2nd. December, 1946.

Judges:

His Honour Sir George Borg, Kt., M.B.E., LL.D.,
*President;*

His Honour Mr. Justice Prof. E. Ganado, LL.D.

His Honour Mr. Justice L.A. Camilleri, LL.D.

**Notary Dr. Rosario Frendo Randon *versus* Lewis Smith**

**Collision — Last Opportunity — Contributory Negligence.**

*The doctrine of Last Opportunity is an important factor for the Courts of Law in determining responsibility in cases of collision. But there must always be a substantial interval of time between the initial negligence of either of the parties and the negligence which was the proximate cause of the injury.*

*If there has been no such interval of time, and both parties are to blame, then each party must assume responsibility in proportion to its contributory negligence.*

By the aforesaid Writ of summons, after prefacing the declaration that on the 15th. January, 1946. at about 5 p.m., in Notabile Road, Qormi, defendant, who was driving a service truck, collided with his car in consequence of defendant's imprudence, carelessness and non-observance of regul-

ations, damaging it extremely; asked that the defendant be condemned to pay to him, by way of damages, such sum as would be assessed by the Court; with costs;

*Omissis;*

By judgment delivered on the 24th. July, 1946, the First Court non-suited plaintiff, with costs against him; on the following considerations:

It appears from the evidence that on the 15th. January last, at about 5 o'clock in the afternoon, plantiff's son was driving his father's (i.e. plaintiff's) car, a Fiat Saloon Balilla Model, proceding from the direction of Qormi, towards Żebbuġ, along St. Bartholomew's Street. On reaching the point where this latter road joins up in the form of a T in the Notabile Road, plaintiff's son rounded the bend to his right towards Żebbuġ, and when he had done so almost completely and was about to straighten his course, the car came into collision with a service truck driven by defendant, which was proceeding on Notabile Road from the direction of Żebbuġ towards Marsa. Plaintiff's car was hit on the offside towards its middle part, and, being of course a much lighter vehicle, was pushed round and flung partly into the road-gutter, sustaining considerable damages;

The referee came to the conclusion that the collision was a typical case of contributory negligence, and should therefore be adjudged as such for the purpose of assessing the damages. In fact the referee held that the defendant was to blame for not having kept to the proper side of the road, and for having driven at a speed which was not advisable in the circumstances at the time of the collision. The referee considered that plaintiff's son was also to blame for not having kept a proper look-out on approaching the bend and for not having slowed down in order to make certain that he could round the bend with safety;

The sitting judge found himself unable to share the referee's opinion;

The reason for the Court's dissent was that the referee

appears to have lost sight of the very important doctrine of "Last Opportunity";

The "loci classici" most frequently quoted in the English Courts anent this doctrine are:— Butterfield vs. Forrester, 1809, 11 East, 60; 36 Digest 112, p. 745; Davies vs. Manna, 1842, 10 M. & W. 546; 36 Digest 113, 751; 12 L.J. Ex. 10; Admiralty Commissioners vs. S.S. Volute, 1922, 1 App. C. 129; 41 Digest 780, 6417; 91 L.J. P. 38; 126 L.J. 425; British Columbia Electric Ry. Co. Ltd. vs. Loach, 1916, 1.A.C. 719, 36 Digest 117, p. 781; 85 L.J.P.C. 23; 113 L.J. 946. In this case Lord Summer quoted with approval the remarks made by Mr. Justice Anglin in the case "Scott vs. Dublin and Wicklow Railway Company, 1861", Irish Law Reports, 377-394; "Cooper vs. Swadling", 1929, 46, T.L.R. 73; "Corstar vs. Eurymedon", Court of Appeal, Dec. 20, 1937. From a perusal of the judgment last named, particularly from the remarks of Lord Justice Scott, it appears that the Privy Council also approved Mr. Justice Anglin's remarks in the afore-mentioned case, and subsequently the correctness of these remarks was approved by the House of Lords sitting as a tribunal. This doctrine of last opportunity, be it noted, has been applied in collisions, whether on land or on sea (see L.J. Greer's remarks in the Eurymedon case aforequoted);

With regard to local case-law, the position appears to be this;

