

1949

## Robert E. Manning v. James M. Powers : Brief of Respondent

Utah Supreme Court

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Stewart, Cannon & Hanson; E. F. Baldwin, Jr.; Attorneys for Defendant and Respondent;

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### Recommended Citation

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IN THE SUPREME COURT  
of the State of Utah

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ROBERT E. MANNING,

*Plaintiff and Appellant,*

VS.

JAMES M. POWERS,

*Defendant and Respondent.*

Case No. 7276

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RESPONDENT'S BRIEF

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**FILED**

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STEWART, CANNON & HANSON  
E. F. BALDWIN, JR.

*Attorneys for Defendant and  
Respondent*

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# In the Supreme Court of the State of Utah

ROBERT E. MANNING,

*Plaintiff and Appellant,*

vs.

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*Defendant and Respondent.*

Case No. 7276

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## RESPONDENT'S BRIEF

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### OPENING STATEMENT

Appellant's opening statement in the form of "Questions Presented" is so obviously calculated to incite prejudice and sympathy as to suggest an effort to confuse the evidence and issues. We cannot accept the conclusions of counsel as *fact* or as *any evidence of the facts*.

Appellant's comment that "defendant's testimony is disproven not only by the physical facts, but by all eye witnesses to the accident" is as unfounded as the false theory that counsel attempted to put over to the jury, namely: that defendant ran deceased down by striking the rear of the bicycle as it was headed down the street in a general southerly direction.

The jury after hearing all the evidence saw the fallacy of appellant's theory and returned a unanimous verdict of no cause of action. Therefore, this court is not required to take that view of the evidence which is most favorable to appellant (which appellant takes for granted) because if the verdict is sustained by the evidence, the judgment should be affirmed.

Because of the distorted picture painted by counsel, we have hereafter summarized the testimony of each witness and *physical evidence*, which proves the inconsistency of plaintiff's claims.

### **No Dispute as to the Course of Travel of the Bicycle Before It Suddenly Turned**

There was no dispute in the pleadings or the evidence that the Manning boy just prior to the accident was traveling south in the west edge of the pavement or a few inches on the shoulder. Plaintiff so alleged and proved. (Tr. 1).

### **Sole Disputed Fact**

The sole dispute arose by reason of plaintiff's allegations that defendant was traveling south *in the most westerly lane* and ran down the boy, striking the rear fender of the bicycle with the right front of his car, whereas defendant contends he, defendant, was traveling *in the lane of traffic next to the center of the highway*, and that the Manning boy suddenly and without any warning or signal turned directly into the right front fender of defendant's car.

As the sole basis for proving his contention, counsel for plaintiff at the trial produced the bicycle, which had a dent in the rear fender and which counsel claimed could only have been caused by contact with the front of defendant's car. All the physical evidence demonstrates the fallacy of that theory.

## **FACTS AND EVIDENCE**

The accident occurred October 6, 1947, a few minutes after 8:40 A.M. on Second West Street between Sixth and Seventh South Streets in Salt Lake City. It was clear and dry, Second West being a paved four lane through or arterial highway with wide gravel shoulders. The regulated speed was 35 m.p.h. (Tr. 205-6). There was a traffic light at 6th South; then none until 9th South. There was no one on the street other than defendant and Robert Manning.

### **Defendant's Testimony**

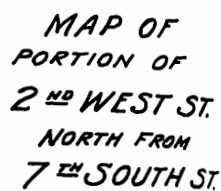
Defendant, James W. Powers, a salesman residing at Brigham City, Utah, testified he was driving his 1946 Nash sedan south on Second West. He had stopped for the red light at Sixth South (Tr. 214); then proceeded south in the lane of traffic next west of the center line (Tr. 214). As he proceeded south, he observed the Manning boy coming out from the west side of the street (from one of the driveways about in the middle of the block) (Tr. 324) and watched him turn south ahead of him on Second West, the boy heading south on his bicycle along the extreme west edge of the concrete, possibly six inches onto the shoulder or possibly six inches on the con-

crete (Tr. 216.) When he, Manning, came out of the driveway, he turned onto the highway, making the usual curve and continuing in a southerly direction along the edge of the highway. As he did so, he, defendant, was approximately 60 or 70 feet back of the boy (Tr. 325). They both proceeded directly south in a parallel direction (there being one lane for traffic between them), the car moving ahead a little faster than the bicycle. When defendant's car was nearly parallel with the bicycle, or possibly the length of the car behind (Tr. 216), the Manning boy suddenly and without warning turned abruptly toward the east side of the street and into the right front of defendant's car (Tr. 215-17). The front wheel of the bicycle struck the front fender of the car (Tr. 216). To avoid the accident, defendant himself turned toward the east and applied his brakes (Tr. 216). After the impact, he momentarily released his brakes to keep out of the way of northbound traffic, and stopped east of the paved portion on Second West (Tr. 216). He testified deceased gave no signal and he, defendant, saw no reason for the boy making a turn until he commenced to turn. The bicycle was at no time in front of defendant's car (Tr. 216). Defendant estimated his own speed at twenty-five to thirty miles per hour. It was a thirty-five mile zone.

