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## NOTES

### SUMMER SCHOOL

The LAW REVIEW is pleased to announce the summer session of the Law School. For the first time during a summer session, the Law School is offering a full program of regular work for credit. The faculty is a strong one and the courses are well selected. It is to be hoped that advantage will be taken of the work offered. New students may begin the study of law—those who are engaged in the study of law may accelerate the completion of their course—those who have completed their course and are engaged in practice may may carry on work in particular fields of interest. A complete announcement appears on the outside cover of this issue.

### CONSTITUTIONALITY OF ZONING LEGISLATION

The Supreme Court of the United States, while expressly leaving for future decision the validity of any particular zoning regulation, has decided that a general zoning law is constitutional. In the case of

*Village of Euclid v. Ambler Realty Co.*,[1] the village council of Euclid, Ohio, adopted an ordinance establishing a comprehensive zoning plan. The entire municipality was divided into districts in each of which uniform regulations and restrictions were prescribed governing the use, area and height of buildings. There were six classes of use districts, three classes of height districts and four classes of area districts. Of the use districts, the first class, U-1, was restricted to single family dwellings, U-2 included two family dwellings, U-3 apartments, hotels, churches, etc., U-4 included offices, retail stores, theaters, garages, gasoline stations, etc., U-5 factories, repair shops, advertising signs, etc., and U-6 included cemeteries, junk yards and other uses not specified. There is a seventh class of uses prohibited altogether. Enforcement of the ordinance is intrusted to the inspector of buildings under rules of the Board of Zoning Appeals.

The Ambler Realty Company brought suit to enjoin the enforcement of the zoning ordinance, contending that it violates the Fourteenth Amendment by depriving the complainant of liberty and property without due process of law. The company owned a large tract of unimproved land on Euclid Avenue which the lower court found could reasonably be expected to develop into a business section due to the fact that it was in the path of the industrial development of the city of Cleveland. By the zoning ordinance, this land was put in class U-2, restricted to purely residential purposes. As such, it was greatly lowered in value, the amount of depreciation being estimated as in the neighborhood of a half million dollars.

On the ground that this amounted to confiscation of property, the federal district court held that the ordinance was unconstitutional and enjoined its enforcement. On appeal, this was reversed by the United States Supreme Court, Justices Van Devanter, McReynolds and Butler dissenting. As a preliminary matter, the court held that equitable jurisdiction was clear in this case, as the existence of the ordinance in effect constitutes a present invasion of the appellee's

[1] *Village of Euclid v. Ambler Realty Company* (1926) 47 Sup. Ct. 114, discussed in 2 U. of Cincinnati L. Rev. 184 (March, 1927), 13 Va. L. Rev. 321 (Feb., 1927), 12 St. Louis L. Rev. 149 (Feb., 1927), 11 Minn. L. Rev. 275 (Feb., 1927), 34 Yale L. J. 427 (Jan., 1927), 13 Am. B. A. Journ. 18 (Jan., 1927). For general discussions of zoning legislation, see Newman F. Baker, *Constitutionality of Zoning Laws,* 20 Ill. L. Rev. 213, 21 Ill. L. Rev. 284; Baker, *Zoning Legislation,* 11 Corn. L. Qt. 164; Bettman, *Constitutionality of Zoning,* 37 Harv. L. Rev. 834; Chamberlain and Pierson, *Zoning Laws and Ordinances,* 10 A. B. A. Jour. 185; Williams, *Law of City Planning and Zoning.*

property interests and a threat to continue it.[2] Mr. Justice Sutherland, writing the opinion of the court, discusses the history of zoning legislation, showing its modern origin in this country and giving as a reason for its spread, the increasing complexity of city life which calls for constant regulation.

