Motor Vehicle Unprotected Intersection Collisions: Motorists on the Right May No Longer Have the Right-of-Way

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I. INTRODUCTION

Two startling highway safety instructions appeared in recent manuals issued by the National Safety Council on the subject of defensive driving. The latest edition of the Student Workbook and Defensive Driver's Manual stated that when a motorist approaches an open intersection he should "[I]ook first to the LEFT, then to the right, because traffic coming from the left is closer . . . and would cross [his] path first."1

The same advice, though stronger, appeared in the 1975 Instructor's Manual issued by the National Safety Council for a defensive driving course. This manual suggested that the instructor ask his class the following question: "DO YOU AGREE THAT ON APPROACHING AN INTERSECTION YOU SHOULD LOOK FIRST TO THE LEFT AND THEN TO THE RIGHT?"2 To this the instructor is given the suggested answer, "Yes, since danger from the left is nearest you."3 The manual also has the instructor ask, "WHO HAS THE RIGHT-OF-WAY WHEN TWO CARS APPROACH AN INTERSECTION AT THE SAME TIME?"4 The instructor is given the suggested answer, "No one has the right-of-way."5 The manual explains:

That's right. Listen to what the Uniform Vehicle Code says. "When two vehicles enter an intersection from different highways

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3. Id.
4. Id. at 9.
5. Id. (emphasis added).
at the same time, the driver of the vehicle on the left shall *yield* the right-of-way to the vehicle on the right."

The law never gives the right-of-way to anyone. It states who shall *yield* and places a penalty on the driver who fails to do so.

If you survive the crash, *you may have the other driver arrested*, but *don't make the mistake of thinking the law has given you the right-of-way.*

One startling feature of this advice in the safety manuals is the fact that recent statutory intersection right-of-way rules would seem at least at first glance to give the motorist on the right the right-of-way where two motorists approach an unprotected intersection, requiring each motorist to look first and primarily to the right.

Certainly the law on intersection right-of-way should be in accord with highway safety. If safety requires a motorist approaching an unprotected intersection to look first to the left, certainly the law should not require him to look first and foremost to the right. In addition, it may be the natural reaction of most motorists to look first to the left, and it is confusing if there is no right-of-way. Nebraska's law follows the Uniform Vehicle Code.

This article raises the question of whether any rule which gives the motorist on the right any preference whatever is contrary to highway safety, obsolete, and should be removed.

**II. EARLY TRAFFIC REGULATION**

Most early motor vehicle traffic laws were enacted by cities, towns and villages. The result was a patchwork of incongruous legislation, each municipality having its own code of regulations, and the motorist not knowing from one town to another whether he was breaking the law or not.

6. *Id.* at 9 (emphasis added).
7. Nebraska's most recent enactment concerning right-of-way at unprotected intersections is found in Neb. Rev. Stat. § 39-635 (Reissue 1974). The act provides that when "two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right." *Id.*
8. A motorist may tend to look first to the left merely from the habit of reading from left to right, or because of the fact that a car coming from the left may present more of a danger to the driver than one coming from the right, his own car acting as a cushion against vehicles approaching from the right.
9. *See* note 7 *supra*.
11. *Id.* at 22.
A. Common Law

At common law, or in the absence of controlling statute, courts across the nation generally held that the vehicle first entering the intersection had the right-of-way. However, as far back as 1921, the Kansas Supreme Court indicated that the old rule of giving right-of-way to the first vehicle reaching the intersection was not suitable to automobile traffic because of the greater speed of motor vehicles, requiring the motorists to be able to determine the right-of-way before either actually entered the intersection. A 1922 Kansas case stated that a "rule giving priority to whichever vehicle first reaches the intersection is obviously not well adapted to automobile traffic." As time progressed, it was decided that the rule which gave right-of-way to the first-entering vehicle "tended to multiply collisions and confuse the traffic." In an attempt to find a better solution as to who should have the right-of-way, a 1920 Kentucky case described an ordinance of Louisville, Kentucky, providing that all vehicles going in an easterly or westerly direction should have the right-of-way over vehicles going in a northerly or southerly direction! An early St. Louis ordinance gave the right-of-way to vehicles on north-south streets. However, this compass direction theory never caught hold, perhaps for the obvious reason that a motorist might not know or be thinking about the compass direction he was traveling, and also because of intersections where the roads went neither east-west, nor north-south.

The rule, accordingly, developed that where two cars approached or entered an intersection at about the same time, the car on the right had the right-of-way and the car on the left had a duty to yield. This appeared to be a simpler and safer rule.

So, there developed a double rule, that the car reaching the intersection substantially in advance of the one on the right had the right-of-way, but otherwise the right-of-way belonged to the car on the right.

12. 3 BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 114.62 (3d ed. F. Lewis & P. Kelly 1965); E. FISHER, RIGHT OF WAY IN TRAFFIC LAW ENFORCEMENT 31 (1956).
17. See Echols v. Vinson, 220 Ala. 229, 124 So. 511. See also 3 BLASHFIELD AUTOMOBILE LAW AND PRACTICE, supra note 12.
18. E. FISHER, supra note 10, at 34-35.
The problem in applying the old test of giving right-of-way to the first-entering vehicle was that after a collision, it was difficult to determine who really had the right-of-way. However, the double rule also had its obvious weakness in that the application of the rule required consideration of particular circumstances, such as speed and the distance of the vehicles from the intersection. Therefore, this rule also worked out unsatisfactorily in its practical application, and rendered the "traveler's insecurity almost, if not quite, as great as if no regulations existed."20

B. Statutory Law

Nebraska's first statute on intersection right-of-way was enacted in 1927,21 one year after the first national Uniform Vehicle Code was written. The first Nebraska statutes creating general traffic laws were enacted in 193122 and provided that when "two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. . . . The driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have hereunder."23 Earlier Nebraska statutes only regulated the speed of vehicles24 and the obligation of carriages meeting each other to turn to the right of the center of the road.25

If it is surprising that Nebraska statutes on the subject of intersection right-of-way were first enacted so recently, it should be remembered that there have been large numbers of motor vehicles in this state, and even public roads and intersections, for only a few decades. The first cross-country highway, Highway 30, was not even begun until 1914,26 nor hard-surfaced through Columbus until about 1930.