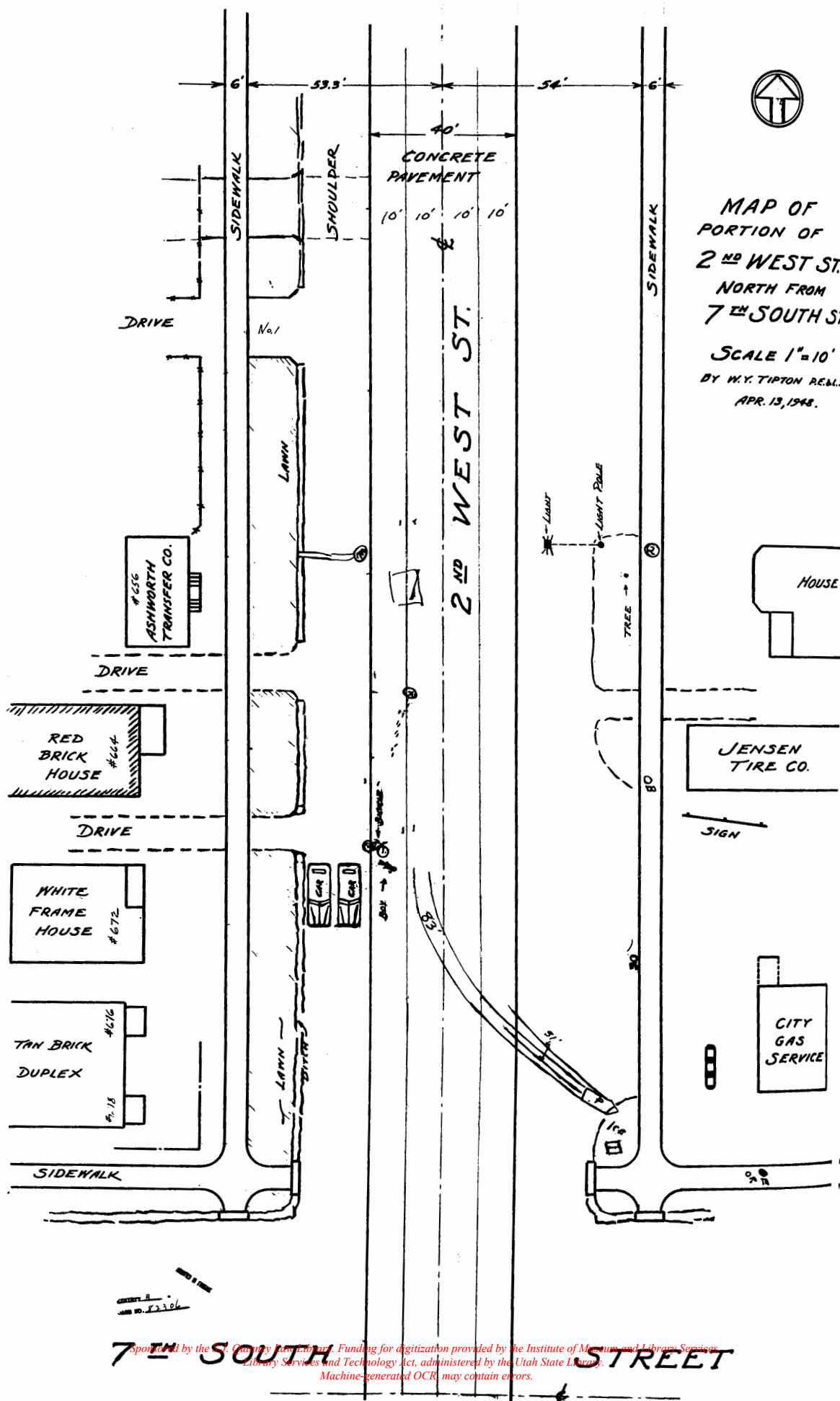
### **Physical Evidence**

As appellant claims defendant's testimony is disproven by the physical facts, and as most of the witnesses testified with reference to the map, we have inserted herein a copy of the relevant portion of the map, Plaintiff's Exhibit A (the original, but not the inserted map

being to the scale of one inch equals ten feet). During the final part of the trial, it was necessary for defendant to recall Mr. Tipton, the engineer who prepared the map, to explain that it showed only one-half or approximately 320 feet of the south one-half of the block, showing Seventh South, but not Sixth South (Tr. 338-40).



SCALE 1"=10'  
BY W.Y. TIPTON P.E.&L.S.  
APR. 13, 1948.



### Point of Impact

The lanes for traffic were ten feet in width (Tr. 248). The investigating officers determined the point of impact as being at the spot marked "X", being 12 *feet east from the west edge of the pavement* and 143 feet north of the north curb on Seventh South. At that point, "there was a real small black mark indicating rubber or something sliding along the pavement for maybe six inches; and then a series of scratches and digs in the pavement leading off to the side of the road (Tr. 248-9, 132).

### Tire Marks

The tire marks made by defendant's car commenced *in the middle of the lane of traffic next to the center line, 30 feet south of the point of impact or point marked "X"* on the diagram (Tr. 252, 132). Officer Sparks explained that in drawing the tire marks on the diagram and in his original notes, he had not drawn them to scale, but they were free hand (Tr. 262-3). It should be observed, therefore, that according to the scale of the map, the tire marks would have shown up in the middle of the lane of traffic next west of the center line three inches south of the point of impact, marked "X", which would be one and a half to two inches north from where he actually placed them on the diagram, plaintiff's exhibit A.

### Marks on Car and Bicycle

The pictures, Plaintiff's Exhibit C and D, show the small dent just to the right of the right headlight where the front fender of the bicycle scraped the car, and both pictures show the large dent in the side on the right front

door and the marks and scratches toward and in the running board (Tr. 256-7). Exhibit C shows a bend in the lower part of the rear fender. There was also "dust—disturbed on the right front fender running back toward the back end of the fender (Tr. 257). In addition to the large dent on the right front door, the door handle was bent into an upward position (Tr. 257). See Exhibit D.

The bicycle, Plaintiff's Exhibit B, had two substantial dents, one on the left side of the front fender, which had been bent in against the front wheel, that is, into the tire to such extent that it was necessary for Officer Sparks to pull the fender out back into position so the wheel would turn (Tr. 358). The same fender had also been torn loose from its attachment on the frame (Tr. 257). *See the picture; Defendant's Exhibit 3.* The other mark was the indentation or crease on the back of the rear fender hereinafter mentioned.

### **Position of Body and Bicycle**

The boy was lying in the center of the west lane and the bicycle just north of him, substantially as illustrated on the diagram, except his head was pointing in a north-westerly direction, his head being six feet from the west edge of the pavement (Tr. 250, 200) and thirty-five feet south from the point of impact (Tr. 251). Exhibit 4 shows blood stains where the blood ran toward the west (Tr. 351-2). An "X" was marked on that exhibit by Officer Sparks showing where the head was lying on the pavement. Manning's lunch which he had held in his right hand was scattered along the edge of the road (Tr. 269-71).

These undisputed physical facts establish the position of defendant's automobile as being in the lane of traffic next to the center line and indicate the manner in which the bicycle and rider, after striking the front fender on an angle, came into contact with the side of the car. The large dent and the damaged door handle are the only explanation of how deceased met his death, by reason of the skull fracture and depression in the rear of deceased's head, described by Dr. Jack Cox as being the most probable cause of instantaneous death. (Tr. 121).

### Plaintiff's Claim

In offering the bicycle as an exhibit (Plaintiff's Exhibit 2), counsel pointed out the dent in the rear fender claimed to be the point of impact as between the right front fender of defendant's car and the bicycle. To so presume, however, ignores the dent on the left side of the front fender (See the bicycle, Plaintiff's Exhibits and the picture. Defendant's Exhibit 3), obviously made when it first came in contact with the car, sliding along the right side of the car. *Viewing all the evidence, it is clear the diagonal crease in the rear fender of the bicycle could not have been caused by the mark or dent just to the right of the right headlight of defendant's car.* Nor is appellant's claim that there was some slight red paint brushed into the dent any proof when both the car and bicycle were painted red. In order to believe appellant's theory, one would have to ignore all the physical facts and further indulge in the wildest kind of speculation as to how the dent in the fender of defendant's car could

have caused the angular dent in the rear fender of the bicycle.

