

1942

# State of Utah v. Grant Allen Adamson : Reply Brief of Appellant

Utah Supreme Court

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

GRANT ALLEN ADAMSON,  
*Defendant and Appellant.*

No. 6375

FILED

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CLERK, SUPREME COURT, UTAH

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**REPLY BRIEF OF APPELLANT**

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MOYLE, RICHARDS AND  
McKAY,

*Attorneys for Defendant  
and Appellant.*

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# I

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
ARGUMENT .....	3
I. There is no Evidence to Support the Verdict.....	3
1. The Defendant's Speed (Par. (a) of Respondent's Brief) .....	3
2. Proper Lookout .....	7
3. Alleged Failure to Yield (Par. (b) of Respondent's Brief) .....	8
4. There is no Evidence that the Defendant Violated the Reckless Driving Statute (Par. (c) and (d) of Respondent's Brief) .....	9
5. Authorities Cited by Respondent (Par. (e) ).....	9
II. The Court Erred in Directing the Jury.....	14
1. Instructions on the Right of Way (Par. (a) of Respondent's Brief) .....	14
2. Refusal to Instruct on the Conduct of the Deceased as the Proximate Cause of the Accident (Par. (b) of Respondent's Brief).....	19
3. The Burden of Proof Was Cast on the Defendant by the Giving of Instruction No. 7-A (Par. (c) of Respondent's Brief) .....	28
CONCLUSION .....	29

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## AUTHORITIES CITED

Andrus v. Hall, 93 Colo. 526, 27 P. (2d) 495.....	16
Biewen, State v., 169 Iowa 256, 151 N. W. 102.....	13
Blackford v. Kaplan, 135 Ohio St. 268, 20 N. E. (2d) 522.....	20, 26
Boyd v. Close, 82 Colo. 150, 257 P. 1079.....	15
Campbell, State v., 82 Conn. 671, 74 Atl. 927.....	20
Chealey, State v., ..... Utah ....., 116 P. (2d) 377.....	6, 29
Cornett v. Commonwealth, 282 Ky. 322, 138 S. W. (2d) 492.....	13

## II

### AUTHORITIES CITED

Continued

	Page
Dalley v. Mid-Western Dairy Products Company, 80 Utah 331, 15 P. (2d) 309.....	23, 24
Dunville v. State, 188 Ind. 373, 123 N. E. 689.....	6
Elliot, State v., 8 Atl. (2d) 873.....	12
Ferguson v. Reynolds, 52 Utah 583, 176 P. 267.....	23
Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917 C, 477	22
Hedinger, State v., 126 N. J. L. 288, 19 Atl. (2d) 322.....	11
Heg v. Mullen, 115 Wash. 252, 197 P. 51.....	21
Johnson v. Selfe, 190 Minn. 269, 251 N. E. 525.....	15
Logan v. Schjeldahl, 66 N. D. 152, 262 N. W. 463.....	8
Logan v. Schjeldahl, supra.....	17
McKeon, People v., 236 N. Y. S. 591, 134 Misc. Rep. 697.....	14
Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2.....	15
Moss v. Christensen-Gardner, 98 Utah 253, 98 P. (2d) 363.....	24, 25
Nielsen v. Watanabe, 90 Utah 401, 62 P. (2d) 117.....	24
Olson v. Denver & R. G. W. R. Company, 98 Utah 208, 98 P. (2d) 944 .....	25
People v. McKeon, 236 N. Y. S. 591, 134 Misc. Rep. 697.....	14
People v. Przybyl, 365 Ill. 515, 6 N. E. (2d) 848.....	12
People v. Smaszcz, 344 Ill. 494, 176 N. E. 768.....	10, 11
Przybyl, People v., 365 Ill. 515, 6 N. E. (2d) 848.....	12
Smaszcz, People v., 344 Ill. 494, 176 N. E. 768.....	10, 11
State v. Biewen, 169 Iowa 256, 151 N. W. 102.....	13
State v. Campbell, 82 Conn. 671, 74 Atl. 927.....	20
State v. Chealey, ..... Utah ....., 116 P. (2d) 377.....	6, 29
State, Dunville v., 188 Ind. 373, 123 N. E. 689.....	6
State v. Elliot, 8 Atl. (2d) 873.....	12
State v. Hedinger, 126 N. J. L. 288, 19 Atl. (2d) 322.....	11
Swoboda v. Brown, 129 Ohio St. 512, 196 N. E. 274.....	21
Werner v. Rowley, 129 Ohio St. 15, 193 N. E. 623.....	25

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STATEMENT OF FACTS

Two statements under the heading “Statement of Facts” on page 4 of respondent’s brief are erroneous conclusions, and should be corrected.