The Nebraska Supreme Court in Epperson v. Utley,27 indicated that the first Nebraska statute on intersection right-of-way was en-

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acted in 1927. The opinion stated that the "Nebraska common law regulating the right-of-way, in the absence of regulations to the contrary, provided the first to enter upon a crossing had the right-of-way with respect to vehicles approaching a street crossing at intersecting points." 28 This is basically incorrect, though some of the earliest intersection accident cases indicated that neither vehicle at an unprotected intersection had the right of way. This appears perhaps to have been the rule even before the common law rule giving right-of-way to the first to enter.

C. Earliest Rule in Nebraska

Apparently, the earliest Nebraska intersection accident case involved an 1890 accident. The court considered the collision between a buggy and a street car at an open intersection and stated:

At such an intersection each have [sic] the right to cross and must cross. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner so as not to unreasonably abridge or interfere with the right of the other. 29

This statement was held by the court in later decisions to be a proper instruction. 30 A 1912 decision involving an open intersection collision held that the rights of a driver of a horse attached to a carriage were not superior to the rights of a driver of an automobile. The court noted that it was told there were 750,000 automobiles in use in the United States alone. 31

However, in a case involving a 1916 accident, the court held that in an open intersection collision, "the defendant's driver having first entered upon the intersection of the two streets, in the absence of some regulation to the contrary, had the right of way." 32 The court went on to say that the law of the road did not require that a wagon stop and allow an automobile to pass in front simply because the latter was a faster-moving vehicle. Nevertheless, the Nebraska cases regarding open intersection accidents before the 1927 statute

28. Id. at 418, 215 N.W.2d at 867.
do not generally determine right-of-way, but rather simply due
care, with charges of negligence such as excessive speed, lack of
warning, and lack of lookout.\textsuperscript{33}

In a 1926 decision, the Nebraska Supreme Court refused “to ap-
ply to automobiles approaching an intersection at right angles the
same rule as applies to railway crossings, to-wit that it is the duty
of a driver upon the highway approaching a railroad crossing to
look and listen for trains”\textsuperscript{34} and that failure to do so prevents re-
covery of damages. On the other hand, in cases before 1927 where
the accident occurred in a town intersection where there was an
ordinance in effect giving right-of-way, the court of course in-
structed on the ordinance involved.\textsuperscript{35}

One of the early cases after the right-of-way statutes had gone
into effect indicated that a reason for the new statute came from
a “recognition by the legislature of the dangers growing out of a
situation permitting one to race for a right of way at an intersec-
tion.”\textsuperscript{36} Another case, decided after 1931, held that although the
plaintiff was on a main-traveled road and collided with defendant
coming from the right on a less-traveled road, the plaintiff did not
have the right-of-way.\textsuperscript{37}

The foregoing shows the long frustration in seeking the ideal
right-of-way rule.

Enactment of the first state statute setting forth who had right-
of-way at an intersection did not end the confusion in intersection
accident cases. Without looking at the cases in detail, it is true that
despite the facts of a collision of two vehicles at an intersection,
a lawyer can almost certainly find at least one case close to his facts
supporting his client and another against his client.

In one of the first cases after the 1931 general traffic statutes
went into effect, where the plaintiff’s car was struck on its left side
near the front, the court affirmed a directed verdict for the defend-
ant on the ground that plaintiff’s failure to look barred his recovery
even though he had the directional right-of-way.\textsuperscript{38}

\section*{III. RECENT LEGISLATION}

The 1969, 1971 and 1973 Nebraska Legislatures made radical
changes in the intersection right-of-way rules so as to drastically

\textsuperscript{33} See, e.g., Andersen v. Omaha & C.B. St. Ry., 116 Neb. 487, 218 N.W.
135 (1928).

\textsuperscript{34} Thrapp v. Meyers, 114 Neb. 689, 692, 209 N.W. 238, 239 (1926).

\textsuperscript{35} Dirks v. Ensign Omnibus & Transfer Co., 107 Neb. 556, 186 N.W. 525
(1922).

\textsuperscript{36} Doan v. Hoppe, 133 Neb. 767, 770, 277 N.W. 64, 65 (1938).

\textsuperscript{37} Whittaker v. Hanifin, 138 Neb. 18, 291 N.W. 723 (1940).

\textsuperscript{38} Nelson v. Plautz, 130 Neb. 641, 644, 265 N.W. 885, 886 (1936).
down-grade the rights both of the motorist on the right and on the left. In particular, under the 1969 legislative changes, Nebraska statutes no longer provided that motorists on the right would "have the right-of-way."

A. Substance of Changes

In 1961, there were two Nebraska intersection right-of-way statutes in effect. Section 39-728 provided that motor vehicles on the left should give right-of-way to vehicles on the right and those on the right should have the right-of-way over vehicles approaching from the left when the vehicles reached the intersection at the same time. It further provided that in all other cases, the vehicle reaching the intersection first should "have the right-of-way." Section 39-751 was partly a duplication of the section 39-728 provisions, stating that when two vehicles approached or entered an intersection at approximately the same time, the driver on the left should yield right-of-way to that on the right. It further provided that any driver traveling at an unlawful speed should forfeit any right-of-way he might otherwise have.