### Plaintiff's Witnesses

The only witnesses called by plaintiff were Ulrich Stark, an elderly farmer from Freedom, Sanpete County, who had not disclosed his presence, nor given his name to the investigating officers at the time of the accident (Tr. 186) and LeRoy Iverson, one of the three investigating officers, who was only called in an effort to prove speed based on tire marks.

### Ulrich Stark

Ulrich Stark, visiting here for October Conference (Tr. 176), said that he was walking casually south on the east sidewalk between Sixth and Seventh South (Tr. 177) standing east of the light pole at the place marked 2 on the map (Tr. 188). He testified to having seen the Manning boy riding his bicycle south on the west side of the street next to the pavement (Tr. 178). In first describing the accident, he testified:

“Q. At that time, what did you see about an automobile on that street?

A. Well, the boy was ahead and the automobile came right behind it, and the *first thing I know, the boy was laying down on the pavement.*” (Tr. 179)

Immediately thereafter, while counsel by leading got the witness to conclude that the automobile was in the west lane and coming along behind struck the bicycle (Tr. 79) that testimony was entirely negatived by the later testi-

mony coming out on both direct and cross examination.  
We quote:

On direct examination:

“Q. What was the thing that first attracted your attention to the accident?

A. Well, I was coming down the road and this bike here, then the automobile, then *I heard the screech of the car, and the crash.*” (Tr. 184)

On cross examination:

“Q. Did you have a clear view of the boy on the bicycle just before the accident occurred?

A. No. I just seen him, that was all. It was done so quick I didn't know which was which.

Q. *You had a clear view of him, and you didn't see him again until you saw him laying on the pavement?*

A. *That is right.*

Q. *Did you see either he or the bicycle moving on the pavement, after you saw him riding it.*

A. *No sir.*

Q. When you observed the boy, did you observe whether or not he was carrying anything in either hand as he rode the bicycle?

A. I never noticed at all.” (Tr. 187)

It is easy to appreciate that from where elderly Mr. Stark was walking, having no idea an accident would occur, he could not place the exact respective positions of the bicycle and car. His testimony insofar as it tends

to prove plaintiff's theory is certainly refuted by the physical facts and his own admissions on cross examination, confirming his original statement that he saw the boy on the bicycle but "*didn't see him again until he was lying on the pavement.*"

Stark's testimony could not be considered any stronger than as shown on cross examination. *Porter v. Hunter*, 60 Utah 222, 207 Pac. 153; *Edwards v. Clark*, 96 Utah 121, 83 Pac. (2d) 1021.

### Officer Iverson

Leroy Iverson said he was assisted in his investigation by Officers Atkins and Sparks (Tr. 125). He described the dent in the right fender and door and the brush marks along the door as shown in the pictures (Plaintiff's Exhibits C and D) (Tr. 126). He identified the bicycle pointing out the dent in the front and rear fenders (Tr. 129), and placed the position of the body as drawn on the diagram (Tr. 130).

In connection with the tire marks, he described them as heading in a southeasterly direction "on an arch-way, arced." (Tr. 130.) At the beginning they were *very slight*. As they went on toward the southeast they darkened up. There was some debris in the street one hundred forty-three feet north of Seventh South and thirty feet north of the north end of the tire marks. The actual tire marks started about thirty feet south of the debris, running eighty-three feet on the pavement and thirty feet into the gravel (Tr. 132).

When asked his opinion as to speed before answering on voir dire, Officer Iverson testified there were only two tire marks at the beginning or north end; that four tire marks commenced sixty feet beyond or near the east edge of the pavement (See map) (Tr. 137). From where the four tire marks commenced, the marks were black and deep into the gravel leading up to the rear of defendant's car (Tr. 137-8). The light tire marks indicated the brakes had not been fully applied until near the edge of the pavement (sixty feet from the point of commencement) (Tr. 137-8). So that at least two wheels had not been causing any friction for the first sixty feet (Tr. 138). The tire marks were of different widths (Tr. 138). The solid brake or tire marks extended thirty feet in the gravel (Tr. 139). The fact that defendant's car was turning or skidding would have a bearing on his, Iverson's calculation of speed (Tr. 141), and the fact that the car was turning or skidding would itself cause some visible imprint depending on the speed (Tr. 141). In his experience, he, Officer Iverson, had made no actual tests where the car was turning as defendant's car was turning (Tr. 142). With this uncertain background and over defendant's objection that the circumstances were not proved with any certainty, and that the witness was not qualified in view of the speculative evidence (Tr. 144), he attempted to place defendant's speed at forty to forty-five miles per hour (Tr. 144). That he did not understand the engineering formula for calculating speed is evident when he held up the trial being wholly unable to explain the formula or figures (Tr. 151-2). S.

S. Taylor, a qualified engineer, later, explained why.

As to the scene of the accident, Iverson identified the pictures (Defendant's Exhibits 1, 2, 3 and 4) as representing the scene of the accident existing when the accident occurred (Tr. 146).

Defendant's Exhibit 1 shows on the right side of the picture, the rear end of defendant's car where it stopped; also the brake marks from the rear of the car to where they left the pavement. The marks did not show up very well on the pavement (Tr. 146-8). (See Spark's testimony to the same effect Tr. 265).

Defendant's Exhibit 2 shows Second West looking south. In the picture, Iverson testified that the ordinary tire marks in the picture (*not caused by defendant's car*) show up rather clearly and do not indicate speed on the part of the vehicle involved (Tr. 149-50). While other marks were readily observable in the pictures, it is significant that in none of the pictures referred to (Defendant's Exhibits 1, 2 and 3) are tire marks from defendant's car visible with any degree of certainty. The only ones definitely shown are in the gravel on Defendant's Exhibit 1, directly back of defendant's car (Tr. 149-50).

### **Manning Boy**

Plaintiff offered evidence that the Manning boy was eleven years of age, in the sixth grade, bright and above average intelligence (Tr. 155). He was a member of and a sergeant in the junior traffic boys or junior service organization at school. Only the most dependable and reliable boys were selected for this work, which required

Manning before school hours to go from corner to corner to check the other traffic boys located at four designated intersections to see that they were present and performing their duties. Robert used his bicycle in doing this work (Tr. 153). He was assigned to check the corners west of West Temple Street, including the intersection at Seventh South and Second West (Tr. 154). School started at 9:00 a.m. (Tr. 155). At school he had been taught safety rules and instructed by demonstrations and an illustrated movie film "Bicycling with Safety" on all the rules of riding a bicycle, the proper way to signal, the proper side of the street, and other traffic rules and regulations (Tr. 156). He was familiar and well versed in those rules (Tr. 156).