One is: “This intersection is a well-lighted intersection.” Since much of the argument of that brief is premised upon this conclusion, we think it important to point out that all the evidence in the case indicates that this is not a well-lighted intersection. On the contrary,

it shows that the intersection was dark. There was only one arc light and that was on the southwest corner — the far corner from both the driver of the truck and the rider of the bicycle. (Tr. 83). Lights were on both service stations on the northeast and southeast corners but these stations were lit to illuminate themselves and not the road. A careful scrutiny of Exhibit “D” — a photograph obviously taken in the day time — shows the lighting system used on the two stations. The search lights shown there are shielded so that the light is thrown away from the road and on the service stations. The intersection was definitely not well-lighted.

The other conclusion is an unfortunate phrasing of the testimony of the location of the defendant's truck after the accident. Respondent said: “Defendant's truck proceeded east on Ninth South Street 157 feet from the point of impact before it stopped. (Tr. 100).” There was no evidence of what the truck did after the accident, either by tracks or skid marks (Tr. 107) or by eye witness. Adamson may have stopped it and then pulled it over to the side of the road out of the way. We know only that it was on the side of Ninth South Street 157 feet from the probable point of collision some indefinite time after the accident (Tr. 77, 100).

## ARGUMENT

**I. There is no Evidence to Support the Verdict.***1. The Defendant's Speed (Par. (a) of Respondent's Brief).*

Respondent objects to the fact that counsel for the appellant limited his discussion entirely to the miles per hour which the defendant was going at the intersection at Ninth South Street and Second West. We submit that regardless of the circumstances, if the unlawful act to be proved was the defendant's speed, that speed must be shown. No speed at the intersection was shown. So to deduce this speed respondent's brief sets forth the following points:

(a) Moulton's testimony can be interpreted, says the brief, to find that the defendant maintained his speed of between 35 and 40 miles per hour until he made his turn. We have already pointed out that Moulton changed his testimony and did not indicate at any time where it was that Adamson was driving at that speed. In a criminal case we must not deal in speculation, especially as there is direct evidence contradicting this inference. The positive evidence in the case, contradicting respondent's inference, is that the defendant drove slowly into the intersection. (Tr. 115).

(b) The jury, says the respondent, could have taken into consideration the fact that the defendant's truck was driven a distance of 157 feet from the point of impact before he brought it to a stop.

There is no evidence that the defendant drove 157 feet before he brought his truck to a stop. There is no evidence of what he did after the impact except walk toward the place of the accident after he had parked the truck (Tr. 77). We know only that when the officers arrived on the scene some time after the accident, Adamson's truck was on the side of the road 157 feet from the probable point of impact. Adamson may have stopped in the middle of the road immediately after the impact and then driven his truck off the side of the road. Or he may have chosen to drive until he got off the road. We must remember he was driving a long truck with three sets of wheels (Exhibit "A"), and that some distance is required to get a long truck off the road to clear it for passing traffic. By no right can we infer without any evidence that Adamson could not bring his truck to a stop before the place where he parked it.

(c) The jury, said the respondent, could also have considered the force with which Kanon was struck, as evidenced by the various injuries which he received. As



a matter of fact the bodily injuries of Kanon have no bearing upon the speed of the truck. It is common knowledge that a slight impact by a heavy body against a light one can seriously injure the light one regardless of the speed of the heavier body.

(d) In a fourth attempt to show speed the respondent claims that the jury could take into consideration the traffic on the highway and the hazard at the intersection and any other conditions therein existing in determining whether or not the defendant was driving at a speed which was greater than was reasonable and prudent. This statement is true as far as it goes but it involves two factors: first, the traffic, and second, the speed. There is evidence of the traffic, but this is not enough. For the jury to determine whether or not the speed was greater than was reasonable and prudent there must be evidence of this speed. There is none. Respondent argues that since the defendant did not see the Kanon boy, and since there is no evidence that the defendant turned in any manner to avoid the collision, he therefore was speeding. Obviously this does not follow. It is a dangerous assumption, made even more vicious by the added assumption that the intersection was well-lighted. We have pointed out that the evidence was that the intersection was dark (Tr. 87). Another dangerous inference expressed by the respondent is the