Zoning laws must find their justification in the police power. Otherwise the deprivation of liberty and property is illegal. How far the zoning regulation can go depends upon whether the court concludes that the regulation "passes the bounds of reason and assumes the character of a merely arbitrary fiat."[3] A zoning law applicable to New York City might clearly be invalid if applied to Chapel Hill. So a law which restricts a particular kind of a building or for a particular use, like a nuisance, is to be judged in connection with surrounding circumstances. "A nuisance may be merely the right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[4]

The court recognizes that the crux of the zoning legislation is the creation and maintenance of residential districts from which business and trade of every sort, including hotels and apartment houses, are excluded. The state decisions which broadly sustain such power of regulation greatly outnumber those which narrowly limit it or which deny it altogether.[5]

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[2] See concurring opinion of Hoke, J., in *Turner v. New Bern* (1924) 187 N. C. 541, 122 S. E. 469.

[3] 47 Sup. Ct. 114, 119.

[4] 47 Sup. Ct. 114, 118.

[5] Cases sustaining zoning laws: *Gorieb v. Fox* (Va.-1926) 134 S. E. 914; *Opinion of Justices* (1920) 234 Mass. 597, 127 N. E. 525; *Inspector of Buildings v. Stoklosa* (1924) 250 Mass. 52, 145 N. E. 262; *State v. New Orleans* (1923) 154 La. 271, 97 So. 440; *Trust Co. v. Bldg. Corp.* (1920) 229 N. Y. 313, 128 N. E. 209; *Auroro v. Burns* (1925) 319 Ill. 84, 149 N. E. 784; *State v. Houghton* (1925) 164 Minn. 146, 204 N. W. 569; *State v. Harper* (1923) 182 Wis. 148, 196 N. W. 451; *Ware v. Wichita* (1923) 113 Kan. 153, 214 Pac. 99; *Miller v. Board* (1925) 195 Cal. 477, 234 Pac, 381; *Providence v. Stephens* (R. I.-1926) 133 Atl. 614.

*Contra: Goldman v. Crowther* (1925) 147 Md. 282, 128 Atl. 50; *Ignaciunas v. Risley* (1923) 98 N. J. Law 712, 121 Atl. 783; *Spann v. City of Dallas* (1921) 111 Tex. 350, 235 S. W. 513; *Smith v. Atlanta* (1926) 161 Ga. 769, 132 S. E. 66.

In Missouri, the Supreme Court has decided against a comprehensive zoning ordinance on the ground that it is contrary to the provision of the Missouri Constitution that "private property shall not be taken *or damaged* for public use without just compensation." *State ex rel. Penrose Investment Co. v. McKelvey* (1923) 301 Mo. 1, 256 S. W. 474. Limiting zoning in the same way as an exercise of the power of eminent domain seems to be clearly wrong. See Baker, *op. cit.*, 20 Ill. L. Rev. 213, 228.

Decisions upholding general zoning laws agree that the exclusion of business and apartment houses from certain residential districts bears a rational relation to the health and safety of the community, as it tends to promote health and security from injury of children and others, aids suppression and prevention of disorder, facilitates fire prevention and traffic regulation, reduces danger of contagion, makes the construction and repair of streets easier and less expensive, increases the security of home life and provides a more favorable environment for raising children and establishing homes. "If these reasons . . . do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[6]

Finally, the opinion indicates that the decision is limited to the question of this zoning ordinance as a whole. There may be future cases where the details of the law as applied to particular premises will prove to be unreasonable and clearly arbitrary. Thus future cases will involve the reasonableness of any particular application of zoning regulation. Under the present decision, comprehensive zoning laws are deemed to advance the public welfare and are held to be valid exercises of the police power.

In North Carolina, the beginning of municipal zoning is seen in the statute of 1919 authorizing cities and towns to create planning boards "whose duty it shall be to make a careful study of the resources, possibilities and needs of the city or town, particularly with respect to the conditions which may be injurious to the public welfare or otherwise injurious, and to make plans for the development of the municipality."[7] This was followed in 1923 by the general zoning law,[8] under which the legislative body of cities and incorporated towns is authorized to regulate and restrict the height, number of stories and size of buildings, the percentage of lot that may be occupied, the location and use of buildings, structures and land for trade, industry, residence or other purpose. To carry this out, the municipality may be divided into districts and within each district the

[6] 47 Sup. Ct. 114, 121.
[7] C. S. 2643.
[8] Pub. Laws, 1923, ch. 250; C. S. (v. 3) 2776, r-aa.