At the time of the accident, there were four friends or school chums of Robert Manning on or near the northeast corner of the intersection. Raymond Hubbard and Tommie Monahan, members of the school traffic patrol, had been patrolling the traffic on the north side of the intersection and were expecting Robert Manning that morning to check them at the intersection before continuing on to school. Eddie Monahan was with these boys. Just before the accident occurred, the fourth boy, Robert or Bobbie Barnett, seeing Robert Manning riding south on the west edge of the highway (at the place marked O.B. on the map in front of Jensen Tire Co.) shouted: "Here comes Bob" and/or "Well, if it isn't Manning." (Tr. 119, 289). At that instant the Manning boy suddenly turned toward the east across the highway toward his friends coming into collision with defendant's car.

At the trial, plaintiff's counsel did not call any of these boys to tell the facts of the accident, except to permit Eddie Monahan to describe the position of the bicycle after the accident occurred (Tr. 112), and that he thereafter moved the bicycle leaning it against a parked car and later riding it to the Manning residence (Tr. 113-14), objecting to high heaven when an effort was made to cross examine the witness about the accident and the fact that he was expecting to meet deceased that morning. The court did finally permit him to testify as to his position on the north sidewalk of Seventh South on the northeast corner just south of the service station where he marked it OE (Tr. 117) with Raymond Hubbard (Tr. 118), and Tommie Monahan (his brother) (Tr. 118-9).

### **Defendant's Witnesses**

In addition to defendant himself, defendant called Officers Atkins and Sparks, the two investigation officers, the four boy friends of Robert Manning, who were standing on or near the northeast corner of the intersection, and S. S. Taylor, an expert on speed.

### **Investigating Officers**

Officers Atkins and Sparks explained that they got to the scene of the accident within four minutes after receiving the radio call (Tr. 198), and upon arrival, seeing the boy had not survived, commenced to make the usual fatality investigation, making a special effort to get full and complete statements from all witnesses and all

possible physical evidence, using a steel tape for accuracy (Tr. 200-1).

Officer Atkins proceeded to get the names of witnesses and get statements, including those of Bobbie Barnett and Eddie Monahan, who sat in the back of his car (Tr. 201, 205), while Officer Sparks investigated the physical evidence (Tr. 248).

### W. S. Sparks

Sparks in addition to testifying to the physical evidence hereinabove outlined, further explained that the tire marks “were *very light marks*, to start out with. You could hardly see them on the pavement. Had to get the light just (Tr. 252) right on them to see them, and they went in a circular direction toward the south-east, and as they continued on they got heavier. There were only two (marks) to start out with, and they changed to four just before they got off the concrete.” The over-all length was 83 feet to the rear wheels of the car. The four wheel marks “started just before the car got off the concrete. They were 31 feet long.” He illustrated the marks by drawing them on the diagram (Plaintiff’s Exhibit A) (Tr. 253). He explained there was a difference between a brake mark that is laid down when the brake is locked and a tire mark that is made when a car (wheels) is turning. When a brake is locked, the marks it leaves on the surface are very heavy and black; and when a car is turning they are not near as wide, and they are not near as black or as easy to see. *He didn’t designate all 83 feet as tire marks.* He did

designate about 32 *feet of them as such* (Tr. 254), only part of the 32 feet being on the pavement (Tr. 255).

During his investigation, he tested defendant's car to get the maximum power out of it, and see if the brakes were good (Tr. 256). He drove it back to Sixth South and running it south on the highway, giving it all the power it had to get it up to forty miles per hour. At a point approximately 50 to 75 feet north of the point of impact he applied the brakes hard and stopped in 58 feet of real black, heavy tire marks on four wheels. In testing the car, he started out in low, got it up to about twenty miles per hour, then shifted into second and gave it all the gas it had. (Tr. 256).

### S. S. Taylor

Mr. Taylor, a qualified expert on traffic engineering, including the analysis of accidents and determining of speeds of vehicles based on braking distances (Tr. 326-7), explained the various formulas were used in computing speed (Tr. 327-8). He said that where the marks laid down were not of such a nature as to evidence a continuous locking or sliding of the tire, it would be impossible to determine speed based on any of the given formulas "without testing the particular car involved and first ascertaining the *percentage of braking first applied*." (Tr. 330). From the formulas ordinarily used, and in particular of the one used by Officer Iverson, with only 31 feet of definite brake marks, it would be impossible to accurately calculate the speed of defendant's car from the physical evidence. (Tr. 330-1-2). He further explained

that in making a turn the car would leave visible tire marks which could be seen and photographed even though the brakes may not have been applied or only partially applied. (Tr. 331-2). He further explained reaction time and that the average reaction time was about  $\frac{3}{4}$  of a second (Tr. 334).

### **Raymond Hubbard**

Raymond said he was eleven years, in the sixth grade, and resided at 339 West 6th South (Tr. 286-7). He had known Robert Manning during all of their school years. He was on the traffic patrol, servicing the intersection mentioned (Tr. 287). Robert Manning regularly checked the corner every morning, but had not as yet checked this particular day. Just before the accident, he was walking to school with Eddie and Tommie Monahan at the point marked OR on the diagram (being on the north sidewalk of Seventh South Street just east of the intersection) (Tr. 288). He said: "The only thing that attracted my attention to it was when Bobbie Barnett called to him." Bobbie Barnett was on his bicycle at the point designated OB, just west of the Jensen Tire Company on the east side of Second West Street. Bobbie called, "Well if it isn't Manning," and just then Eddie Monahan ran over to the corner (Tr. 289). He turned around and talked to say something to Tommie, but he saw the bicycle and car come together. He had first seen the defendant's car up the street about opposite the figure 2 (which was a short distance north of the point of impact). He thought the car was about in the middle of the two lanes, referring to the two west lanes.

“Q. What did Bobbie do as the car approached Robert Manning?

A. Well, he turned out to miss those two cars, *or he was going to come over to us, but he turned out in front of the car.*

Q. Did you see him turn out?

A. Yes. (Tr. 290).

Q. Did you observe whether or not he made any kind of signal before he turned?

A. I don't think he did.”

He saw the bicycle and car come together, but he was not sure what part of the bicycle struck what part of the car. Bobbie Manning was carrying his lunch in his right hand. After the accident, Eddie ran over to where the body was lying. He and Tommie later left for school. When Bobbie Barnett called, “If it isn't Manning” the accident had not then occurred. That was before the accident occurred (Tr. 291-2).

