

1951

# Marcella Jensen Tuttle and Richard Dale Tuttle v. Pacific Intermountain Express and Heath H. Cornette : Brief of Appellants

Utah Supreme Court

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Stewart, Cannon & Hanson; E. F. Baldwin, Jr.; Attorneys for Defendants and Appellants;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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MARCELLA JENSEN TUTTLE  
and RICHARD DALE TUTTLE,  
a minor, by his Guardian ad Litem,  
Marcella Jensen Tuttle,

*Plaintiffs and Respondents,*

VS.

PACIFIC INTERMOUNTAIN EX-  
PRESS, a corporation, and HEATH  
H. CORNETTE,

*Defendants and Appellants.*

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BRIEF OF APPELLANTS

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**FILED** STEWART, CANNON & HANSON,  
ELF BALDWIN, JR.,

MAR 31 1951

*Attorneys for Defendants  
and Appellants.*

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Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT of the STATE OF UTAH

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MARCELLA JENSEN TUTTLE  
and RICHARD DALE TUTTLE,  
a minor, by his Guardian ad Litem,  
Marcella Jensen Tuttle,

*Plaintiffs and Respondents,*

vs.

PACIFIC INTERMOUNTAIN EX-  
PRESS, a corporation, and HEATH  
H. CORNETTE,

*Defendants and Appellants.*

Case No.  
7619

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## BRIEF OF APPELLANTS

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### I.

#### STATEMENT OF FACTS

This action was brought by Marcella Jensen Tuttle and Richard Dale Tuttle, the widow and minor child, respectively, of Dale Tuttle, deceased, to recover damages for his death resulting from an automobile collision which occurred January 15, 1949 at about 8:30 P.M. on the main highway, U. S. 91, between Provo and Springville.



At the scene of the accident the highway has four marked paved lanes with gravel shoulders, and runs southeasterly, substantially straight, although turning slightly to the left or east as one proceeds toward Springville. The scene of the accident was illustrated by two drawings, Exhibits FF and GG, a substantial duplicate of which is hereafter inserted.

Snowplows had cleared the road, leaving snowbanks on the shoulders. Packed snow covered the center lanes, the outer lanes being substantially cleared by the traffic, as shown by the pictures, Exhibits 11, 7, 5, and 6.

Defendant Heath H. Cornette was driving a large tractor and trailer for the Pacific Intermountain Express. He left Provo going south, travelling in the lane of traffic next west of the center. His speed was estimated at from 40 to something slightly in excess of 50 miles per hour. Just after passing Lou's Place (located on the west side of the highway) he, Cornette, undertook to pass two passenger cars travelling in the same direction in the west lane of traffic. After sounding his horn and blinking his lights to indicate his intention to pass he succeeded in overtaking the first car driven by Claudius E. Stevenson. Continuing to sound his horn he was about to pass the second car, a blue Plymouth driven by deceased, when the latter suddenly and without giving any warning turned left into the center lane as though making a U turn immediately in front of defendants' truck, where it was struck broadside (see picture Exhibits 3 and 4). Defendants' rig jack-knifed as it and deceased's car skidded across the highway onto the east side, where

a telephone pole was struck, causing electric wires to drop to the pavement and flash as described by the several witnesses hereinafter mentioned.

The foregoing facts are established by disinterested eye-witnesses, as well as defendants' driver. Their testimony is corroborated by the physical evidence.

Contrary to the foregoing facts, and in an obvious effort to avoid the effects of deceased's own negligence, plaintiffs' counsel set out in the beginning to allege and prove that deceased was traveling north upon the highway, rather than southerly.

In a desperate effort to establish some grounds of liability, numerous allegations of negligence, numbered "a" to "m," inclusive, were made in the original and supplemental complaint. (Tr. 6-11). At no time were any of these mere allegations of negligence connected up with the accident or any proof made that any alleged claim of negligence was a *proximate cause of the collision*. In fact plaintiffs' theory of liability is, and was from the beginning, based upon an entirely false assumption of fact, *namely, that deceased was travelling north when in fact his course of travel was toward the south*.

The numerous unfounded allegations of negligence (several of which were repetitious and should have been stricken, on motion duly made by defendants) (Tr. 14-15), together with the inconceivable number of plaintiffs' requested instructions—45 in all—(Tr. 150-196), injected various claims of negligence which were not supported by actual evidence and which created hope-



less confusion on issues submitted to the jury, giving rise to numerous prejudicial errors.