The 1969 legislature amended both of these sections by making changes, which at first glance might appear to be of little importance, but which do have great impact. The two sections were changed to provide (1) that a vehicle should yield right-of-way to another vehicle which had entered the intersection and (2) that when two vehicles entered an intersection at approximately the same time, the driver on the left should yield to that on the right. One change was to remove the provision that unlawful speed forfeits right-of-way. However, the drastic and easily overlooked change was that though a motorist continued to be obliged to yield to a motorist already within the intersection regardless of the direction from which he came, and the motorist on the left was required to yield to the motorist on the right when they entered at about the same time—the provisions were removed that the yielded-to-

41. Id.
motorist should "have the right-of-way" over the other vehicle in both situations.

This change in terminology was no mere exercise in semantics. Rather it was a substantial change in intersection right-of-way rules, as will be discussed in connection with the legislative history of the change.

In practical effect, the changes by the 1969 legislature appear ordinarily to have the effect of preventing the motorist on the left who entered the intersection first and was struck on his extreme right rear from collecting damages; as he shall no longer "have the right-of-way." Also, the motorist struck on his left side would ordinarily be barred from obtaining his damages—since he also no longer would "have the right-of-way." The 1971 legislative changes appear to be simply of form and not of substance.44

Then, in 1973, the legislature passed the new codification of the rules of the road, effective January 1, 1974, and in the process repealed section 39-751. The new replacement section is 39-63545 which does make a substantive change from the previous provision. Section 39-635 entirely removed the provision that a driver of a vehicle approaching an intersection should yield the right-of-way to a vehicle which entered the intersection from a different highway. Section 39-635 thus down-graded further the claim of a motorist on the left who entered the intersection first. All that remained of the old right-of-way rules in the new section 39-635 is the provision that when "two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right."46

Section 39-635, as it presently stands, seems to say that when there is an intersection collision, the motorist on the left is clearly in the wrong, because he did not yield right-of-way, so he cannot recover his damages. However, the section does not say that the motorist on the right shall have the right-of-way, so ordinarily he also is barred. This reasoning is supported by the comments in the defensive driving course Instructor's Manual that the "law never gives the right-of-way to anyone."47

The same legislature which removed the forfeiture-by-speed clause removed the "shall have the right-of-way" clauses. If, as Ep-

46. Id.
person suggests, removal of the first clause eliminated it as law, certainly removal of the second clauses likewise eliminated them. A “rule of reason” cannot restore the “shall have the right-of-way” clauses.

The removal in both places of the language “shall have the right-of-way” was not a change in verbiage without change in meaning, but rather was intended to do exactly what it says, to remove the right-of-way previously given the motorist on the right or the first-entering motorist.

The Nebraska Supreme Court so held in Epperson, where it discussed the fact that before the 1969 amendments, section 39-751 contained a clause providing that the driver of any vehicle traveling at an unlawful rate of speed would forfeit any right-of-way which he might otherwise have had. The court also noted that the legislative history of the hearing on the 1969 bill to amend section 39-751 showed that on the floor of the legislature the forfeiture provision was eliminated so as to make section 39-751 conform to the Uniform Vehicle Code and to section 39-728. The court concluded that since 1969, Nebraska statutes have contained no forfeiture of right-of-way by unlawful speed provision.

In Epperson, the plaintiff argued that even though the forfeiture provision had been eliminated by the 1969 legislature, it should nevertheless be applied in Epperson where the collision occurred after the 1969 amendments under “rule of reason.” The court refused to accept the argument, stating that the “forfeiture rule is completely derivative from statute and not from decisional law. . . . It is beyond doubt that the Legislature in 1969 expressly excluded the forfeiture provision from the applicable statutes. The intent was clear.” The court held that the trial court had properly refused to instruct on forfeiture of right-of-way by unlawful speed.

The same reasoning by the court in Epperson as to the forfeiture provision must apply as to removing the two “shall have the right-of-way” clauses. These also were a creature of statute, not decisional law, as the opinion in Epperson states.

B. Legislative History

The history within the legislature as to the 1969 changes shows that the legislature did indeed intend to remove the provision that

50. Id. at 420, 215 N.W.2d at 869.
51. Id. at 419-20, 215 N.W.2d at 868.
a motorist shall "have" the right-of-way. It shows an emphasis on "defensive driving" and "yielding" right-of-way.

The 1969 bill, L.B. 448E, amended section 39-728. It was reported out of the Committee on Public Works with a statement that the purpose of the bill was to:

redeline the rules of the road pertaining to right-of-way at an intersection to correspond with the latest revision of the Uniform Vehicle Code. The present uniform code provisions have been prepared with the emphasis on defensive driving, with the direction to yield the right-of-way instead of conferring a right-of-way.52

Ralph Nelson, Lincoln city attorney, appeared for the bill. Nelson, in his testimony of March 7, 1969 stated that

the principal emphasis, the principal reasons for the change have been the emphasis on defensive driving, as it becomes so important in terms of traffic safety. The emphasis is on the yielding of the right-of-way, instead of conferring the right-of-way.53

Nelson added that the "emphasis is all now on defensive driving, trying to make sure that we . . . guaranteeing our own individual rights of the driver that we watch out for the other individual, and we drive defensively. This is the purpose, I think, primarily, of this change."54

Senator Fern H. Orme, principal introducer of L.B. 448 stated in her Introducer's Statement of Purpose that the "present uniform code provisions have been prepared with the emphasis on defensive driving, with the direction to yield the right-of-way instead of conferring a right of way."55

The right-of-way provision of section 39-751 was amended by L.B. 994 of the 1969 legislature. Rick Budd, as chairman of the Committee on Public Works signed a statement on the bill, with respect to left turns at intersections. The statement noted that the "latest revision is in accord with modern emphasis on defensive driving and good driving habits to require a yield to a vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard."56

Also regarding L.B. 994, Nelson testified that again "we find the changing emphasis on defensive driving, in this latest provision. This is the purpose, to redefine the rules of the road on vehicles turning left in terms of right-of-way. This would be a recurrence

53. Id. at 12 (Mar. 7, 1969).
54. Id.
55. Id., Introducer's Statement of Purpose (Feb. 21, 1969).
56. See note 52 supra.
of the modern emphasis of defensive driving . . . ."57 The Introducer's Statement of Purpose68 said the bill was in accord with the modern emphasis on defensive driving.