On cross-examination, he stated he wasn't paying much attention to the automobile. Whether it was in the center of one or the center of another of the particular lanes of traffic, he didn't pretend to state. He was looking more carefully at the Manning boy (Tr. 292). He had expected Robert Manning to check him that morning before school (Tr. 293). Before Robert Manning turned, he was headed due south. When he turned, he went in a southeast direction (Tr. 294).

### **Tommie Monahan**

Tommie was Eddie's brother and was in the sixth grade, residing at 335 West 6th South (Tr. 311). He was standing with Raymond Hubbard and Eddie Mona-

han. The first thing that attracted his attention to Robert Manning was *Bobbie Barnett calling to him*. Manning was just waving at Bobbie and then “started turning.” Then the car hit him. He could not describe the point of contact. Before Manning turned, he was going south (Tr. 312). After he turned he was going southeast, turning over into the direction where they were standing. “I don’t think he signalled, but if he did, I didn’t see him.” He was watching him until the accident happened. He didn’t see the car until it occurred. He didn’t have any opinion as to the speed of the car, other than “it was going about as fast as all the other cars along there go.” (Tr. 313).

On cross examination, he refused to state that the automobile hit the back of the bicycle. He did see Bobbie Manning riding right along on the shoulder toward the parked cars on the shoulder (Tr. 316). “I just saw him turn—then there was a crash.” (Tr. 317). After the accident he didn’t see any cars move away from the scene. The cars that were there just remained right there, and the bicycle was placed leaning against the outside car. (Tr. 318).

### **Robert Barnett**

Robert Barnett testified he was riding his bicycle north on the east side of the street at about the point marked OB on the diagram. He first saw Robert Manning riding his bicycle on the shoulder south on Second West in front of Ashworth Transfer Company (marked on the diagram). He was going straight on (Tr. 296,

299). When he saw Robert Manning, he “hollered to him, ‘Oh, no, if it isn’t Manning.’ (Tr. 296). He (Manning) waved at me with his left hand; then put his hand back on his handlebars.” He did not see Manning make any signal. After the impact he got off his bike and ran over to Robert, who was lying about in the position shown on the diagram (Tr. 297). He didn’t know how far the car was on the pavement (Tr. 300). His impression of it was that part of the car was on the outside lane and part of it was on the inside lane. Both “kept on going right along there—until he (Manning) turned out.” (Tr. 301). He *did not tell* Attorney Willard Hanson (when they visited the scene of the accident) “that the automobile was right behind the bicycle.” *What he meant was that the bicycle was right on the edge of the edge of the road* (Tr. 302).

While this witness on cross examination was finally led to say that the automobile had hit the rear of the bicycle (Tr. 307), this was only when this immature witness was confronted with a signed statement obtained by Attorney Willard Hanson from the boy at his home, couched in counsel’s own language (Tr. 305-7). When an effort was made by defendant to show surprise based on what Robert Barnett had said in his original statement to the police officers, defendant was prevented from using the statement by reason of counsel’s objections that it was an effort to impeach defendant’s own witness. (Tr. 309-11).

### **Eddie Monahan**

Eddie Monahan, walking with his brother and Ray-

mond Hubbard, saw Robert Manning riding south on the west edge of the highway—west edge of the concrete. He heard Bobbie holler to him and saw Bobbie Manning turn without signalling and the car and bicycle coming together. He had no opinion as to the speed of the car (Tr. 278-9). He thought the car was traveling between the two west lanes of traffic just before the accident (Tr. 281). When he saw the car and bicycle, the car was a little ahead of the bike. The bike was west of the automobile. They weren't very close. He "knew Bobbie turned," but he didn't know whereabouts in there." (Tr. 284).

## **QUESTIONS FOR REVIEW**

Appellant has made six assignments of error which can be divided into two groups, namely:

1. Is the verdict supported by the evidence?
2. Was there prejudicial error in the instructions to the jury?

## **ARGUMENT**

### **APPELLANT'S ASSIGNMENT OF ERROR NO. I THE VERDICT WAS MORE THAN SUSTAINED BY THE EVIDENCE**

While most of the eye witnesses were boys, friends of deceased, there is no real or substantial inconsistency with their testimony and the testimony of defendant. Inasmuch as plaintiff did not call these boys as witnesses, defendant was obligated, or at least justified in so doing, although he was thereby precluded from showing their original statements as given to the investigating officers

just after the accident occurred. Practically the only variance in their testimony as compared with that of defendant was that they placed defendant's car as being straddle the two lanes of traffic. However, the *physical facts* establish defendant's position in the lane of traffic next to the center of the highway. The boys were not certain as to the exact position of the car and from where they were could not too accurately judge.

We have reviewed the testimony of all the witnesses and called particular attention to the *physical evidence* to show that appellant's claim that the verdict is not sustained by the evidence is not well taken. Rather the physical evidence viewed in the light of all the testimony corroborates defendant's version and establishes the proximate cause of the accident as being the negligence of Robert Manning in suddenly turning from a direct course on the edge of the pavement or shoulder *across a lane of traffic* and immediately into defendant's right front fender. The evidence not only sustains the verdict, but no other conclusion is reasonable under all of the evidence.

In *Richards v. Palace Laundry*, 55 Utah 409, 186 Pac. 439, plaintiff was riding a bicycle north on State Street. To keep out of the way of an automobile coming from behind, plaintiff turned his bicycle to the west and in so doing, one of the bicycle wheels went into a depression or "groove" in the rail of a street car track, causing the bicycle to fall, plaintiff falling on the west side of the highway about twenty or thirty feet in front

of defendant's truck approaching from the north at nine to fifteen miles per hour. Plaintiff's foot was crushed by the truck. The court held there was no evidence that the driver of defendant's truck saw plaintiff fall in front of the truck in time to have stopped before passing over his foot. A non-suit was sustained on appeal.

See also *Kawaguchi v. Bennett*, ..... Utah ....., 189 Pac. (2d) 109, where a school child was unexpectedly pushed in front of defendant's bus and there was insufficient time to avoid the accident. A verdict of no cause of action was sustained.

Where the jury finds the issues in favor of defendant, that view of the evidence must be resolved which is most favorable to defendant, that is, the view which sustains the verdict.