defendant's "inability to bring the truck to a stop within less than 157 feet." There is not a fragment of evidence of any inability to bring the truck to a stop within any distance, nor any evidence that the truck was not brought to a stop before Adamson drove it to the side of the road where the officers measured its location. The whole argument is based upon the "if" clauses on page 10: "If he was going at a speed . . . If he was not looking . . ." Anglo-American justice does not permit us to deprive a man of his liberty by adding up several hypotheses to make a fact. The whole argument of respondent is that defendant was driving at a rate of speed that was not reasonable and prudent because he had an accident; because he had an accident he was driving at an excessive speed; therefore, because he was driving at an excessive speed he had an accident.

"Explanations by reasoning back from results with no place to land are not helpful. They lead to speculations only" — Mr. Chief Justice Moffat, in *State v. Chealey*, ..... Utah ....., 116 P. (2d) 377.

The case of *Dunville v. State*, 188 Ind. 373, 123 N. E. 689, is analogous in its facts to the case at bar in this: That in both cases the driver of the car was faced with an unexpected presence of a child in the front of the car. Respondent argues that Adamson should have

anticipated the bicyclist's presence because he was at the intersection. This would ordinarily be true, and might be true in this case if it were not for the fact that Kanon was violating the law in the two particulars mentioned in the appellant's main brief, that is, he was riding his bicycle in the dark without a lamp and he was out in the inside lane of traffic instead of near the curb where the ordinance and prudent driving required him to be. Regardless of how careful Adamson might have been under this state of facts the same accident could have happened.

*2. Proper Lookout (Par. (a) of Respondent's brief).*

By a summation of inferences respondent argues that because the Kanon boy was hit, Adamson failed to keep a lookout. We submit that the accidental striking in the dark of a boy on a bicycle without lights in the middle of the street where he is not supposed to be does not denote failure to keep a lookout, especially when we take into consideration the added confusion of lights in the service station and the presence of the car which preceded the bicycle through the intersection.

3. *Alleged Failure to Yield (Par. (b) of Respondent's Brief).*

Before there can be violation of law for failure to yield the right of way there must be such a right. Respondent says that Sylvester Kanon had this right. We should bear in mind the discussion and authorities starting on page 24 of appellant's main brief and in the latter part of this brief on this point: Sylvester Kanon when he rode his bicycle into the intersection unlawfully, lost the right of way, which he otherwise would have had by virtue of the statute.

In *Logan v. Schjeldahl*, 66 N. D. 152, 262 N. W. 463, the court said :

“When a driver operates his vehicle in an unlawful manner, as for instance by driving at an excessive speed, he loses the right of precedence which would be his under the statute had he been complying with the law, or as stated in Blashfield's Cyclopedia of Automobile Law and Practice, Permanent Edition, Sec. 1009, ‘He loses his statutory preferential status.’ ”

Other authorities on this point are quoted under Part II of this brief.

4. *There is no Evidence That the Defendant Violated the Reckless Driving Statute. (Pars. (c) and (d) of Respondent's Brief).*

There is no new evidence mentioned in this section of respondent's brief and it becomes a summary of the other allegations which were not proved: Alleged speed which was not reasonable and prudent, alleged failure to keep a lookout, and alleged failure to yield a right of way. There being no evidence to support any one of these three claims, the charge of violating the reckless driving statute which depends upon them must, of course, fail also. We should note, however, that the brief makes statements in this section which are not borne out by the evidence. There is no evidence, for example, that the defendant drove between 30 and 35 miles per hour until he arrived at the intersection, and of course no evidence that defendant "just sailed" through the intersection. Such assertions are misleading conclusions. Again respondent says the intersection was "well-lighted". Constant repetition of those words does not make them a fact.

5. *Authorities Cited by Respondent (Par. (e) ).*

Though respondent admits that decisions relating to the sufficiency of evidence in involuntary manslaughter cases are not very helpful, he cites several

of them. We should, therefore, analyze their facts and contrast them with the lack of evidence of recklessness in the case at bar.