In 1971, L.B. 265 was introduced to further amend section 39-751. Again, Nelson testified, stating that there "are drivers who will insist upon a right-of-way even though another car is already there, unfortunately."59

The 1973 legislative changes were made by way of L.B. 45. The Introducer's Statement of Intent60 for this bill stated that a codification of the national standards for uniform traffic regulation was desired at the state level. The legislative history of the 1973 bill did not indicate that the bill was intended to make any substantive changes as far as intersection laws were concerned.

It is most important to note, especially regarding the 1969 legislative changes in intersection laws, that constant reference was made to "defensive driving" by those promoting the changes. The 1969 legislative history shows "defensive driving" mentioned at least nine times in the promotion of the two 1969 bills. This preoccupation with defensive driving should be compared to the discussion in the National Safety Council's manuals, quoted earlier.61 It is as if the Nebraska Legislature adopted by reference the views of the National Safety Council.

C. No Right-of-Way

It appears that since 1969, neither motorist in an open intersection has any right-of-way privilege. The motorist on the right can have no right-of-way when the legislature expressly removed the provision that such motorist should "have the right-of-way." The instructor's manual as to defensive driving issued by the National Safety Council interprets the law as giving right-of-way to neither motorist at an intersection. This may be the best way of assuring highway safety, for if a motorist realizes upon approaching an open intersection that he does not have any right-of-way regardless of the direction from which the other vehicles might come, he hopefully will tend to be much more cautious than if he approaches an

58. See note 55 supra.
61. See note 2 supra.
intersection with an understanding that he may have a "right-of-way" over someone else.

There were Nebraska decisions involving accidents before 1969 where motorists on the left received awards when struck on the right toward the rear, or the speed of the motorist on the right was much greater. However, it seems that such holdings are now completely obsolete. The 1969 legislative amendments down graded the rights of the motorist on the left triply. First, by removing the clause that the motorist on the left should "have the right-of-way" when he was first in the intersection. Second, they removed the clause that excessive speed forfeits right-of-way. The latter provision was interpreted by the Nebraska Supreme Court as forfeiting only the rights of the motorist on the right. Third, the rights of the motorist on the left were given a final death blow when the 1973 legislature removed the clause that the second motorist who entered an intersection had to yield to a motorist who had previously entered the intersection.

It may be a shock to the courts and lawyers at first to be presented with a theory that no one has a right-of-way at an intersection, even if this is the best law from the view of highway safety. We are too accustomed to someone having a right-of-way, confusing as the law has been on the subject.

However, as noted earlier, it appears under the first Nebraska intersection accident cases that no one was accorded a right-of-way. So, if that should again be the law, it would be no great shock to go back to what we had in the beginning. With the next most recent rule, that the first-entering vehicle has the right-of-way, removed from the statutes by the 1973 legislature, and with previous confusion as to the dual test, one can hardly say that there has been stability in the law of right-of-way. It would seem that we are best off going back to no right-of-way at all by direction or for first-entering vehicles. The recent course of decisions by the Nebraska Supreme Court would suggest that there is not much left of the directional right-of-way anyway, such that its complete removal might be a gain rather than a loss.

At the very least, the 1969 legislature, by removing the "have the right-of-way" clauses drastically down graded the rights of the motorists on the right and on the left at intersections. As to accidents occurring since April, 1969, there is no justification for any court instruction that the motorist on the right shall "have the

62. 191 Neb. at 419, 215 N.W.2d at 868.
63. See notes 29-31 and accompanying text supra.
64. Id.
right-of-way” as that clause is strictly a creature of the legislature, first created in 1927 and removed in 1969.

IV. RECENT CASE LAW

So many recent changes by the legislature in such rapid order were confusing to say the least. The only way that a judge or lawyer could see what effect the changes really had would be to copy each of the bills enacted in 1961, 1969, 1971 and 1973 and carefully compare them along with committee reports and testimony.

A. Statutory Changes Overlooked

As an indication that the courts and lawyers were apparently unaware of the changes by the 1969 legislature, one might note the 1972 decision of Dovey v. Sheridan,\(^65\) where an intersection collision occurred March 22, 1970, nearly a year after legislative changes went into effect in April 1969.\(^66\) The case itself was heard by the Nebraska Supreme Court about three and a half years after the 1969 legislative changes went into effect. Yet, Dovey indicated that the trial court instructed the jury on intersection right-of-way that “vehicles traveling upon a public highway shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left, when said vehicles shall reach the intersection at approximately the same time.”\(^67\) The instructions given the jury were in accord with section 39-728 as enacted in 1961, but the language emphasized above was repealed by the 1969 legislature. However, as indicated, this was the instruction the trial court gave and it is not criticized by the supreme court, even though the emphasized language had been repealed three and a half years before the supreme court heard the case. One can only conclude that neither the trial judge, the attorneys, nor the supreme court was aware of the change which the legislature had made so long before.

Again, the court in the 1971 case of Hacker v. Perez\(^68\) overlooked the fact that the 1969 legislature had made the statutory changes. In Hacker, an intersection collision occurred June 29, 1969, but the court nevertheless held that the operator of a motor vehicle who would otherwise have the right-of-way under statutory regulations

\(^{65}\) 189 Neb. 133, 201 N.W.2d 245 (1972).