The case was first tried before the Honorable R. L. Tuckett, resulting in a hung jury. It was again tried before the Honorable Joseph E. Nelson, beginning May 15, 1950, resulting in a verdict in plaintiffs' favor in the amount of \$24,000.00 (Tr. 261). Defendants promptly filed a motion for a directed verdict, notwithstanding the verdict, and a notice and motion for a new trial (Tr. 254-5). This motion filed May 29, 1950, was taken under advisement until the trial court finally denied such motions November 15, 1950. Notice of appeal to this court was duly filed and perfected (D. 267).

## II.

### STATEMENT OF POINTS

1. Defendants' motion for a directed verdict should have been granted on at least three grounds, namely:

(a) The collision was proximately caused or proximately contributed to by *deceased's own negligence*.

(b) Plaintiffs failed to prove that *deceased was traveling north* as claimed and alleged or any facts sufficient to constitute a cause of action.

(c) Plaintiffs failed to prove or establish *proximate cause* and the verdict necessarily rests on speculation and conjecture.

2. The court erred in instructing the jury, such errors being initiated by the improper requested instructions of plaintiffs, and in refusing defendants' requested instructions, as follows:

(a) The court erred in giving its instruction No. 13 (Tr. 233), improperly defining the duty of defendants and requiring a *“constant lookout not only ahead but to the sides of his vehicle.”*

(b) The court erred in giving its instructions Nos. 14 and 15 (Tr. 234, 5), requiring defendants absolutely *“to prevent or avoid colliding with any person, vehicle or other conveyance,”* regardless of circumstances.

(c) The court erred in refusing to give defendants’ requested instructions Nos. 16 and 17 (Tr. 213, 4) in explanation of any speed as constituting or not constituting a proximate cause.

(d) The court erred in giving its instructions No. 6 (Tr. 226) and No. 9 (Tr. 229) and in *placing too much emphasis on so-called presumptions and inferences not warranted by the evidence*, and in refusing defendants’ requested instructions No. 7 (Tr. 204) and No. 19 (Tr. 216) in explanation of the effect of actual evidence as overcoming any presumption of due care.

(e) The court erred in giving its instruction No. 1 (Tr. 219-21) submitting all allegations *unsupported by evidence*.

(f) The court erred in giving instructions *as mere abstract statements of law without application to the facts and circumstances*, such as court’s instructions Nos. 17, 18 and 19 (Tr. 237-9) and wrongfully denying defendants’ requested instructions No. 5 (Tr. 202) No. 8 (Tr. 205) No. 9 (Tr. 206), No. 10 (Tr. 207) and No. 11 (Tr. 208) in explanation of contributory negligence and certain statutory and legal duties of deceased.

3. Plaintiffs’ counsel, through his own client, a witness Carol Ellis, wrongfully injected insurance indemnification.

4. The court erred in denying defendants' motion for a new trial when the verdict was not only against the great weight of the evidence but was contrary to and against the evidence and when there was prejudicial errors denying defendants a fair trial.

### III.

## EVIDENCE AND ARGUMENT

### 1. DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

Defendants' motion for a directed verdict was duly made both at the close of the evidence (Tr. 453-4) and after verdict (Tr. 254) as permitted under Rule 50(b) U.R.C.P., the reasons and grounds specifically enumerated (Tr. 453-4) are above and hereafter stated under subheadings (a), (b) and (c). This matter necessitates a summary of the evidence relating to the manner in which the accident occurred. To assist in visualizing the surroundings and accident, we have inserted herein a reproduction of the map, plaintiffs' "Exhibit GG" which should be considered with the testimony of the various witnesses.



## WITNESSES

In explanation of the witnesses near enough to have seen the accident we should mention that three of them, John Martin McPhee, Irma McPhee, his wife, and an elderly gentleman, Elmer M. Roberts, were walking from Lou's Place to the McPhee residence, a short distance south on the west side of the highway. Claudius E. Stevenson and Carol Ellis were riding in the passenger car in the west lane of traffic following the Plymouth driven by deceased. Clifford Beardall and Ernest L. Holt were riding in one of the first, if not the first car, to arrive at the scene of the accident from the north. It is clear that those of the foregoing mentioned who actually saw the accident observed deceased proceeding south near the west edge of the highway, and his attempted turn to the left immediately in front of defendants' truck as it was about to pass. In quoting testimony, we have referred to the pages as numbered by the court reporter.