*Carter v. Standard Acc. Ins. Co.*, 65 Utah 465, 238 Pac. 259;

*Flinders v. Hunter*, 60 Utah 314, 208 Pac. 526;

*Harris v. Ogden St. La. Co.*, 39 Utah 436, 117 Pac. 700;

*Angerman Co. v. Edgerman*, 76 Utah 394, 290 Pac. 169;

3 Am. Jur. Sec. 888, page 44; Sec. 889, page 448;  
Sec. 901, page 468; Sec. 903, page 472.

#### **APPELLANT'S ASSIGNMENT OF ERROR NO. II**

THE COURT DID NOT OVER-EMPHASIZE THE DEFENSE OF CONTRIBUTORY NEGLIGENCE, BUT CORRECTLY INSTRUCTED THE JURY ON THE RESPECTIVE STATUTORY AND COMMON LAW DUTIES OF BOTH PARTIES.

Appellant's criticism of the court's instructions is not justified in that he singles out isolated parts of the instructions without reviewing them as a whole, and without any consideration of the issues defined by the pleadings and several statutory provisions involved.

Both parties allege several grounds of negligence and contributory negligence, *each of which was denied by the other*. It was, therefore, incumbent upon the court to instruct the jury on each specific claim, defining the law and the duties of each, leaving the issues of fact to be determined by the jury. The only instructions in which contributory negligence was covered, other than in a general sense, were instructions Nos. 12 to 16 inclusive, or five instructions (Tr. 354-7).

Of these, the court's instruction No. 12 (Tr. 63, 354-5) instructed the jury with respect to the statutory law or duty defined under *Section 57-7-133, (a)*, prohibiting the turning of a vehicle from a direct course upon a highway unless and until such movement could be made with reasonable safety.

The court's instruction No. 13 (Tr. 64, 355) explained the statutory law with respect to making a signal before turning in the manner defined under *Section 57-7-135 (1)*, by extending the hand horizontally for a distance of one hundred feet, as further defined under *Section 57-7-133*.

By instruction No. 14 (Tr. 65, 356), the court instructed the jury on the provisions of *Section 57-7-128*,

relating to the necessity of keeping entirely within a single lane unless movement therefrom could be made with reasonable safety.

By the court's instruction No. 15 (Tr. 356), the court instructed the jury as to plaintiff's duty in keeping a proper lookout, which duty is well established by this court.

*Bullock v. Luke*, 98 Utah 501, 98 Pac. (2d) 350;  
*Sine v. S. L. Transportation Co.*, 106 Utah 289,  
147 Pac. (2d) 875;

*Reid v. Owens*, 98 Utah 50, 93 Pac. (2d) 680.

The court's instruction No. 16 (Tr. 357) instructed the jury that if the plaintiff, Robert Manning, "negligently drove his bicycle from a place of safety into the side of defendant's automobile, and that such act, if any, proximately contributed in any degree to cause the collision, the plaintiff could not recover." It is well established law that one can be negligent in carelessly moving from a place of safety into a place of danger, and it was proper to so instruct the jury.

Section 57-7-148 makes bicycles subject to the motor vehicle act.

While plaintiff complains of the court's instruction No. 17 (Tr. 357), that instruction did not relate to contributory negligence, but to the duty of plaintiff and *his freedom from negligence if he was in exercise of reasonable care.*

## QUALIFYING INSTRUCTIONS

Each of the instructions given on contributory negligence were qualified by the court's instruction No. 3, defining "negligence", "contributory negligence", "ordinary care" and "proximate cause", (Tr. 348-9) "ordinary care" being defined as follows:

" 'Ordinary care' is that degree of care which a reasonably prudent person would use under the same or similar circumstances. 'Ordinary care' implies the exercise of reasonable diligence and such watchfulness, caution and foresight as *under all the circumstances* of the particular case would be exercised by a reasonably careful, prudent person; "

Each instruction was further qualified by the court's instruction No. 4 (Tr. 349):

"That said Robert Manning was under a duty to exercise that degree of care for his own safety which would ordinarily be used by an ordinarily prudent boy of the same age, capacity and experience."

Said instruction further told the jury that they were to presume deceased was in the exercise of due care unless there was actual proof to the contrary.

The jury was further instructed that the instructions though numbered separately were:

"to be considered and construed by you as one connected whole. Each instruction should be read and understood with reference to and as a part of the entire charge and not as though one instruction separately was intended to present

the whole law of the case upon any particular point," etc. (Tr. 361-2).

By instruction No. 2 (Tr. 347), the jury was told that defendant had the burden of proving contributory negligence.

## DUTY OF THE COURT TO INSTRUCT ON ALL ISSUES

It is well-established law that defendant is entitled to have the case submitted to the jury on any theory justified by defendant's evidence, as well as upon the theory of the whole evidence, and failure to instruct the jury on a material issue would affect defendant's substantial rights.

*Morgan v. Bingham Stage Lines Co.*, 75 Utah 87, 283 Pac. 160;

*Hartley v. Salt Lake City*, 41 Utah 121, 124 Pac. 522;

*Pratt v. Utah Light & Tr. Co.*, 57 Utah 7, 169 Pac. 868;

*Smith v. Lenzi*, 74 Utah 362, 279 Pac. 893.

See also *Reid's Branson Instructions to Juries*, 3rd Ed. Vol 1, Sec. 52, Page 155, where the author states:

"It is the duty of the court to submit all such issues, both affirmative and negative."

And at page 157:

"It is not enough to give the theory of one of the parties, both in the affirmative and the negative, but the court should also give the theory of the other party. The affirmative charge should

be given though a general charge may have been given to the same effect.”

See also *Vol. 1 Blashfield's Instructions to Juries*, 2nd Ed., pages 218-9:

“Instructions to the jury should not ignore any of the issues, theories or defenses. \* \* \* Whether the court believes the evidence or not, the issues must be presented to the jury.”

The duty of the court to instruct on all issues is especially important where the alleged claim of negligence or contributory negligence is expressly *denied by the opposing party*. See *Smith v. Columbus Buggy Co.*, 40 Utah 580, 123 Pac. 580.

### **To Combine Instructions May Be Error**

While it may be possible to give correct instructions by combining some of them, some discretion is given to the trial court as to the form of the instructions given, combining the instructions has sometimes lead to confusion and is error.

In *Leete v. Hayes*, (Iowa), 233 N. W. 481, *where several grounds of negligence were alleged, and denied by the opposing party, it was held error to group the separate claims of separate and distinct acts of negligence into one instruction.*

See also *Reid's Branson Instructions to Juries*, 3rd Ed. Vol. 1, at page 248:

“While it is the duty of the court to give instructions declaring the law applicable to all phases of the case, it is discretionary with the

judge whether or not to elaborate upon instructions given that do fairly cover the case. Each instruction should be complete, though it is not required to contain *all* the law applicable to the case. \* \* \* Where several items of negligence are charged against the defendant in an automobile accident case, they should be set forth in *separate instructions*, and it is error to group them.”