\(^{67}\) 189 Neb. at 136, 201 N.W.2d at 247.

\(^{68}\) 187 Neb. 485, 192 N.W.2d 166 (1971).
loses it if he operates his vehicle at an unlawful rate of speed. This is a provision which had been repealed more than two months before the accident.

Then, in the leading case of Hodgson v. Gladem, an intersection collision occurred May 27, 1969, more than a month after the 1969 legislative changes had gone into effect, yet no mention of this fact was made in the opinion. Hodgson made a statement, apparently erroneous in view of the 1969 changes, that the “plaintiff had what is usually referred to as the directional right-of-way.” It also erroneously quoted the favored position of the motorist on the right to be “forfeited because of excessive speed under the circumstances.” This provision, as indicated earlier, was also repealed by the 1969 legislature.

In Kremlacek v. Sedlacek, an accident occurred after the 1969 legislative changes. The court determined that the “statute contemplates that the driver on the left entering first has the right-of-way when outside the range of ‘at approximately the same time.’”

In fact, none of the decisions by the court which have involved intersection collisions occurring since the 1969 legislative changes have mentioned these changes except Epperson, decided in 1974. There, the court noted that under the 1969 legislative amendment, unlawful speed by a motorist having directional right-of-way no longer causes a forfeiture of right-of-way. The opinion disapproved of Hacker to the extent that it implied that unlawful speed did forfeit right-of-way. However, Epperson did not discuss the other change by the 1969 legislature, removing the provisions that the motorist on the right or first entering should “have the right-of-way.”

The Nebraska Jury Instructions published in 1969 also discussed intersection right-of-way. The instructions stated that where two motorists approach an intersection at approximately the same time, the driver approaching from the right “and traveling at a lawful rate of speed has the right of way . . . .” The 1975 supplement to the instructions noted that sections 39-728 and 39-751 were re-

69. 187 Neb. 736, 193 N.W.2d 779 (1972).
70. Id. at 739, 193 N.W.2d at 781.
71. Id. at 742, 193 N.W.2d at 783.
73. Id. at 465, 209 N.W.2d at 154.
75. NEBRASKA SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS, NEBRASKA JURY INSTRUCTIONS, No. 7.10 (1969) [hereinafter cited as N.J.I.].
76. Id.
pealed and section 39-635 replaced the repealed statutes. The latter section was quoted. However, nothing was said about the statement in the text being obsolete since April, 1969.\(^7\) Apparently, district courts have been instructing on the incorrect statement as it appears in the bound volume since 1969, at least as to the “has the right-of-way” clause.

The foregoing is not intended in the slightest to be a criticism of lawyers or the courts in not keeping up with legislative changes. Rather, it is a commentary on too many legislative changes, more than busy lawyers and courts can sometimes manage.

B. Plaintiffs on Right Barred for Negligence

In Hodgson, the Nebraska Supreme Court considered a case where plaintiff's automobile entered a “blind” open country intersection at an admitted speed of 40-45 miles per hour and was struck on the left door and left side by the defendant's car which was traveling at about the same speed. The district court had entered a directed verdict for defendant which was affirmed on appeal. The supreme court held that though the plaintiff had the directional right-of-way, he was nevertheless barred as a matter of law from any recovery. The court said that the “underlying purpose of right-of-way rules is, of course, to prevent collisions and they must be applied . . . in such a way that if the rules are observed they will tend to have this result.”\(^7\) The court concluded:

> We hold that a driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law. The trial court’s determination was correct.\(^7\)

Very importantly, even though the court reached the result that plaintiff was barred as a matter of law, it did so with the apparently erroneous assumption that at the time of the accident, statutes still stated that the motorist on the right should “have the right-of-way.” With the 1969 amendments denying the plaintiff in Hodgson right-of-way, there would be far more emphatic reason for

\(^7\) N.J.I. No. 7.10 has been obsolete since 1969, both as to the phrase “traveling at a lawful rate of speed” and the phrase “has the right-of-way.”

\(^7\) 187 Neb. at 740, 193 N.W.2d at 782.

\(^7\) Id. at 742, 193 N.W.2d at 783.
holding the plaintiff barred. The court in *Hodgson* instead based its decision on a discussion of earlier Nebraska cases holding barred as a matter of law a motorist on the right who entered an obscured unprotected intersection.

*Weber v. Southwest Nebraska Dairy Suppliers, Inc.*, 80 involved a country unprotected road intersection collision between two trucks. The accident occurred on July 23, 1969, once again after the 1969 right-of-way amendments had gone into effect. In *Weber*, the court indicated that, from the evidence, both parties could see each other for at least 250 feet from the intersection.81 The truck in which plaintiff's decedent was a passenger struck the left door of defendant's truck. The court held under these facts the plaintiff's driver who was the motorist on the left was negligent as a matter of law. The only question in the two appeals to the Nebraska Supreme Court therefore was whether the negligence of the driver was imputed to plaintiff, and the jury ruled that it was. So, *Weber* would appear to hold that in an intersection where two motorists had a view of each other for at least 250 feet, the motorist on the left is negligent as a matter of law. However, *Weber* also stated that the "plaintiff's evidence would indicate that the defendant was negligent in not maintaining a proper lookout."82 Defendant of course was the motorist on the right and was struck on the left door.

Although *Weber* involved an accident which occurred after the statutes had been changed to remove the language that the motorist on the right should have the right-of-way, the *Weber* opinion made no reference to this statutory change. Once again, the court decided the rights and obligations on the basis of the pre-April 1969 law. If the 1969 legislative changes are applied, it appears that the plaintiff and defendant were even more clearly negligent.

