed as to the prudence and good judgment with which he was managing his machine. Can anyone doubt that had the soldier who was injured not taken so much to drink that after the accident he smelled strongly of liquor, this case would never have had any reason for being?

I append a few citations from the authorities in support of the general principles upon which I base this dissent.

Berry in his work on "The Law of Automobiles," para graph 131, says: "In the use of the public highways a person has a right to expect from others ordinary prudence, and to rely upon that in determining his own means of using the road. He has a right to travel on any portion of the highway he may see fit, unless he is about to pass another vehicle. (Daniels vs. Clegg, 28 Mich., 32, 36; Reens vs. Mail & Express Pub. Co., 10 N. Y., Misc., 122.)"

And again, in paragraph 124, he says, with regard to pedestrians: "The rights and duties of pedestrians and drivers of vehicles are equal. Each may use the highway, and each must exercise such care and prudence as the

circumstances demand. (Eaton vs. Cripps, 94 Towa, 176, 180; Jennings vs. Schwab, 64 Mo. App., 13; Barker vs. Savage, 45 N. Y., 191, 195; 6 Am. Rep., 66.)"

And that "The law of the road requiring travelers in vehicles when meeting on the highway to turn to the right in order to pass does not apply to the meeting of a vehicle and pedestrian."

And again, in paragraph 122, he says, supporting the doctrine with citation of authorities: "When there are no other vehicles which can be interfered with, one is at liberty to drive on any part of the highway he may choose or may find most convenient or agreeable for the purpose of travel. In passing an obstruction in the highway it may be one's duty in the exercise of reasonable care to pass to the left of the same if that way appears less hazardous than the way to the right."

And in paragraph 121 he says: "The law does not require unnecessary things to be done, hence if it is not necessary to turn to the right when meeting on the highway in order to pass, the rule need not be observed. Thus, it was not necessary for the operator of an automobile to turn to the right when meeting a vehicle which was being driven outside of the traveled part of the road and which had sufficient room to pass."

Huddy in his work on "The Law of Automobiles," page 91, discussing "The Law of the Road," says: "Properly considered, the rule of the road is a rule of negligence, and the fact that a person was on the wrong side of the road when a collision took place does not per se make him liable for damages, but his liability is determined by the rules of law applicable to cases of negligence. The rule is not an inflexible one, and a deviation therefrom is often proper and sometimes necessary."

And again, at page 96, he says: "The rights of footmen and drivers in the highway are equal and both must exercise such care as circumstances demand."

And again, on page 112, he says: "An accident to a traveler on a highway, struck by an automobile, happening without negligence on the part of the driver of the automobile or the traveler, is an unavoidable accident, and the traveler cannot recover therefor."

Again, on page 139, in discussing the rights of pedestrians, he says: "Ordinarily a pedestrian has no right of way superior to that of the driver of an automobile, but each may continue in his own course with relative regard for the other's right of travel, and the driver of a motor car is not bound to bring his car to a stop, in the absence of proof authorizing an inference that, in the exercise of due care, he had reason to believe that if he proceeded a pedestrian would come in contact with the car, and where it did not appear that, after such contact was inevitable, the driver of the motor omitted anything to prevent that contact there was no liability."

And again, on page 140: "Where one injured by being run over by an automobile in the streets of a city saw it before it struck her, or by reasonable use of her senses could have seen it in time to avoid the injury, she could not recover."

Again, on page 143, discussing the question of permissible speed at night, he says:

"In the large cities there is likely to be less traffic on the streets during certain hours of the night, and there an automobile might therefore safely travel slightly faster than during the day." See *Curry vs. Con. Ry. Co.* (71 Atl. Rep., 356), in which it was held that "The speed at which any vehicle can be driven over a highway at night must be determined partly in view of the distance ahead of it at which travelers upon or approaching the same highway would become visible." In the case of *Sagestrom vs. Lawrence* (64 Wash., 245), it was held that: "There is a law of the road also, arising from usages and custom, which requires persons traveling upon a continuously used street or highway to keep upon the right side of such way. However, one may lawfully use what is to him the left hand side of the road if there is no travel at that time upon that part of the way, or if the

travel is not so heavy as to make his conduct a source of danger."

Perhaps, to avoid misunderstanding, I should add that the driver of an automobile, when for any reason he leaves the side of the road upon which he has a right to pass vehicles coming in an opposite direction, is charged with a high degree of care and diligence to avoid collisions. The authorities all properly agree that under such circumstances the obligation rests upon him to take special pains to see to it that vehicles coming in an opposite direction are not taken unawares by his presence on the side of the road upon which they have a right to pass. But this, like the general rule of the road, is a mere rule of negligence, and it by no means follows that he is liable, at all events, and despite the exercise of due diligence on his part, for any collision which may take place, merely because he has crossed over for some sufficient reason to that side of the road. And certainly it does not mean that one who is driving an automobile at or near the center of an unoccupied suburban or country road can be held criminally liable for reckless negligence unless he reduces his speed, and runs so slowly that he can bring the machine to a dead stop in time to avoid a collision with a more or less intoxicated pedestrian who suddenly, unexpectedly and negligently steps, runs or stumbles in front of the machine, it appearing that in all other respects the driver was exercising due care and diligence in the management of his machine.

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