use of buildings, structures and land may be regulated and restricted. The statute states the purposes of such regulation: to lessen congestion in streets, to secure safety from fire, to promote health and general welfare, to provide adequate light and air, to prevent overcrowding of land, to facilitate provisions for transportation, water, sewerage, parks, schools, etc. Surely, if the court finds that a particular zoning law fulfills any or all of these purposes, it should follow that the zoning regulation in question is a reasonable exercise of that inherent power of government, broad in its scope, incapable of definition, flexible in its application, varying with time and place,—the police power. The statute states what are approved legislative objects under that power.

Although several North Carolina cities have adopted general zoning ordinances, the Supreme Court has not yet passed on their validity. However, there are a number of cases involving municipal regulations of the use of private property which may give us some light on the larger question. The establishment of fire limits by a city or town is justified under the general welfare clause[9] and is authorized specifically by statute.[10] Within such fire limits, it shall be unlawful to erect, alter and repair wooden buildings or structures or additions thereto.[11] The repair of a roof on a wooden addition to a brick hotel within the fire limits was forbidden although the roof was to be covered with tin, a fireproof substance.[12] Incorporated cities and towns are authorized to pass laws for preventing and abating nuisances.[13] Perhaps this is the earliest form of zoning. Certainly there is a relation between the validity of a zoning ordinance restricting property to certain uses and the power to regulate nuisances. Whether the use of property may be abated as a nuisance or restricted under a zoning regulation is largely determined in view of surrounding conditions. Thus the court held that an ordinance prohibiting the keeping of hides, fertilizers, etc. within 400 feet of any dwelling is not violated unless the keeping is a nuisance to the annoyance of the citizens or injurious to the public health.[14] Likewise an

[9] *State v. Johnson* (1894) 114 N. C. 846, 19 S. E. 599; C. S., s. 2673, 2787, sub. s. 7.

[10] C. S. 2746, 2802.

[11] C. S. 2750, 2802.

[12] *State v. Lawing* (1913) 164 N. C. 492, 80 S. E. 69; also *State v. Shannonhouse* (1914) 166 N. C. 241, 80 S. E. 881.

[13] C. S. 2676, 2787, sub. s. 6.

[14] *State v. Beacom Supply Co.* (1914) 168 N. C. 101, 82 S. E. 948.

ordinance was held to be invalid which required that all billboards should be securely placed and kept at a distance of at least two feet more from the outer edge of the sidewalk than the height of said billboard. The court thought that a billboard might be securely constructed without conforming to the ordinance and so would not be dangerous or a nuisance.[15]

But the United States Supreme Court has upheld a city ordinance which prohibited the erection of billboards in certain residential districts without first obtaining the consent of the majority of the property owners within the block where the billboard was to be placed.[16] The police power was thus extended beyond public health and safety to the general welfare of the community by promoting public convenience and general prosperity. A city ordinance prohibiting the construction of mills within certain boundaries was enjoined until a hearing to determine whether the ordinance was reasonable under the circumstances. It appeared that the ordinance was most unreasonable in its operation. Justices Walker and Hoke, while concurring in the result, wanted it to be understood that they believed that a municipality, in the exercise of the police power, could prohibit the erection of mills within a defined territory.[17]

An ordinance is valid which prohibits the erection of a private hospital within 100 feet of a residence.[18] Such a hospital may be a nuisance and would tend to decrease the value of surrounding property. Therefore the ordinance is not unreasonable. Stables may be prohibited altogether within certain prescribed areas and regulated within other areas.[19] So with dance halls[20] and pool rooms.[21] In a recent North Carolina case,[22] a municipal ordinance was held invalid which provided that permits for the erection of gasoline stat-

[15] *State v. Whitlock* (1908) 149 N. C. 542, 63 S. E. 123; cf. *State v. Staples* (1911) 157 N. C. 637, 73 S. E. 112, where an ordinance was held valid which prohibited the erection of billboards nearer the ground than 24 inches, except where erected against a solid wall.