In *People v. Smaszcz*, 344 Ill. 494, 176 N. E. 768, the court found that the evidence indicated that the defendant was going at an excessive rate of speed at the time of the collision. What was this evidence? A witness saw the defendant's car jerking along after the accident, which showed, the court said, that the brakes had been applied and were checking the momentum of the car, which nevertheless ran 45 feet before it stopped. The force of the collision between the automobile and human flesh was so great that it sounded like two automobiles coming together. The street intersection was well-lighted. The automobile showed the force of the collision. The right headlight was dented, its glass broken, the reflector dropped out, the metal rod between the headlights was broken, and the left fender was badly damaged.

“The broken bar and dented metal showed the force was extreme, particularly when it is considered that the collision was not of metal but of metal with human flesh, and that the bodies of the three women were thrown or dragged 45 feet from where they were struck. . .

“The flight of the plaintiff in error from the scene of the collision without any effort to

ascertain the extent of the injuries caused by his act or to help the injured persons may also be taken into consideration as evidence of guilt.”

And in *State v. Hedinger*, 126 N. J. L. 288, 19 Atl. (2d) 322, a witness in a rear upstairs room of the building away from the intersection heard the crash. The court said she was “at a considerable distance away under conditions none too favorable.” This impact of an automobile with human flesh smashed the headlights and completely broke the grille work of the car, though the grille work was such that an expert testified it would not break unless under a severe impact. In this case, also, the defendant ran away from the scene, and the court said that his statement that the happening in question never occurred so far as he knew, could be taken in connection with the other evidence. Compare the damage done to the automobiles in this case and in *People v. Smaszcz*, *supra*, with the slight damage done to the defendant’s truck in the case at bar. Officer Anderson testified:

“There was, about in the center of the bumper there was a long scratch mark, possibly inflicted by coming in contact with metal. The grill was bent, and I found a cap and a top of a fruit jar bottle, the lid of a fruit jar bottle was laying on the fender, and there was milk spilt all over the windshield and also the hood and left fender.” (Tr. 108).

No one examining the appearance of the truck in Exhibit "A" and that of the bicycle in Exhibit "C" can claim very ardently that the truck could have been going very fast and yet cause so little damage to the vehicles.

In its discussion of *State v. Elliot*, 8 Atl. (2d) 873, respondent's brief assumes again that the defendant tried to stop his truck as soon as he could. This assumption, of course, is unfounded against the evidence that he drove it over to the side of the road. *State v. Elliot* is the decision of a lower court of Oyer and Terminer.

Respondent's brief cites *People v. Przybyl*, 365 Ill. 515, 6 N. E. (2d) 848, as authority for the proposition that failure of the driver to have his car under such control that he could avoid a collision was an utter disregard of the safety of others. But compare the facts of that case. The defendant in that case traveling east in a taxicab swung to the north rail of the west bound street car track, passed an automobile at about 45 miles per hour in a district in which the speed limit was 35, struck the deceased and threw him directly east 40 or 50 feet, skidded about 75 feet to the south curbing and struck a post, shearing it off. The defendant said he saw the deceased when the deceased was about 15 or 20 feet in front of him. The court said:



“Not every violation of the Motor Vehicle Law amounts to criminal negligence, for the reason that not all such negligence is reckless or wanton and of such a character as shows an utter disregard for the safety of others; but, where excessive speed in passing other cars is combined with disregard for persons or things approaching or crossing, whom the passing driver cannot see, such is evidence of criminal negligence.”

In the case at bar there is a complete absence of such excessive speed and of any disregard of persons. The defendant ran against a boy who unlawfully suddenly appeared before him in the dark.

The facts of *Cornett v. Commonwealth*, 282 Ky. 322, 138 S. W. (2d) 492, are not at all comparable with those of the case at bar. In this case the defendant had been warned in advance of the children playing with a ball on the edge of a highway. In the case at bar the defendant was suddenly confronted with an emergency not of his own making.

The authorities cited on page 20 of respondent's brief are not applicable to the instant case because in the case at bar there is no evidence of speed. Further discussion of them would be pointless.

In *State v. Biewem*, 169 Iowa 256, 151 N. W. 102, the court said that the death of the child might well

have been found in consequence of the recklessness of the driver. But in that case the child was in the road in plain view in broad daylight. The court said:

“Counsel suggest that, as the child was found west of the center of the road, the driver’s attention may have been distracted by the dog on the east side, and the child, in following the dog, may have run out in front of the car. A sufficient response to this is the mother’s testimony that the child was in the road in plain view. Moreover, the driver must have been aware of striking the child, and moving on without stopping or tendering assistance was a circumstance indicative of guilt on his part.”