CLAUDIUS E. STEVENSON, driver of the passenger car immediately following the blue Plymouth driven by deceased, testified that he followed the Plymouth from the intersection at Seventh East and U. S. Highway 91 to the scene of the accident (Tr. 380-1). Because his attention was momentarily attracted to the three people above mentioned who were walking on the side of the road, he did not see the actual impact. However he testified that defendant's truck passed him just before the accident; that he observed deceased's car 75 to 100 yards ahead of him just before the impact;



that immediately after the impact, he observed defendant's truck and trailer sliding across the highway to the east and observed that the Plymouth had disappeared from its former position, later identifying it on the east side of the road as the car involved in the wreck. He saw no northbound cars whatsoever. We quote:

“Q. Could you estimate the distance that this car was ahead of you?

A. I tried to keep you behind the car because of conditions on the road, and I tried to keep, oh, seventy-five yards to a hundred yards behind him.

Q. Which lane of traffic were you traveling in?

A. I was as close to the shoulder as I dared to get. The snow was piled quite high, and I was in the section that was fairly well worn, about three feet away from the pile of snow out there.

Q. What lane of traffic was this car (Tuttle car) which was proceeding you traveling in?

A. In the same lane.

Q. About how fast were you going as you went along?

A. Thirty to thirty-five miles an hour.

Q. When you got near the vicinity of Lou's Place, did anything unusual occur?

\* \* \* \*

A. I was attracted by the honking of a horn.

Q. Where was that honking coming from? (Tr. 381)

A. From behind me.



Q. And did you see the kind of vehicle that approached you at that time?

A. I was overtaken by a large truck.

\* \* \* \*

A. As he passed me the back of the truck was throwing up a rolling cloud of snow. Almost blinded me.

Q. Go ahead.

A. Well, when the snow started to clear I could see some people walking on the side of the road.

Q. Which side of the road was that?

A. That would be on the west side of the road, and my attention was attracted to them because I was pretty close to them, pretty close to the snowbank, and I looked up and saw this truck starting to slide.

Q. Which way was the truck sliding?

A. It started to slide down the highway and gradually turned, the whole truck, and the cab part of the truck and trailer started to turn sideways across the road with a sliding motion across the highway to the east.

Q. Did you see the truck come to a stop over there?

A. Yes. (Tr. 282)

Q. At the time you noticed the truck, or just prior to that time, did you see the lights of any northbound traffic?

A. Not that I recall.

\* \* \* \*

Q. Were there any other cars around there at

that time, besides your car and the two vehicles that had been in this collision?

A. Not that I saw. (Tr. 383).

Q. Now I show you what has been marked Defendant's Exhibit "3."

Q. From what you saw do you know whether or not the car which you were following was the car which was involved in the accident (Tr. 384) with the truck?

A. At the time I assumed—All my conclusions were that that was the car, because I didn't see it any further.

Q. That conclusion was based on what you saw?

A. That is right.

Q. At that time?

A. At that time.

Q. I show you plaintiff's Exhibit "B," showing an automobile and ask you if you recognize that photograph? (Handing to witness.)

A. Yes.

Q. And what is the car that appears in that photograph?

A. That apparently is a picture of the car that was involved. (Tr. 385)

\* \* \* \*

Q. Did any other cars ever get between that car \*(Tuttle car) and your car from the time you followed it until the accident occurred?

A. No. There was very little passing being done that night, and no one came in between us. (Tr. 411)

Q. Did you see anyone around either of those

vehicles prior to the time that you got out of your car?

A. I got out of my car just as the first people started to approach. (Tr. 412)''

(Insertions in parentheses ours)

Mr. and Mrs. McPhie and Mr. Roberts explained that at the time of the accident they were walking along the west shoulder near the snow bank, returning from Lou's Place to the McPhie's residence a short distance south, both places being on the west side of the highway.

MRS. McPHIE testified:

“Q. And where were you when the—when your attention was first attracted to either of these vehicles?