[16] *Cusack v. Chicago* (1917) 242 U. S. 526. 37 Sup. Ct. 190.

[17] *Berger v. Smith* (1911) 156 N. C. 323, 72 S. E. 376.

[18] *Lawrence v. Nissen* (1917) 173 N. C. 359, 91 S. E. 1036.

[19] *State v. Stowe* (1925) 190 N. C. 79, 128 S. E. 481. But an ordinance prohibiting the building of a stable nearer to the residence of another than it is to owner's residence is invalid, as having no uniform standard, *State v Bass* (1916) 171 N. C. 780, 87 S. E. 972.

[20] *State v. Van Hook* (1921) 182 N. C. 831, 109 S. E. 65.

[21] *Brunswick-Balke Co. v. Mecklenburg* (1921) 181 N. C. 386, 107 S. E. 317.

[22] *Bizzell v. Goldsboro* (1926) 192 N. C. 348, 135 S. E. 50, Stacy, C. J., dissenting.

tions should not be granted by the building inspector without the approval of the Board of Aldermen. Such a regulation is arbitrary and unreasonable. There is no standard which will assure fair and impartial treatment. The Board of Aldermen could provide that there should be no gasoline stations in certain districts, but the location of such stations in the entire city cannot be left to the untrammeled discretion of the Board, to grant or refuse as they see fit.[23]

In *Turner v. New Bern*,[24] the ordinance prohibiting lumber yards in certain residential districts was held to be valid, Clark, C. J. saying: "As to the section protected by this ordinance, not solely for aesthetic reasons, but by reason of menace from fire and disturbances by noises incident to the unloading of motor trucks and great barges by negroes and stevedores, and for the comfort and welfare of the citizens . . . these were sufficient justification for the ordinance." The Court holds squarely that a municipality, by virtue of the police power, may regulate businesses or prohibit buildings which are not nuisances. This gets away from the earlier North Carolina cases which seem to limit the application of particular zoning regulations to unquestioned nuisances,[25] in line with the minority of state courts which give a narrow scope to the exercise of the police power.[26] While there is a good deal of talk in the United States Supreme Court decision about nuisances, still it seems clear that there is no desire to limit zoning regulations to the prohibition and regulation of nuisances, unless we are willing to extend our conception of nuisances. The police power is broader, extending to all the great public needs.

In the recent case of *Harden v. Raleigh*,[27] the lower court held that the general zoning ordinance of Raleigh was constitutional. But it was found that the plaintiff's property was located in the neighborhood-business zone and therefore that the plaintiff was entitled to

[23] The leading North Carolina case on this question, which was relied upon and controls the decision in *Bizzell v. Goldsboro*, is *State v. Tenant* (1892) 110 N. C. 609, 14 S. E. 387, where an ordinance was held void which provided that no person shall erect, add to or change any building without first obtaining permission of the Board of Aldermen. Stacy, C. J., in his dissenting opinion in the *Goldsboro* case argued that the discretion of the Board of Aldermen was not arbitrary but was to be exercised with reason. But the view of the court is that the ordinance is deficient in failing to provide any standard, uniform and fair in its application.

[24] *Turner v. New Bern* (1924) 187 N. C. 541, 122 S. E. 469.

[25] *State v. Beacom Supply Co.*, n. 14 *supra; State v. Whitlock*, n. 15 *supra.*

[26] Note 5 *supra*, cases *contra.*

[27] *Harden v. Raleigh* (1926) 192 N. C. 395, 135 S. E. 151.

erect a gasoline station on her property. Hence, the appeal by the City of Raleigh from this finding did not raise the question of constitutionality. It seems likely that the North Carolina Supreme Court would uphold a general zoning ordinance in line with the more numerous and better reasoned state decisions[28] and the recent holding of the United States Supreme Court.[29] In any case which may arise, the fundamental problem will be whether the particular zoning regulation is a reasonable exercise of the police power.

R. H. WETTACH.

### CONSTITUTIONAL LAW—KANSAS INDUSTRIAL COURT ACT—RIGHT TO STRIKE

In 1920 the legislature of Kansas, composed largely of men with agricultural and non industrial interests, passed the Court of Industrial Relations Act.[1] This act was designed to secure continuity of production in certain essential industries and to that end government regulation was substituted for the usual conflict between capital and labor.