*People v. McKeon*, 236 N. Y. S. 591, 134 Misc. Rep. 697, the last case on sufficiency of evidence in Respondent’s brief, is a case from the Court of Special Sessions of the City of New York, and, of course, is not an authority.

## II. The Court Erred in Directing the Jury.

### 1. *Instructions On the Right Of Way. (Par. (a) of Respondent’s Brief).*

The court included failing to yield the right of way in its fifth instruction which purported to set forth the law an infraction of any part of which would constitute grounds for conviction. Exception was properly taken

to this, and we submit that by including the fifth subsection of this instruction, the court committed reversible error.

Sylvester Kanon did not have the right of way for two reasons: (a) because his violation of law in failing to have a light on his bicycle, and in failing to keep on the right side of the road cancelled his statutory preferential status; and (b) because there was no evidence to show his relative position to come under the right of way statute.

In appellant's main brief it was pointed out that one who is himself violating the law can not claim the right of way which he otherwise would have had. This doctrine is sometimes set forth in statutes (interpreted in *Johnson v. Selfe*, 190 Minn. 269, 251 N. E. 525 and *Morris v. Bloomgren*, 127 Ohio St. 147, 187 N. E. 2). We submit that it is immaterial whether the statute so contains it or not. The necessary implication is there that the one claiming the right of way must himself be driving legally. The cases so hold.

In *Boyd v. Close*, 82 Colo. 150, 257 P. 1079, Boyd made a left turn at an intersection and the defendant coming straight through the intersection from the right collided with him. The defendant answered that he had the right of way and that Boyd's failure to yield con-

stituted contributory negligence. The court said that ordinarily he who turns must yield; but in this case defendant was violating the speed limit and was driving while intoxicated. Boyd was handicapped by the night, the lights, the locations of the cars, and falling snow.

“We are now asked to fix responsibility in every case of automobile crossing collision in favor of the car having the right of way under the strict provisions of statute, ordinance, or rule of the road, notwithstanding drunkenness, gross negligence and excessive speed, and notwithstanding every reasonable precaution exercised by the other under circumstances which the first driver knew, or should have known, would in all probability prove ineffectual; to outlaw every left-hand driver and give carte blanche to every right-handed driver to run him down. The mere statement of the proposition is its own refutation. We know of no court that has ever countenanced it, and we expressly repudiate it.”

In *Andrus v. Hall*, 93 Colo. 526, 27 P. (2d) 495, quoted in appellant's main brief, the defendant approached the intersection from the plaintiff's right and ordinarily would have had the right of way. However, he entered it at a speed in excess of the speed limit. The court held that a driver cannot be required to yield the right of way when his inability to know and act is chargeable to the lawless conduct of him who claims it.

Respondent claims that if this court rules that

Kanon, through his violation of law, thereby lost his right of way, then it would have to hold that Adamson could run him down at will or that Adamson could take the right of way from Kanon. This does not follow at all. Taking a preferential right from Kanon would not give it to Adamson; it would leave both parties under their common law duty to exercise care.

In *Logan v. Schjeldahl*, supra, the court phrased this as follows:

“This does not mean, however, that the driver who thus loses his right of way becomes a trespasser on the highway, neither does it mean that the right of way so lost is conferred upon the driver of another car.”

Of course Adamson could not run Kanon down if he saw him, but neither could the court tell the jury that Kanon had the right of way and that because Adamson failed to yield this right of way he could be found guilty of violating the law and therefore criminally negligent. The district attorney argued the right of way before the jury. We have no way of knowing that this part of the instruction was not the basis of the verdict. The giving of the instruction on the right of way constituted a reversible error. Let us remember that Kanon's violation of law was in two serious particulars, either one of which may have been the proximate cause of

the accident: his riding without a light on his bicycle in the dark made his presence unknown; his riding on the inside lane of traffic placed him where he could not have been expected. Respondent contends that since there is no curb in the intersection, Kanon was not required to turn his vehicle to the northeast to follow the pedestrian lane. Such an interpretation of the ordinance would permit Kanon to ride straight out from the curb line south of Ninth South Street and after he had crossed the intersection suddenly find himself with a duty of making a right angle turn in the face of north-bound traffic in the righthand lane in order to approach the curb where the ordinance required him to be. The ordinance provides that bicycles shall drive as closely as practicable to the righthand *edge* or *curb*. Obviously it contemplates the turn by the bicycle at Ninth South Street toward the east so as to continue its course to approach the righthand edge and curb on the northeast corner.