The sitting judge first applied this doctrine in the case "Spiteri vs. Camilleri", which was decided (with regard to the first judgment on the question of liability) on the 16th. June 1936 (see page 117 of that record). On appeal, the decision was varied, but on points of fact (pages 145 of that record). With regard to the doctrine of last opportunity, the Court of Appeal (then composed of R.F. Ganado, J., Edg. Ganado, J., and Camilleri, J.) remarked that the doctrine in question was a correct one, even though, in its view, not applicable to that particular case (see page 152 of that record). Further on, at page 152a, overleaf, the Appellate Court, after reviewing certain provisions of the Maltese Law, went on to

state that the doctrine of last opportunity, even under Maltese Law, may be applicable when, in the words of Mr. Justice *Erskine* in the case "Davies vs. Mann, 1842", there is a substantial interval of time between the initial negligence of the defendant or of the plaintiff respectively and the negligence which was the proximate cause of the injury. In fact the Appellate Court varied the judgment because it did not agree with the sitting Judge (then the trial judge) that there had been such substantial interval of time, and it was of opinion that the negligence was so contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence. It is obvious that, had the Appeal Court agreed with the First Court that there had been a substantial interval of time, it would have applied the doctrine aforementioned. The doctrine was later on applied by the sitting judge in the case "Attard vs. Stephens", decided on the 5th. May, 1936 (page 104 of that record). On appeal the judgment was affirmed. The Court of Appeal (then composed of Mercieca, C.J., R.F. Ganado, J., and Bartolo, J.), in the course of its judgment accepted the reasonings of the First Court and quoted the principles of the doctrine in question, expressly mentioning the "ultimate negligence";

The question which must be answered in the present case is, therefore, this:— "Even assuming that defendant was negligent, would the plaintiff have averted the consequences of this negligence, and did he culpably fail to do so?"

The referee held that defendant was negligent in that he drew out to the right-hand side of the road prematurely. As may be seen by reference to the sketch at page 60, the carriage-way which ushers St. Bartholomew's Street into Notabile Road is divided into two traffic lanes by a chain of some twenty studs, at a distance of about four feet from each other..... The referee was also of opinion that defendant should have driven at a slower speed, under the circumstances, in order to be able to stop dead if an emergency arose;

*Omissis;*

The all-important question of the last opportunity appears to be answered in the report itself. In para. 12 thereof (page 52 of the record), the referee says:— "Coming now to the part played by the driver of the pla ntiff's car, it cannot be said that his manner of driving was ideal. This driver should have kept well in mind that a situation might have arisen at the bend which could have necessitated his coming to a halt to give way to traffic on his right proceeding in the direction of Marsa, and this for the reasons stated in paragraph six. In order to be prepared for this emergency, which was not very remote as the road leading to Marsa is very busy, this driver should have slowed down before emerging into Notabile Road to a mere crawl, or, even, pulled up, and after exploring the stretch of road on his right, proceed further ahead if and when the conditions of the road allowed. Had he done so, he would have discovered the presence of the oncoming vehicle well in time, and would have prepared h mself for the emergency by stopping and allowing it to pass, even if its driver was disregarding one or more rules of the road." In the passage now quoted the referee, particularly by underlining, as he himself did, the concluding words, appears to have caught the underlying spirit of the doctrine of last opportunity; but he then failed to follow it up to its logical conclusion;

The duty of the driver of plaintiff's car to ascertain that he could take the bend with safety before venturing to do so was a serious one indeed, as there were various considerations which imposed it; in fact.....;

Instead of slowing down, or even stopping if necessary, ..... the driver of plaintiff's car entered Notabile Road almost blindly, without slowing in any way..... It is plain that, had plaintiff's dr ver slowed down before entering Notabile Road, ..... he could have easily avoided the consequence of any negligence, even granted there was any such negligence, on the part of defendant by allowing the truck to pass on so as to be able to negotiate the bend in safety..... It should be noted — and this is an