The legislators were more interested in protecting the dominant agricultural public than in safe-guarding the customary interests of capital and labor. The doctrine of *Munn v. Illinois*[2] was extended by the act beyond the limits set by the courts upon this doctrine. The manufacture or preparation of food products, the manufacture of clothing, the production of fuel, the transportation of these commodities, and all public utilities were declared to be affected with a public interest and subject to public regulation. A Court of Industrial Relations was established with extensive powers to investigate and settle industrial controversies. The court was given authority to order such reasonable changes in the conduct of the specified industries in the matters of working and living conditions, hours of labor, rules and practices, and wages as were necessary to secure continuity of production. In effect strikes were prohibited. Section 19 of the Act made it a felony for an employer or a trade union officer in the industries named to wilfully use the power of their positions to influence another person to violate any provision of the act. The radical nature of the legislation was appreciated by the

[28] Note 5 *supra.*

[29] *Village of Euclid v. Ambler Realty Co.*, n. 1 *supra.*

[1] Kansas Special Sess. Laws, 1920, c. 29.

[2] *Munn v. Illinois* (1876) 94 U. S. 113, 24 L. Ed. 77.

law makers, and they anticipated a struggle in the courts by providing in Section 28 that if any section of the act were found invalid by the courts it should be presumed that the act would have been passed without this section.

Both capital and labor advanced the argument that the act deprived them of their rights guaranteed by the Fourteenth Amendment to the constitution. Labor objected that its right to strike was taken away, capital that its property rights were unreasonably interfered with.

The question of constitutionality was first raised by the Kansas miners. In February, 1921 the union officials, led by Howat, president, and Dorchy, vice-president, called a strike against the Mackie Fuel Co. which operated in Kansas. A contract between the company and the union provided that employees under 19 shoud be paid $3.65 a day, and those over 19, $5 a day. Mishmash, an employee of the company, had been paid at the lower rate from August 31, 1917, to March 22, 1918, without protest. At the latter date he demanded back pay at the $5 rate from August 31, 1917 on the grounds that he had been born August 31, 1898. The company disputed this claim. It was shown that the employee's family bible recorded his birth under two dates, August 31, 1898 and August 31, 1899. After the dispute had gone unsettled for nearly two years a strike was ordered to compel the payment of the claim although at the time Mishmash had left the employ of the company.

Howat had been enjoined from calling a strike in the mining industry, and his first conviction was for contempt of court because of his violation of the injunction. He appealed to the Kansas Supreme Court which sustained the judgment.[3] Although not necessary to the decision the court took occasion to uphold the constitutionality of the Industrial Court Act. This decision was appealed to the U. S. Supreme Court where it was sustained.[4] The question of whether the act was unconstitutional was not passed upon by the court as they held that this issue was not before them for decision.

Howat and Dorchy were then prosecuted under section 19 of the act for calling the strike. They were convicted. The Kansas Supreme Court, in affirming the sentence, held that the conviction under section 19 was not a violation of constitutional rights.[5] In an appeal

[3] *State ex rel. Hopkins, Atty. Gen. et al. v. Howat et al* (1921) 109 Kans. 376, 198 Pac. 686.
[4] *Howat v. Kansas* (1922) 258 U. S. 181, 66 L. Ed. 550.
[5] *State v. Dorchy* (1922) 112 Kans. 235, 210 Pac. 352.