Respondent claims that the balance of the right of way statute was properly left off because there was no evidence that the defendant gave a signal. We submit that this requirement would shift the burden of proof, particularly as the requirement of signaling for a left turn would not be pertinent to Kanon, the driver of the vehicle from the opposite direction.

2. *Refusal to Instruct on the Conduct of the Deceased as the Proximate Cause of the Accident.*  
(*Par. (b) of Respondent's Brief*).

In its discussion of appellant's argument that the jury were deprived of proper instruction on the deceased's conduct being the proximate cause of the accident, respondent's brief cites a number of cases which hold that contributory negligence is not a defense in a manslaughter action. We take no issue with that point. The jury were not entitled to an instruction that the contributory negligence of the deceased would bar conviction of the defendant. They were entitled, however, to the requested instructions on the conduct of the deceased as the proximate cause of the accident. If Kanon's illegally riding without a light in the darkness was the cause of Adamson's failure to see him, it, and not any negligence of Adamson, was the cause of the accident, and the jury were entitled to pass on that point. If Kanon's illegally being in the middle of the road was the cause of the accident or combined with not having a headlight as the cause of the accident, the jury were entitled to determine that point. And the court's refusal to instruct them on Kanon's specific conduct as the proximate cause of the accident was prejudicial to the defendant's rights to a fair trial.



In respondent's discussion of the requested Instruction No. 15 on page 27 it does not state the grounds of the objection to the sentence: "You are instructed that a driver may presume that others in the road will conduct themselves in a lawful manner," except to state that it is improper, citing *State v. Campbell*, 82 Conn. 671, 74 Atl. 927. This case does not rule on the question presented; the instruction there refused stated that the State must prove that the deceased's own negligence was not the proximate cause of the injury.

Respondent also cites *Blackford v. Kaplan*, 135 Ohio St. 268, 20 N. E. (2d) 522. In this case, it is true, the refusal of a requested instruction similar to the first sentence of requested Instruction No. 15 was held proper. That instruction was:

"You are instructed that every person in the lawful use of the highways in this state has the right to assume that every other person using the said highways will do so in a lawful manner."

The only reason given for such a holding was that it was incomplete in that it did not contain the words: "In the absence of notice or knowledge to the contrary", or similar language. If there was evidence in that case that the defendant had notice of the plaintiff's unlawful act, the objection would be valid, otherwise, the decision is against the general rule. The only authority cited



by the Ohio court on that point was the eighth paragraph of the syllabus of *Swoboda v. Brown*, 129 Ohio St. 512, 196 N. E. 274, a case which did not involve the question. The text of the case stated the law and approved the inclusion of notice in the instruction, but did not pass on its exclusion:

“No fault may be ascribed to failure to anticipate negligence of another. On the contrary, one may rightfully assume the observance of the law and the exercise of ordinary care by others until the contrary is made to appear. Action in accordance with such presumptions, in the absence of notice or knowledge to the contrary, is not negligence. *Norris, Ex’x v. Jones, Rec’r.* 110 Ohio St. 598, 144 N. E. 274. Hence there was no error in the requested instructions embodying that principle.”

In *Heg v. Mullen*, 115 Wash. 252, 197 P. 51, the court points out that where the evidence shows actual notice of the other party’s violation of law, the right to presume that the other is observing it ceases to exist. The instruction there was as follows:

“ ‘You are instructed that persons upon the public highway, as were the plaintiffs at the time of the collision, had the right to presume that the defendant, in the operation of the said automobile, would comply with the statute pertaining thereto. \* \* \* ’ ”

The court said :

“*While this instruction states the law correctly as a general proposition*, it was incorrect as applied to the facts of this case as testified to by the respondents. It will be remembered that they testified that when they were making the turn at the intersection of the road they saw the appellant’s car coming at the rate of 45 or 50 miles an hour. Under these circumstances it would be incorrect to instruct that the respondents had a right to assume that the appellant was obeying the law.” (Italics ours)

In *Harris v. Johnson*, 174 Cal. 55, 161 P. 1155, L. R. A. 1917 C, 477, the court said :

“ ‘The general rule is that every person has a right to presume that every other person will perform his duty and obey the law; and in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person.’ 29 Cyc. 516; *Meffin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078. Such person must of course, himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time. The plaintiff had the right to assume that the defendant’s automobile, or any other vehicle coming westerly on Seventh street, would confine its travel to the righthand side of the street, as provided in the ordinance aforesaid, unless and until, in the reasonably careful use of her faculties, she had reasonable cause to believe otherwise.”