At page 246:

“Great importance is not attached to the matter of form of instructions provided they are germane to the issues and are correct statements of the law.”

At page 249:

“There is no fixed rule as to the order of the instructions. This matter is at the choice of the court.”

In *Smith v. Columbus Buggy Company*, supra, at pages 596-7 of the Utah report, this court pointed out that the trial judge has some discretion as to the form of instructions, and there is no error simply because they are not in the precise form requested or desired by counsel.

### **CO-EQUAL INSTRUCTIONS GIVEN ON DEFENDANT'S ALLEGED NEGLIGENCE**

The court did not over emphasize contributory negligence as compared to the instructions given on defendant's alleged negligence. By reciprocal instructions, the court instructed the jury upon the specific duties of defendant, in each instance stating that defendant was liable if they found him negligent. By the court's in-

struction No. 1, the *five specifically alleged claims of negligence were stated* (Tr. 343-6), and by the court's instructions Nos. 5, 6, 7, 8 and 9 (Tr. 350-3) the court defined each separate duty of defendant and told the jury that defendant was liable for such negligence if they found him guilty of any one of the claimed alleged violations.

The court's instruction No. 5 (Tr. 350) referred to all the alleged acts of negligence.

Instruction No. 6 (Tr. 350) extensively covered defendant's duties as to speed.

Instruction No. 7 (Tr. 351) specifically covered defendant's statutory duties in passing another vehicle.

Instruction No. 8 (Tr. 352) covered defendant's duties in passing, and in addition thereto his duties respecting sounding the horn or signalling in passing.

Instruction No. 9 (Tr. 353) defined defendant's duty regarding lookout.

In each of these instructions, the jury was instructed that a violation of one of these duties by defendant was negligence, and that if such negligence was the proximate cause, in the absence of contributory negligence, defendant was liable.

From the foregoing, it is seen that the court instructed mutually on the respective duties of each of the parties. There was no particular emphasis on the defense of contributory negligence as against or compared to the claim of negligence of defendant.

At page 340, *Volume 1, Blashfield's Instructions to Juries, 2nd Edition, Section 147*, the author says:

“If the substance of the evidence for both parties is fairly and impartially stated, one party cannot complain that the evidence of his adversary is more fully or prominently stated than his own.”

See also *Reid's Branson Instruction to Juries, 3rd Ed., Vol. 1, at page 291*:

“The fact that the contentions of one party are stated at greater length than those of the other party does not conclusively show that undue stress is laid upon the contentions of the other.”

Particularly in view of the instructions given on defendant's negligence, we fail to see or appreciate where there was any particular emphasis on contributory negligence as compared with the instructions on the negligence of defendant.

### **APPELLANT'S AUTHORITIES DISTINGUISHED**

In the citation of authorities, appellant fails to consider the distinction between the court's singling out particular *facts or evidence*, as distinguished from instructing the jury on the law, as for example, in negligence cases where instructions are given relative to the legal duties of each party. The former is sometimes an invasion of the province of the jury as constituting comments on the evidence, whereas the latter is the proper function of the court in instructing the jury on the law.

The case of *Valiotis v. Utah Apex Mining Co.*, 55 Utah 151, 184 Pac. 802, cited at page 11 of Appellant's Brief, illustrates. In that case a requested instruction which contained the following language:

“Nor are you to presume or infer any negligence on the part of the defendant merely because a round was loose or broken.”

was held to be properly refused in that the request tended to invade the province of the jury as to the inferences of fact to be drawn, and therefore the requested instruction was properly refused, particularly when the respective theories of the parties were fairly covered by the instructions given. See pages 157-9 of the Utah report.

In *International & G. N. R. Co. v. Newman*, (Tex.) 40 S. W. 854, at page 11 of Appellant's Brief, the court held there was no prejudicial error, affirming a verdict for plaintiff.

In *Carter v. Missouri K. & T. Railway Co.*, (Tex.) 160 S. W. 987, at page 12 of Appellant's Brief, the repetition in the court's instructions of the definition of assumption of risk was held not reversible error. The court said that it is accepted doctrine that such repetitions are not reversible error, particularly

“When the repetitions are necessary in order to apply any given rule of law to the various phases of the case raised by the evidence.”

In *Wiser v. Copeland*, (Ariz.) 203 Pac. 565, at page 14 of Appellant's Brief, a pedestrian was hit by a west-

bound car. One of defendant's requested instructions read:

“You are instructed that the defendant had the legal right to drive his vehicle upon any part of the right of the said McDowell Road, whether the same was that part described in evidence as paved or unpaved, and you *cannot find him guilty of negligence* merely because you may find that he drove his machine in part upon the unpaved portion of said road.”

In holding there was not reversible error in refusing the request, the court pointed out that negligence must be determined from all the circumstances, and had the instruction been given:

“The jury might well have concluded that if the appellant had not been negligent in the driving of his car (in fact, partly upon the unpaved portion of the road) that the injury would not have been inflicted.”

Considering the instructions of the court taken in their entirety, there was no particular over emphasis on contributory negligence as compared to the instructions given on defendant's alleged negligence. The specific instructions given were on issues *denied by defendant* and involved several statutory and common law duties on which the court was obligated to instruct. All instructions given were qualified by other explanatory instructions. Counsel acknowledges the correctness of the instructions given and he has no real grounds for complaint.

## APPELLANT'S ASSIGNMENTS OF ERROR NOS. III AND IV

While appellant has not referred to any transcript number under these assignments, it appears counsel complains that the court did not give his requested instruction No. 6 (Tr. 26) in the exact form requested. The request was long and confused and the substance of the same was covered by the court's instruction No. 4 (Tr. 55, 349) and No. 3 (Tr. 54, 348), wherein the jury qualified the care required of Robert Manning according to his age, capacity and experience.

It has repeatedly been held that there is no error in refusing a requested instruction if the substance is given in another instruction.

*Trimble v. Union Pac. Stages*, 105 Utah 457, 142 Pac. (2d) 674;

*Davis v. Heimer*, 54 Utah 428, 181 Pac. 587;

*Bergman v. Denver & R. G. W. R. Co.*, 53 Utah 213 at page 225, 178 Pac. 68;

*Moore v. Miles*, 108 Utah 167, 158 Pac. (2d) 676;

*Brooks v. Utah Hotel Co.*, 159 Pac. (2d) 127, 108 Utah 220 at page 226.