to the U. S. Supreme Court, Dorchy contended that section 19 of the Act was void because it prohibited strikes and that to do so was a denial of the liberty guaranteed by the Fourteenth Amendment. A few months before Dorchy appealed, the U. S. Supreme Court in *The Wolff Packing Company v. The Court of Ind. Relations*[6] had decided that the Industrial Court Act, in so far as it permitted the fixing of wages in appellant's packing house, was a deprivation of appellant's property and liberty of contract without due process of law. This decision definitely restricted the powers of the Industrial Court to regulate industry. As far as the manufacturing interests of Kansas were concerned they had been saved from the radical social legislation of the State Legislature by the conservative policy of the U. S. Supreme Court. It now remained for the courts to determine the status of organized labor under the act. In view of the Wolff Packing Co. case the judgment against Dorchy was reversed and the case remanded for the state court to determine whether section 19 was severable from the act so that it might stand disassociated from the provisions held unconstitutional.[7] Subsequently, the Kansas court held that section 19 was to be regarded as having the legal effect of an independent statute making it a punishable offence for an officer of a labor union to call a strike of coal miners thereby suspending production of coal. The judgment of the district court holding Dorchy guilty of violating section 19 was re-affirmed.[8]

Dorchy again appealed to the U. S. Supreme Court which in a recent opinion delivered by Mr. Justice Brandeis has affirmed the conviction.[9] The question before the court was whether section 19 of the Industrial Court Act was constitutional. But the court did not undertake to decide whether the legislature could prohibit strikes. It confined itself to a consideration of whether the denial of the right to call a strike in this case was a violation of the rights of the appellant under the Fourteenth Amendment. The Court says that there is no absolute right to strike. Since a strike is an interference with the right to carry on business and results in damage to the employer, the union must be justified in calling it or stand the legal

[6] *Wolff Packing Co. v. Court of Industrial Relations* (1922) 262 U. S. 522, 67 L. Ed. 1103.

[7] *Dorchy v. Kansas* (1923) 264 U. S. 286, 68 L. Ed. 686.

[8] *State v. Howat et al* (1924) 116 Kans. 412, 227 Pac. 752.

[9] *Dorchy v. State of Kansas* (1926) 47 S. Ct. 86.

consequences. If the strike is justified and is conducted properly, the resulting loss to the employer is not actionable. The law recognizes the clash of interests between capital and labor and will not act to save one party from damage by the acts of the other as long as those acts are not unlawful in themselves and are the result of justifiable motives.

The opinion sets forth several causes of industrial disputes which are suggestive of what the Court considers justifiable grounds for striking. "There had been no controversy between the company and the union over wages, hours, or conditions of labor; over discipline or the discharge of an employee; concerning the observance of rules; or over the employment of non-union labor. Nor was the strike ordered as a sympathetic one in aid of others engaged in any such controversy." The purpose of the strike against the Mackie Fuel Co. was to secure none of these things. It was simply to impose a claim long out of date, and, in effect, it amounted to coercion of the company. The Court held that the Legislature of Kansas acted within its powers in making an officer of a trade union criminally liable for calling such a strike, and consequently Dorchy was not deprived of his constitutional rights by section 19.

If Dorchy had been convicted under section 19 for calling a strike for a justifiable purpose it is probable that the U. S. Supreme Court would have declared the law unconstitutional as depriving him of his rights under the Fourteenth Amendment. It would seem, if the ideas of Mr. Justice Brandeis are generally held by the other justices, that section 19 is valid only in so far as it punishes acts that already are illegal and actionable at common law.

In specifically denying the right of the state to regulate wages and hours[10] in certain vital industries, and now by implication denying the right to prohibit justifiable strikes, the U. S. Supreme Court has effectively defeated the efforts of the Kansas legislators to provide for industrial peace.

The unusual circumstance in the Industrial Court litigation is the alignment of labor with capital in an appeal to the courts for the protection of constitutional rights. Traditionally the courts have checked the efforts of legislatures to advance the interests of labor at the expense of capital. Labor has learned that judicial review of

[10] In *Wolff Packing Co. v. Industrial Court* (1924) 267 U. S. 552, the Industrial Court Act was found unconstitutional in so far as it provided for fixing hours of labor in the meat packing industry.

social legislation has been at the expense of its ambitions. But in Kansas, labor found a legislative body whose efforts to protect the public no more coincided with labor's aims and ideals than with capital's. Consequently in the Industrial Court cases, labor is found at one with capital in an appeal to the courts for the protection of cherished rights against the encroachment of the Kansas Legislature.