And in *Ferguson v. Reynolds*, 52 Utah 583, 176 P. 267, this court is on record against respondent's contention. The instruction there approved was as follows:

“‘You are further instructed that a street sweeper or a pedestrian who undertakes to use the street in the line of his employment where it is frequently used by automobiles or other vehicles, has the right without looking and listening to presume that drivers of automobiles are observing the law, and they will so reduce or gauge their speed and are so conducting themselves so as to meet the obligations which circumstances demand of them at such places.’”

The court said:

“The instruction, in effect, merely informed the jury that the plaintiff had a right to assume that the driver of the automobile would exercise ordinary care in driving the car. This certainly is the law everywhere. No one using a public street or being lawfully thereon is required to assume otherwise than that all persons using the same will exercise ordinary care in doing so and will not expose any one on the street to unnecessary danger.”

At the oral argument it was suggested that the doctrine of *Dalley v. Mid-Western Dairy Products Company*, 80 Utah 331, 15 P. (2d) 309, has overruled the *Ferguson* case and is a committal by this court against the general ruling set forth in the preceding cases. We

respectfully submit that this is not so. The *Dalley* case did involve the driving of an automobile into a truck illegally parked on the highway and the case held that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway used by vehicles and pedestrians at such a rate of speed that the said automobile can not be stopped within the distance at which the operator of the said car is able to see objects on the highway in front of him. To this extent, as applied to civil negligence, it may be a limitation upon the general rule that one has a right to presume that others will obey the law. But the doctrine of "the assured distance ahead" has taken a direction peculiar and distinct in itself. The *Dalley* case has gone farther than any of the Utah cases on the point, and later cases have limited its application rather than extended it. Both *Moss v. Christensen-Gardner*, 98 Utah 253, 98 P. (2d) 363, and *Nielsen v. Watanabe*, 90 Utah 401, 62 P. (2) 117, show that a driver need not at all times be on his guard against one illegally on the highway. We submit that whatever limitations the *Dalley* case places on the general rule, they should not be extended.

It is significant that two of the states in the foregoing opinions, Ohio and Washington, which approved the general rule in the cases heretofore cited had prior to rendering those decisions already approved the "as-

sured clear distance ahead'' rule. *Werner v. Rowley*, 129 Ohio St. 15, 193 N. E. 623; *Ebling v. Nielson*, 109 Wash. 355, 186 P. 887.

In *Olson v. Denver & R. G. W. R. Company*, 98 Utah 208, 98 P. (2d) 944, this court held that when a railroad company is using its right of way in a careful and lawful manner, it has a right to presume that motorists on crossing streets will proceed lawfully and carefully and will drive with their cars in such control as to be able to stop within the distance at which they can see objects ahead.

Let us remember, too, that we are dealing in the case at bar with the definition of criminal negligence. We submit that the words of Mr. Justice Larson in his dissenting opinion in *Moss v. Christensen-Gardner*, *supra*, are applicable in the case at bar :

“But when one is unlawfully upon the highway, is making an unlawful use of the highway, he should not be permitted to impose upon another making a lawful use thereof the duty of protecting him in his unlawful use. To a wrongdoer the driver owes only the duty of not wilfully injuring him or his property. Since the wrongdoer is not lawfully upon the highway the driver is not charged with anticipating his presence there and is not impressed with the duty of protecting him to the same extent as he owes to one making lawful use of the highway.”

The court committed error in refusing to give requested instruction No. 15 so that the jury could properly arrive at a definition of criminal negligence.

Respondent also objects that requested Instruction No. 15 was too general in not informing the jury what unlawful conduct of the deceased would bring about such results, citing *Blackford v. Kaplan*, supra. In that case the instruction read:

“ ‘Right of way’ means the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction it is moving in preference to another vehicle approaching from a different direction into its path. You are therefore instructed that if you find that the defendant in approaching or entering the intersection where the collision in this case took place was not proceeding in a lawful manner, he therefore did not enjoy any preferential status or privilege over the driver of the other car which the statutes of Ohio might have otherwise given him.”