Appellant complains of that part of the court's instruction No. 4 (Tr. 55, 349) which instructed the jury that:

“The age, capacity and experience of the said Robert Manning are factors which you may take into consideration together with all of the evidence in the case in determining whether or not the defendant was negligent, so far as such

factors were known to or in the exercise of ordinary care could have been seen by the defendant.”

The portion of the instruction complained of was favorable to plaintiff in that in determining whether plaintiff used reasonable and ordinary care *under all of the circumstances* as defined under the court’s instruction No. 3 (Tr. 54, 348), the jury was thereby advised and effectively instructed that greater care was required of defendant where children were involved.

### APPELLANT’S ASSIGNMENT OF ERROR NO. V

As explained in the preceding paragraph, the jury having been instructed that defendant was required to exercise ordinary care under all of the circumstances, and in particular having regard to the safety of children, and the court having fully instructed the jury on several of its instructions *emphasizing each of the claimed or alleged acts of negligence of defendant*, the jury was effectively instructed on the contents and substance of plaintiff’s requested instruction No. 4 (Tr. 24). Furthermore the instruction as requested was misleading and improper in that the first sentence reads:

“You are instructed that it is *undisputed* that the defendant Powers in driving along and upon the highway at the time and place in question observed the deceased, Robert Manning, proceeding along and upon the highway *in front of him* upon his bicycle, that he intended to pass him and that he knew at said time that the deceased was a young boy.”

While it is undisputed that defendant did see Robert Manning proceeding along the highway, the evidence was that he, Robert Manning, was to the west or side of the defendant on the edge of the shoulder, *with an entire traffic lane separating them*, and it would have been misleading and erroneous to instruct the jury to the exact request, namely: That it was undisputed that Robert Manning was “proceeding along and upon the highway *in front of him*.”

#### **APPELLANT’S ASSIGNMENT OF ERROR NO. VI**

By this assigned error, appellant complains of the court’s instruction No. 10 (Tr. 61, 353).

By the court’s instruction No. 1 (c) (Tr. 50, 345), and the court’s instruction No. 8 (Tr. 59, 352), the jury was instructed on plaintiff’s alleged claim of failure to sound his horn. The first part of No. 8 given at defendant’s request read:

“You are instructed that the laws of the State of Utah require that whenever any person who is driving or operating an automobile on any public highway desires to overtake and pass a vehicle proceeding in front of him, the person driving the automobile coming from the rear shall by audible signal indicate his intention to pass the vehicle proceeding in front of him, thereby giving to such overtaken driver or rider an opportunity to turn immediately to the right side of the traveled portion of such highway so as to allow one-half of the highway to the person desiring to pass, and to warn the overtaken driver or rider of the approach of the oncoming vehicle, and failure to give an audible signal of in-

tention to pass under such circumstances constitutes negligence.’’

The statute involved, *Section 57-7-206(a), Utah Code Annotated 1943*, reads:

“Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, but no horn or other warning device shall emit an unreasonably loud or harsh sound or a whistle. *The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway.*”

The court’s instruction No. 10 read:

“You are instructed that the law of this state pertaining to the requirement of sounding a horn on a motor vehicle does not require the use of a horn in passing, if the driver of a vehicle intends to pass another vehicle under any and *all circumstances*. Therefore the question of sounding the horn is a matter which is left to the sound judgment of the operator of the motor vehicle *in the exercise of ordinary care*, and the failure to sound a horn immediately prior to the happening of an accident does not constitute negligence as a matter of law.”

The court did not say that it was entirely left to the defendant to determine if it was necessary to sound the horn, except by so doing he was “*in the exercise of ordinary care*.” In other words, if the jury believed from all of the circumstances, defendant *in the exercise*

of ordinary care did not sound the horn, then he was not negligent in such particular.

In *Nelson v. Lott*, 81 Utah 265, 17 Pac. (2d) 272, it was held error to instruct the jury the defendant was under an absolute duty to sound the horn.

### INSTRUCTIONS CONSTRUED IN ENTIRETY

Referring to instructions to the jury, the court in *Olsen v. Oregon S. L. R. R. Co.*, 24 Utah 460, 68 Pac. 148, said:

“ ‘The charge is entitled to a reasonable interpretation. It is construed as a whole, in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so although it consist of clauses originating with different counsel, and applicable to different phases of the evidence. If, when so construed, it presents the law fairly and correctly to the jury, in a manner not calculated to mislead them, it will afford no ground for reversing the judgment, although some of its expressions, if standing alone, might be regarded as erroneous, or because some of them, taken abstractly, may have been erroneous.’ *Anderson v. Mining Co.*, 16 Utah 38, 50 Pac. 815; *State v. McCoy*, 15 Utah 141, 49 Pac. 420; *Reese v. Mining Co.*, 17 Utah 496, 54 Pac. 759.”

See also *State v. McCoy*, 15 Utah 141, 49 Pac. 420.

In *Morgan v. Mammoth Mining Co.*, 26 Utah 174, 72 Pac. 688, the court said the fact that one paragraph abstractly considered does not state the law with absolute precision does not constitute reversible error.

In *Davis v. Heimer*, 54 Utah 428, 181 Pac. 587, it was held that the case would not be reversed for technical flaws or particular form of instructions within the discretion of the trial judge. See also *Bergman v. Denver & R. G. W. R. Co.*, 53 Utah 213, 178 Pac. 68; *McMaster v. Salt Lake Transportation*, 108 Utah 207, 159 Pac. (2d) 121; *Brooks v. Utah Hotel Company*, 108 Utah 220, 159 Pac. (2d) 127; and *Smith v. Columbus Buggy Company*, 40 Utah 580, 123 Pac. 580.

The issues of negligence and contributory negligence were fairly and impartially tried. The instructions taken as a whole and viewed in the light of the several claims of negligence and contributory negligence denied by each opposing party and the several statutory provisions and common law duties involved, substantially and fairly presented the issues. Counsel's complaints at most are of technical defects as to arrangements or form.

## CONCLUSION

The evidence in this case establishes that defendant did not run the Manning boy down as contended by appellant, and *the dent in the rear of the bicycle was not caused by the front of defendant's car*. The physical facts corroborated by testimony shows that when Bobbie Barnett called to Bobbie Manning, the latter in his haste to join his companions, suddenly turned without warning across an entire lane of traffic and into defendant's car before defendant could have time to avert a collision. Defendant was not violating the rules of the road and

he had no reason to anticipate that Robert Manning would suddenly make such a *dart* across the street. The physical facts justified a directed verdict in favor of defendant and the verdict is more than sustained by the evidence.

It is respectfully submitted that a re-trial is not justified.

Respectfully submitted,

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