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NEGLIGENCE—RULES OF THE ROAD IN MEETING AND PASSING

In the recent North Carolina case of *Dreher v. Divine*[1] the plaintiff brought an action for damages to his automobile caused by defendant's failure to yield the road in order to allow plaintiff's automobile to pass on the left from the rear as required by statute. The court held that defendant owed no duty to keep a look-out for traffic approaching from the rear and that he was not required to turn out until seasonable notice of the desire to pass had been given and conditions rendered passing reasonably safe. Judgment for the defendant was affirmed.

The statute upon which the plaintiff based his right to recover is in part as follows: "Any person so operating a motor vehicle shall on overtaking any such horse, draft animal, or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal, or other vehicle shall, as soon as practicable turn to the right so as to allow free passage on the left."[2]

Although the statute deals with motor vehicles, the provisions are very general, requiring only that the approaching driver shall pass to the left and that the driver in front shall turn to the right. There is no provision for signal by the approaching driver, nor does it clearly provide when it becomes the duty of the driver ahead to turn to the right to allow those approaching from the rear to pass. Must he turn to the right when approached from the rear? If so, it is his duty to know of the approach of vehicles from the rear. The court in deciding the principal case applied the statute only in a general way and used the principles of negligence as laid down by many jurisdictions to decide the specific phases.

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[1] *Dreher v. Divine* (1926) 192 N. C. 325, 135 S. E. 29.
[2] C. S. 2617.

The law of the road is a set of rules for the protection of the rights of all who travel upon the highways, regardless of the nature of the vehicles or the speed at which they travel. Common law principles of negligence are used in framing statutes to regulate modern traffic conditions, but since new situations are constantly developing, it is clear that statutory rules may be insufficient and that recourse to common law principles is necessary. There are two chief divisions of the rules of the road as laid down by statutes and judicial decisions: (1) rules which must be observed by drivers going in the same direction when it becomes necessary or desirable for one to pass the other, and (2) those which must be observed by drivers going in opposite directions to prevent collisions and obstruction of the highways.

1. A driver who is traveling along the highway has the duty of due care in the use of the road, but does not have to maintain a look-out for traffic from the rear.[3] When one driver approaches another from the rear he is required to use due care under the circumstances in any attempt to pass,[4] and, where the driver ahead is not otherwise apprised of the desire to pass, the driver wishing to pass must give a signal indicating his desire.[5] Where such signal is given, the driver in front is not required to turn to the right if there is sufficient space on the left to permit the approaching driver to pass;[6] but where the road is wide enough to allow passage only by his turning to the right he is required to do so when he has heard the signal.[7] Before the rear driver attempts to pass he must by request, or "equivalent notice," acquaint the driver ahead of his intention to pass; and he must be reasonably assured that the driver ahead heard the request, and has accorded him right of way.[8] Where a driver upon request refuses to yield the road it is the duty of the driver approaching from the rear to bring his machine to a full stop if necessary to avoid a collision.[9] Under exceptional circumstances it may become the duty of the forward driver to stop

[3] *Strever v. Woodard* (1913) 160 Iowa 332, 141 N. W. 931; *Delfs v. Dunshee* (1909) 143 Iowa 381, 122 N. W. 236.

[4] *Moore v. Hart* (1916) 171 Ky. 725, 188 S. W. 861.

[5] *Dunkelbeck v. Meyer* (1918) 140 Minn. 283, 167 N. W. 1034; *Young v. Cowden* (1897) 98 Tenn. 577, 40 S. W. 1088.

[6] *Savoy v. McLeod* (1913) 111 Me. 234, 88 Atl. 721.

[7] *Dunkelbeck v. Meyer* (1918) 140 Minn. 283, 167 N. W. 1034.

[8] *Lumber Co. v. Ollinger* (1922) 18 Ala. App. 518, 94 So. 177.