In *Peterson v. DePrez*, 83 a very recent case involving a country road intersection collision, the court indicated that the evidence was very vague as to obstructions to view, but still permitted the jury to find that the views of both drivers were obstructed until within a few feet of the intersection. Defendant's pickup truck had struck the plaintiff's car near its left front door. Defendant testified to a speed of 10-15 miles per hour, and plaintiff to 15 miles per hour, just before the collision. There was a jury verdict for the defendant, which was affirmed on appeal. The court cited *Hodgson*, though the opinion used the important language that there "was

81. Id. at 609, 193 N.W.2d at 276.
82. Id.
at least a jury question on the issue of plaintiff's contributory negligence."\textsuperscript{84} The opinion said that the only substantial difference between the evidence in \textit{Hodgson} and in the instant case was that in \textit{Peterson} both vehicles were traveling much more slowly and probably could have stopped had timely observation been made. As the jury had found for defendant anyway, it was not necessary to decide whether plaintiff was negligent as a matter of law.

In \textit{Hodgson},\textsuperscript{85} the court barred from recovery as a matter of law the plaintiff who entered a blind country road intersection at an admitted 40-45 miles per hour and was struck on the left door and side. However, \textit{Hodgson} left open the question of whether the court would apply the same rule if the intersection had been one where the motorists had a long, clear view of each other.

The plaintiff in \textit{Hodgson} had argued that his contributory negligence, if any, was a question for the jury to decide. He relied on \textit{Sanderson v. Westphalen},\textsuperscript{86} where each motorist had a clear view of the approach of the other for about 700 feet, the plaintiff had the directional right-of-way but failed to see the approach of defendant's vehicle, and the plaintiff could have expected to be seen by a driver approaching from the left and therefore have his right-of-way respected. The opinion in \textit{Hodgson} said that \textit{Sanderson} was different from the \textit{Hodgson} situation where neither motorist could see the other until almost in the intersection. The \textit{Hodgson} opinion concluded that \textit{Sanderson} was not applicable, and thus left undecided the question of whether in a clear view intersection, as opposed to a blind intersection, the plaintiff who was on the right was not negligent as a matter of law.

Arguably, a plaintiff on the right who collides in a clear view intersection is barred even more emphatically as a matter of law than such a plaintiff in the \textit{Hodgson} situation where the intersection is blind.

First, \textit{Hodgson}, though involving an accident which had occurred after the 1969 amendment to the intersection right-of-way statute, still applied the pre-April 1969 statutes.

Second, \textit{Sanderson} involved an accident which occurred long before 1969, during the time that the statutes gave the motorist on the right the right-of-way where the two vehicles approached the intersection at about the same time. In fact, as the \textit{Hodgson} opinion indicated, the basis of the \textit{Sanderson} opinion, where the plaintiff was on the right, was that the plaintiff had a right to expect

\begin{itemize}
  \item \textsuperscript{84} \textit{Id.} at 307, 242 N.W.2d at 643.
  \item \textsuperscript{85} 187 Neb. 736, 193 N.W.2d 779 (1972).
  \item \textsuperscript{86} 178 Neb. 298, 133 N.W.2d 16 (1965).
\end{itemize}
the defendant to see him and the right to expect his right-of-way to be respected. With the 1969 amendments to the statute removing the "have the right-of-way" clauses, Sanderson is out of date, and neither Sanderson nor the Hodgson discussion of it can have any relevance.

Third, though the Hodgson opinion says that it is simply distinguishing itself from the facts in Sanderson, an analysis of the Hodgson opinion's authorities indicates that it in effect is disapproving of Sanderson. There simply is no way that Hodgson and Sanderson can be reconciled. Sanderson claims to overrule two cases, including Evans v. Messick to the extent that it is in conflict with Sanderson. In Evans, the defendant ran into the left front door of plaintiff's car in an open residential intersection where the view was partly blocked. Plaintiff was held barred from recovery as a matter of law. Yet, Evans, which Sanderson indicates that it overruled, is the foremost case relied on by Barajas v. Parker, and Barajas is the first and primary case relied on by the Nebraska Supreme Court in its Hodgson opinion. In fact, Barajas quoted from Evans twice, and Evans is the only case from which Barajas quoted. This would seem to indicate that Evans, though overruled by Sanderson in 1965, was un-overruled by Hodgson in 1972 and thus has been revived to strong life as to its holding that a plaintiff struck on the left front door in what in Evans was a partly-blind intersection is barred from recovering his damages as a matter of law. In fact, Evans is itself cited in the Hodgson opinion in the quotation where Barajas is quoted. In any event, where Hodgson relies on what Sanderson disapproved, Hodgson is in effect disapproving of Sanderson.

Fourth, under the practical reasoning of the Hodgson opinion, if a plaintiff is barred who collides in a blind unprotected intersection where he had no reason to expect another motorist to be approaching at the same time, most certainly a plaintiff who has a collision in an open clear view intersection where he can see the other motorist approaching is barred. As to a blind intersection, at least in the country as in Hodgson, there might be only one chance in several thousand that another vehicle would be approaching the intersection at the same time from the blind direction so as to involve a collision. Yet, in a clear-view intersection the plaintiff approaching from the right has an opportunity to see that there is a vehicle coming from his left and to know that the chances are

87. 158 Neb. 485, 63 N.W.2d 491 (1954).
88. 165 Neb. 444, 65 N.W.2d 894 (1957).
89. See id., 165 Neb. 444, 448, 449, 65 N.W.2d 894, 897 (1957), quoting from Evans v. Messick, 158 Neb. 485, 63 N.W.2d 491, 492 (1954) (syllabus by the court).
100 per cent that there will be a collision, or a danger of such a collision, if he does not slow or stop. A motorist who approaches an intersection and sees or is able to see the car from the left and who does not take the necessary steps to avoid collision, is far more negligent than was the plaintiff in Hodgson. The plaintiff in Hodgson was on the right and entered a blind intersection too fast where the chances were very remote that another vehicle would be entering the intersection at the same time.