important consideration in the application of the last opportunity doctrine — that, as required in the exposition of the doctrine by Mr. Justice Anglin in the case afore quoted, there was not only an appreciable interval of time within which the driver of plaintiff's car could have obviated the consequences of the alleged negligence of defendant, but in this case there was ample time within which to avoid the impending collision. In fact, there was absolutely nothing which prevented, or could have in any way prevented, the driver of the car from observing the elementary rule of the road, of slowing down and looking out for traffic on the other road prior to venturing on it. Plaintiff's driver could have avoided the other road-user's alleged negligence with ease and comfort. In this case, therefore, there was even more than the substantial interval of time stressed by the Court of Appeal in the "Spiteri vs. Camilleri" case..... Thus, even though there may have been "ex hypothesi" an initial negligence on the part of the defendant, what Mr. Justice Anglin called the "ultimate negligence" was decidedly on the part of plaintiff's driver, and provided there was, as in point of fact there undoubtedly was in the present case, an appreciable interval of time between one negligence and another, this ultimate negligence is — again in the words of Mr. Justice Anglin — not merely a remote cause, but the "efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief".

Matters could have been different if the other party had no appreciable period of time within which to avoid the consequences of the first party's negligence, because, in any such case, such other party would be faced by an unavoidable emergency given rise to by the first party, and may be also by his own negligence, in which eventuality the doctrine of the last opportunity would not apply, and the other doctrine of contributory negligence would replace it. Not so in this case, in which the driver of plaintiff's car had ample time to slow down, and by slowing down, as it was his duty to do, avoid the consequences of any road-user on Notabile Road. In

Torrell's "The Law of running down cases", at page 2, it is correctly stated that the driver of a car "must keep a proper look-out for the road-users..... Even if another user of the road is negligent, he must exercise due skill in trying to avoid the consequences of that negligence";

It may not be amiss to note that in one of the examples quoted by the Appeal Court in the "Attard vs. Stephens" case aforequoted there is one which approaches the present case, and is set out thus:— "Assume a motor-car driven too fast by X along a street. Another motor-car is drawn up in a side-road ready to cross. A, who has in charge of it, sees X, starts his car across the street so that X cannot clear him, and there is a collision. A's negligence, the last in point of time, renders him responsible";

In conclusion the First Court was of opinion that the referee's findings of fact, that is negligence on the part of both litigants, should, by the application of the test of the "last opportunity", have fixed the sole and entire blame on the driver of plaintiff's car, who could, and should have avoided successfully, but for his own negligence, any initial negligence of defendant. Plaintiff, therefore, could not claim, as he was the author of his own wrong;

The claim failed and was disallowed with costs against plaintiff;

Against this judgment plaintiff entered an appeal before this Court, and in his petition he prayed that the judgment be reversed with costs and that his claim be allowed;

*Omissis;*

The Court considers that it is an established principle in the English case-law, as set down in the series of judgments quoted by the First Court, that the doctrine of "last opportunity" is an important factor for the Courts of Law in determining responsibility in cases of collision. This Court has in previous judgments followed, so far as it is consistent with the local law, the principle propounded above, but has held the view that there must always be a substantial interval of time between the initial negligence of the defendant

or of the plaintiff respectively and the negligence which was the proximate cause of the injury; if there is not such substantial interval and both parties are to blame, then each party must assume responsibility in proportion to its contributing negligence, as set down by the Civil Code;

The Court takes the view in the case under review that there was no substantial interval of time between the initial negligence and the negligence which was the proximate cause of the collision;

The referee, at page 55, elaborates the causes that brought about the collision. He says that had defendant kept to the left up to the last moment, and kept his car under control by going slower and by using a higher degree of caution, he would have cleared his car and passed safely ahead; while, on the other hand, had the driver of the car exercised a sharper look-out before taking the bend by slowing down to a mere crawl, and, if necessary, coming to a halt, nothing would have happened, as the service vehicle would have passed quite safely;

The Court accepts the views expressed by the referee as to the causes which brought about the collision, in consequence of which plaintiff suffered damages to the extent of £70 as detailed in the referee's report;

Wherefor, the Court declares that both the driver of plaintiff's car and respondent have contributed in equal proportions to the collision; allows plaintiff's appeal in the sense above stated; and therefore in like manner allows his claim; condemns respondent to pay to plaintiff the sum of £35, with interest from the date of this judgment; and in view of the circumstances of the case orders that all costs be borne by the contending parties in the proportion of one moiety each. And in the above sense reforms the judgment delivered by the First Court.