The court said of that requested instruction:

“This request is objectionable for the reason that it does not explain what acts would be unlawful and work a forfeiture of the preferential right; it should not be left to the jury to determine what was or was not lawful and in accord with the statutes. *The explanation, however, might well be given in other instructions by the court; but the record does not show such an explanation was anywhere made so as to clarify the request.*” (Italics ours.)

This instruction would have been good if other instructions had clarified what the unlawful act was. In the case at bar, defendant's requested instructions Nos. 12, 13, 18, and 20 clearly set forth to the jury what Kanon's unlawful acts were.

When respondent, in attempting to defend the refusal to give defendant's requested instructions Nos. 20 and 21 says that there was no evidence to justify these instructions because Kanon was as close to the righthand curb as was practicable, as long as there was a curb where he was riding, respondent does not face the fact that Kanon was riding straight out in the direction in which he had been riding and did not turn east to follow the pedestrian lane (Tr. 89). His course would immediately throw him into the center lane of traffic (Tr. 33). The officers' measurements also indicate this clear course of the deceased (Exhibit "B"). To say that Kanon was not violating the ordinance because there was no curb in the intersection is specious. At the time of the collision he was already out in the road and headed straight on a line which was more than 22 feet from the east curb of Second West street south of Ninth South. There was a clear violation of law.

Respondent urges that in Instruction 7A the court sufficiently instructed the jury as to the conduct of the



deceased. In that instruction the court told the jury to consider the conduct of the deceased, but in no way detailed any of that conduct or told the jury that the deceased's conduct was unlawful. The court refused to do this when it refused to give the instructions relating to the failure of Kanon to have a light on his bicycle and his not being on the extreme righthand edge of the road. This has nothing to do with the question of the deceased's contributory negligence that the respondent argues about at length on pages 31 *et seq.* The jury must be told that the conduct of the deceased was illegal before the jury can properly determine whether or not the defendant was negligent in failing to see Sylvester Kanon. It is possible that the whole question of guilt of the defendant because of failure to keep a lookout depended upon the jury's knowledge that Kanon's acts were unlawful. This is why it was so essential that these instructions be given.

3. *The Burden of Proof Was Cast on the Defendant by the Giving of Instruction No. 7A. (Part (c) of Respondent's Brief).*

Counsel submitted that appellant can not take advantage of the court's adding the last sentence in its Instruction No. 7A, because exception was taken to the whole instruction and not to the last part only. Respon-



dent properly points out that the reason for requiring exceptions to parts of an instruction when any of the instruction is good, is to point out specifically to the court the error it makes in any part of the instruction. We submit that the manner of taking this exception to Instruction No. 7A brings it within the reason and the rule. In defendant's requested instruction No. 9 defendant requested what became the first sentence of Instruction No. 7A. The court on its own volition added the second sentence. Clearly the court could not presume, when defendant excepted to Instruction No. 7A, that he was excepting to that part of the charge he had already requested. The exception therefore went to the second part.

## CONCLUSION

We submit that the state did not prove any violation of the law by the defendant and that on the meager proof adduced the case should have been dismissed. In *State v. Chealey*, ..... Utah ....., 116 P. (2d) 377, this court said, referring to that defendant:

“Aside from the naked facts that the defendant drove his auto-truck off the right hand side of the highway—the side upon which he was lawfully driving, there is no evidence as to carelessness or heedlessness;—none as to doing so in wilful or wanton disregard for the safety of

others. Turning off on the right hand side of the road might have been the result of a temporary diversion of attention to which all persons are at times subject, or falling asleep, or the approach of another car in the defendant's lane of the highway as maintained by him. The point is that the state made no attempt to explain any reason of circumstance or condition or cause other than the turning of the auto-truck off the highway. No attempt was made by the state to show that any person upon the highway was endangered. Explanations by reasoning back from results with no place to land are not helpful. They lead to speculations only.''

In the principal case likewise there is nothing to show that carelessness and heedlessness in wilful or wanton disregard for the safety of others which must be found to sustain this conviction of manslaughter. The State's whole case rests upon the fact that there was a collision. We submit that none of the other evidence upon which respondent's brief tries to weave a case in any way shows recklessness on the part of the defendant.

Even if there had been evidence from which the jury might have found recklessness, the court deprived the defendant of the right to have the jury ascertain the facts. It kept from them the fact that the deceased's conduct was unlawful. Finally, it presented to the jury

as a possible basis of conviction an alleged failure on the defendant's part to yield the right of way when the right of way was non-existent.

Respectfully submitted,

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