The court in Hodgson said that the purpose of right-of-way rules is not to give a motorist who has the right-of-way an excuse for racing into an intersection and having an accident and then collecting his damages. The underlying purpose of right-of-way rules is to avoid collisions, and such reasoning must apply whether the intersection is blind or has an open view for both motorists. Hodgson said that in an obstructed view intersection, both drivers must approach the intersection at such speed that each may effectively exercise an option on how to proceed when they reach a point where they can see. Such reasoning would apply as much if not more to an open view intersection as to a blind one.

Fifth, in an intersection collision where both motorists have long clear views of each other, a collision will occur because both motorists either (1) did not look in the direction of the other vehicle, (2) looked in the direction of the other vehicle but did not see it, or (3) looked and saw the approaching other vehicle but did nothing to prevent collision. In any of these eventualities, both motorists are necessarily negligent as a matter of law.

Hodgson, quoting with approval from an earlier case, Whitaker v. Keogh, stated that:

The general rule governing the type of case at bar is that when the injured party fails to look at all, or looks straight ahead without looking to either side, or is in such a position that he cannot see, or, in other words, when he takes no precaution at all for his own safety, it is usually a question for the Court.

This quotation indicates the plaintiff to be barred, even under pre-1969 intersection law, in both the first and third alternatives above described and impliedly in the second. Hodgson expressly covers the second alternative when it states that for statutory right-of-way

90. The statutory right-of-way rule, if it is to be effective, must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with underlying purpose of the rules. 187 Neb. at 741, 193 N.W.2d at 782.

91. 144 Neb. 790, 14 N.W.2d 596 (1944).

92. 187 Neb. at 742, 193 N.W.2d at 783.
rules to be effective, a motorist must keep a lookout "and make effective observations." Moreover, Hodgson quotes with approval from Barajas where plaintiff was held barred as a matter of law because it "was her duty to look for approaching automobiles and to see those within the radius that denoted the limit of danger." This brings to mind also the rule that failing to stop for an object within range of vision is negligence as a matter of law. As for the third alternative above, where the plaintiff is the motorist on the right and looks and sees the approaching motorist from the left on a collision course but does not take sufficient action to avoid the collision, there are numerous Nebraska cases holding such a motorist barred as a matter of law.

Thus, in Stocker v. Roach, plaintiff's car was stopped on the edge of a highway at night when its lights failed and the plaintiff and his wife walked behind the car to signal other drivers. Defendant, coming from the rear, struck both of them and then their car. Plaintiff sued and defendant cross-petitioned. The court held the defendant was barred from recovery as a matter of law on his cross-petition because he did not slow after seeing plaintiff's wife.

In Donald v. Heller, the plaintiff motorcyclist was driving along a highway in daytime. The defendant's car, coming from a side road, stopped and then started slowly across the highway. Plaintiff saw the defendant's car when it was 300 to 400 feet away, but continued at 40 or 50 miles per hour and did not slow until 90 feet away when it was too late to avoid a collision with the defendant. The Nebraska Supreme Court dismissed the action, holding that plaintiff's failure to slow sooner barred his recovery. The court stated that he had made no "attempt to decrease his speed, except to retard the throttle and shut off the gas."

In Allen v. Cavanaugh, the plaintiff drove along a country road at night, and saw the defendant's car stopped 300 feet ahead near the middle of the road. Yet plaintiff continued at a speed of

93. Id. at 742, 193 N.W.2d at 783.
94. Id. at 741, 193 N.W.2d at 782 (emphasis added).
95. 140 Neb. 561, 300 N.W. 627 (1941).
96. If this court should decline to hold the defendant's conduct to be negligent, the court would be in the anomalous position of holding that failure to see an object within range of a driver's lights, or failure to so drive or control a car that the driver can avoid a collision with obstacles appearing within range of his lights, constitutes negligence, but that failure to exercise any care after being aware of an obstacle, if not a warning, is not negligence.
97. 143 Neb. 600, 10 N.W.2d 447 (1943).
98. 143 Neb. at 609, 10 N.W.2d at 451.
15 miles per hour trying to pass the defendant's car on the left. There was not enough room to do so, and the plaintiff struck the car. The court held that though the defendant was guilty of negligence, plaintiff was barred from recovery because of his own contributory negligence as a matter of law. The opinion noted that plaintiff saw defendant's car when it was 300 feet away and as he drew closer, but continued toward the danger.

In *Klement v. Lindell*,'100 plaintiff approached a highway and stopped at a stop sign. As he started to cross the highway, he saw defendant's truck approaching. Plaintiff continued and the defendant's truck struck plaintiff's car on the side. The Nebraska Supreme Court upheld a directed verdict for the defendant, noting that plaintiff "continued a negligent course of conduct by driving directly in front of the truck, thereby exposing himself to danger that was imminent. His failure to use proper precaution, under the circumstances, makes him guilty of contributory negligence more than slight."'101

In *Dryer v. Malm*,102 the plaintiff drove along a gravel country road in daytime and came over a hill at 55-60 miles per hour. He saw about 1800 sheep owned by the defendant blocking the road. Although the sheep were about 400 feet away, plaintiff did not try to stop until she had gone 287 feet and then ran off the road. The Nebraska Supreme Court held that the action of the trial court in dismissing her suit was correct, because she was barred by her own contributory negligence in not stopping sooner after seeing the danger. The court stated that it "became her duty in the light of what she admittedly knew and saw, in the exercise of ordinary care, to so operate her automobile as to bring it under control and avoid such an eventuality as befell her."103

*Hodgson* involved an intersection where the views of both motorists were obstructed until the motorists were practically in the