[9] *Ware v. Saufley* (1922) 194 Ky. 53, 237 S. W. 1060.

in order to permit the driver of a faster vehicle to pass from the rear,[10] but under ordinary circumstances no such duty exists. The highway must be protected, and a driver who approaches from the rear must use due care. When by failure to do so he inflicts an injury upon another who was not guilty of contributory negligence he is liable for the damages caused by the breach of this common-law duty.[11]

2. Custom and statutes have made it a rule in all of the United States that persons traveling in opposite directions must pass on the right. Each is entitled to half the road under ordinary circumstances, but there may be conditions which may require a driver to yield more than half the road, or justify him in yielding less than half. The law of the road does not require a traveler to keep always to the right while using the road. He may use any part thereof that suits his convenience, but upon meeting and passing it is his duty to keep to the right,[12] and failure to turn to the right has been held negligence.[13] The mere fact that a driver is driving to the right of the center of the highway does not relieve him of the duty of exercising due care to avoid collisions.[14]

The driver of an automobile has the right to presume that an automobile coming from the opposite direction will keep to the right as required by the rules of the road,[15] but there may be circumstances under which the exercise of due care to protect the life and property of others may require a driver to go to the left in order to avoid a collision.[16] Where a driver reasonably believes that a collision can be avoided by his turning to the left he is required to do so, notwithstanding a statute requiring him to keep to the right.[17] Such situations have given rise to differences of opinion in several jurisdictions. For example: A, who was driving to the right of the center of the road, was approached by B, who was driving to the left of the center. A believed that by turning to the left a collision could be avoided. A turned to the left and at the same

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[10] *Mark v. Fritsch* (1909) 195 N. Y. 282, 88 N. E. 38.
[11] *Potter v. Glarsell* (1920) 146 La. 687, 83 So. 898.
[12] *Sims v. Eleager* (1921) 116 S. C. 41, 106 S. E. 854.
[13] *Goodrich v. Matthews* (1919) 177 N. C. 198, 98 S. E. 529.
[14] *Walker v. Lee* (1921) 115 S. C. 495, 106 S. E. 682.
[15] C. S. 2617. *John v. Pierce* (1920) 172 Wis. 44, 178 N. W. 297.
[16] *King v. Holliday* (1921) 116 S. C. 463, 108 S. E. 18.
[17] *Walker v. Lee* (1921) 115 S. C. 495, 106 S. E. 682.

time B turned to the right to allow free passage on his left, and collided with A, who was on the left of the center of the road. What rights have the parties? Some jurisdictions hold that A as a reasonably prudent man was forced by the negligence of B to turn to the left, and, in so doing, he was not negligent and should be allowed to recover.[18] Other courts hold that the accident was caused by the mistaken belief of an excited driver that the approaching driver did not intend to yield the road, and that his act in turning across the road was negligent and he cannot recover.[19]

When a driver overtakes another on a hill and attempts to pass, and, in doing so, collides with an automobile coming from the opposite direction, the driver so attempting to pass is held liable on the theory that he should have made the attempt to pass only when it was safe for him to do so. He was negligent in attempting to pass when he could not see enough road clear for a safe passage.[20] The same principle is involved where a driver attempts to pass another on a curve. He must not place himself in such a position as to be unable to yield the road to one coming from the opposite direction.

The following case presents an unusual situation: D was driving in front of P, who blew his horn as a signal that he intended to pass. D did not hear the signal, but pulled to the right preparatory to making a left turn at an intersection. P believed D had accorded him the right of way and attempted to pass. D suddenly turned to the left at the intersection and a collision occurred. The court held that neither party could recover, that D owed no duty to P to indicate that he intended to turn left when he had not heard P's signal, and that P was justified in acting upon the assumption that D had heard the signal and yielded the right of way.[21]

J. C. KESLER.

[18] *Hubbard v. Bartholomew* (1913) 163 Iowa 58, 144 N. W. 13; *Molin v. Wark* (1911) 113 Minn. 190, 129 N. W. 383.

[19] *Lloyd v. Calhoun* (1914) 82 Wash. 35, 143 Pac. 458; *Cupples Mfg. Co. v. Bow* (1920) 32 Idaho 774, 189 Pac. 48.

[20] 183 App. Div. (N. Y.) 816.

[21] *Lumber Co. v. Ollinger* (1922) 18 Ala. App. 518, 94 So. 177.