100. 139 Neb. 540, 298 N.W. 137 (1941).
101. Id. at 545, 298 N.W. at 139.
102. 163 Neb. 72, 77 N.W.2d 804 (1956).
103. Id. at 79, 77 N.W.2d at 803. Accord, Ritchie v. Davidson, 183 Neb. 94, 158 N.W.2d 275 (1968) (defendant's foot brake did not hold, but defendant did not use emergency brake); Kirchner v. Gast, 169 Neb. 404, 100 N.W.2d 65 (1959) (plaintiff on an arterial highway saw defendant coming from the side street, but did not put on his brakes until he was 40 or 50 feet from defendant); Ecker v. Union Pac. R.R., 164 Neb. 744, 83 N.W.2d 551 (1957) (decedent saw the defendant's train coming but did not go to a safe area); Berlo v. Omaha & C.B. St. Ry., 104 Neb. 827, 178 N.W. 912 (1920) (plaintiff motorist saw the defendant's street car backing into the street a block away but did nothing to avoid collision until the last moment); Russell v. Elec. Garage Co., 90 Neb. 719, 134 N.W. 253 (1912) (motorist put on brakes but made no effort to turn).
intersection. In Weber, the two motorists had a clear view of each other for the last 250 feet. In Barajas, the opinion indicated that there was a hedge along the intersection which made vision difficult. In Evans, there was a city residential intersection where the view of plaintiff was partly blocked to his left though the opinion said that when plaintiff was 40 feet from the intersection he could see the lights of defendant. There, plaintiff was held negligent as a matter of law. Evans is the case primarily relied on by Barajas, which in turn is relied on by Hodgson.

In Parsons v. Cooperman,104 also cited in Barajas, plaintiff testified that he first saw the defendant's car about one and one-half car lengths before plaintiff's car struck the right side of defendant's vehicle. The court noted that if this testimony were undisputed, plaintiff would be guilty of contributory negligence sufficient to defeat recovery. In Wendel v. Carlson,105 also cited by Barajas, there was an open-view country road intersection collision where plaintiff did not look and was struck on the left side. The court held plaintiff guilty of negligence as a matter of law, noting that he could have seen cars approaching the intersection from left or right for about a quarter of a mile. In Miller v. Aitken,106 again cited by Barajas, there was a blind country road intersection.

Whether the intersection is blind, wide-view, or some in-between variation, under the Hodgson rule, particularly if one adds it to the effect of the 1969 legislative changes, both drivers usually are negligent as a matter of law.

V. CONCLUSION

As indicated at the start of this article, the first rules as to rights at intersections were that neither motorist had a right-of-way, or that the first-entering motorist had the right-of-way. It was not until well into the 1900s that a rule was applied giving motorists on the right a preference. The reason for the latter rule was a desire to make rights and obligations at intersections clearer.

It is uncertain when and on what basis the rule originated giving a preference to the motorist on the right. Neither cases, encyclopedias, texts, the U.S. Department of Transportation, the National Safety Council, the Library of Congress, nor the Uniform Vehicle Code has the answer.

In the British Isles, motorists drive on the left. Apparently this same custom was used at one time in some of the provinces of

105. 162 Neb. 742, 77 N.W.2d 212 (1956).
Canada. In those countries where motorists drive on the left side of the highway, a rule giving preference to the motorists on the right has far more reason. Thus, a driver in Britain on approaching an unprotected intersection should as a matter of safety look first to the right rather than the left, because it is from the right that a motorist will first cross his path. Any defensive driving manuals in Britain should advise a motorist on approaching an unprotected intersection to look first to the right, regardless of the right-of-way which the law might apply. In the United States, where motorists drive on the right and the first motorist from a point of danger would be from the left, a driver should as directed in the defensive driving manuals, look first to the left.

It might be that the rule which finally emerged to give a preference to the motorist on the right came from the much older rule as to ships at sea. When steam vessels are in a "crossing" situation, analogous to motor vehicles entering an intersection, the vessel "which has the other on her own starboard side shall keep out of the way of the other." The rule requiring a steam vessel to give preference in a crossing situation to another steam vessel on the right goes back at least to an 1869 United States Supreme Court case involving an 1860 collision. The opinion stated that the "regulations then existing required that when two steam vessels were crossing, so as to involve risk of collision, the one which had the other on her own starboard should keep clear." This navigational rule hardly applies to high speed motor vehicles in land road intersections. With ships at sea, there may be many minutes during which ships on a collision course can observe each other and take corrective action including the giving of whistle blasts. One of the statutes dealing with ship navigation rules in fact states that when steam vessels are in a crossing situation, and there is a risk of collision, either vessel shall give as a signal of intention to comply with the rule one whistle blast, and the other vessel shall answer with a similar blast. Such rules for ships at sea hardly are practical for motorists.

Any rule giving preference to the motorist on the right is confusing, contrary to safe driving and impractical at today's high speeds. It would appear after the 1969 amendments and recent case decisions that there is little left of any rule which might still exist giving a preference to the motorist on the right, and that in the usual

107. 29 C.J. Highways § 415 (1922).
110. Id. at 250.
situation of an intersection accident, both drivers are negligent as a matter of law.

If there are any intersection accident cases which are still for the jury to decide, there should in any event not be an instruction that the motorist on the right "has" any right of way as this provision has been removed from the statutes since 1969.

It appears that no right-of-way rule or combination of rules enacted in the last 50 years has worked. For safety and clarity, it seems that we should return to what appears to be the very earliest rule, that no motorist has right-of-way at an intersection, and that both motorists must use due care.

This is the direction in which we are being led by both the Nebraska Supreme Court and the Nebraska Legislature, a direction which should cause more caution by motorists approaching open intersections—and thus promote the saving of life and property.