A. Just a little north of our home on the highway. (Tr. 329)

Q. What were you doing at that time?

A. We were walking south toward our home.

Q. Who was with you?

A. Mr. Elmer Roberts, my husband and myself.

Q. Now which side of the highway were you on?

A. We were on the west side.

Q. Was there a snowbank on either side of the highway?

A. Yes, there was.

Q. Where were you walking, with reference to this snowbank?

A. Well, close to the snowbank as possible.

Q. Did anything occur about the time that you were there which directed your attention to

- either of the vehicles involved in the accident?
- A. Well, we heard a sounding of a horn.
- Q. And then what did you do?
- A. Well, I turned to see if it was honking at us.
- Q. What did you see when you turned around?
- A. It was passing a car about opposite of Lou's. It was a truck honking.
- Q. And did you see any other cars at about that time?
- A. Yes, there was one passing us about that time.
- Q. And in which lane were these two cars traveling?
- A. The two cars were on the west lane furthest west.
- Q. Which lane was the truck traveling in?
- A. Seemed to be on the inside west lane.
- Q. Tell the jury in your own words just what happened.
- A. Well, we turned to see if it was honking at us, and it wasn't (Tr. 330) so we proceeded on south, and the car passing us at that time was slowing down and our attention—my attention seemed to go on it because I thought perhaps it might be stopping at my home, and a truck passed and it continued to sound its horn, and just a little beyond my home the car turned directly in front of the truck, and they seemed to throw up some snow then and go to the southeast side of the road, or to the east side, would be traveling southeast, and came to a stop there.
- Q. Then what did you do?
- A. Well, I went directly to the scene of the acci-

dent and my husband went in my home—in our home to call the police. (Tr. 331)

Q. At the time you observed the two vehicles come together, did you see whether or not there were any other cars coming from the south at that time and traveling north?

A. No, there wasn't any that I observed. (Tr. 333)

Q. With reference to your home, about where were you standing at the time this happened?

A. Well, it would be about a fourth of the way to Lou's, or half way between a road that takes—that goes west off from the highway, between a road that—there is a road that goes west between our place and Lou's, and we were standing between the road and our home, about half way.

Q. Now did you observe this car which was farther south just before the impact, as to whether or not any signals were made of any kind to indicate an intention to turn?

A. No, I didn't see any. Just slowing.

Q. Did you see any stoplights come on?

A. No. (Tr. 334)

Q. And how far did the lead car travel after it began to turn until the point of impact, if you have a judgment?

A. Well, when the truck was about twenty or twenty-five feet in back of it it turned suddenly in front of the truck. (Tr. 350)

Q. But I thought you said it turned out to the right?

A. It had been turning to the right going rather slow.

- Q. I see. And how far from the point of impact did the car begin to turn to the right?
- A. Oh, maybe thirty-five or forty feet.
- Q. About thirty-five or forty feet from the point of impact; is that right?
- A. Yes. About in front of my home.
- Q. All right. You say it would be about the width of this room then?
- A. Yes, or just a little more. (Tr. 351)''

JOHN MARTIN McPHIE testified:

- “Q. Now I call your attention again to that night. Where were you when you first became aware there was—first put on notice that something unusual was going to happen, or was happening at that time? (Tr. 355)
- A. Well, we was about halfway between my place and a little crossing, crossroad there, not a crossroad but a lane there.
- Q. When you say “we,” who was with you?
- A. Mr. Roberts and my wife and myself.
- Q. Now did you hear anything unusual at that time?
- A. Yes, the sounding of a horn.
- Q. Where did that sound come from?
- A. Right around Lou’s Place. Right close to Lou’s little cabaret out there. Beer joint.
- Q. Lou’s Place is north of your place?
- A. Yes.
- Q. What did you do when you heard this sounding of the horn? Say what you did.
- A. Well, I just edged over.



- Q. Edged over where?
- A. Towards the bank of the snowbank.
- Q. Did you see what vehicle was sounding this horn?
- A. Yes, it was a truck.
- Q. Where was the truck at that time?
- A. Just coming up by Lou's, from Lou's Place towards—going south.
- Q. What direction was the truck going in at that time?
- A. Going south.
- Q. Did you observe any other vehicles at that time?
- A. Yes. There was—He was passing one and there was one passing us at this—just passing us at that time.
- Q. How many vehicles did you see altogether at that time in that vicinity? (Tr. 356)
- A. A truck and two cars.
- Q. Can you tell us in which lane the two cars were traveling when you observed them?
- A. They were both in the outside lane.
- Q. Could you see where the truck was coming?
- A. Yes.
- Q. Can you tell us about where the truck was from the west edge of the concrete driving surface?
- A. On the west lane. Second lane over.
- Q. After you edged over to the snowbank, then what did you do?
- A. I noticed another car I thought was going to

stop at my house, my place. Instead of that he went up a little further and made a turn.

Q. Where was the truck when he made that turn?

A. He was about even with us, a little past us, and the other (Tr. 357) car was by us at that time.

Q. Tell the Jury in your own words what you saw at that time.

. It just pulled over in front of the truck and the truck collided with him. The other car (second or last car) (explanation in parentheses ours) pulled up by my place and stopped just a little beyond my place on the other side of the driveway.

Q. What happened after that?

A. Right around Lou's Place.

A. I broke and run for the phone. (Tr. 358)

Q. Did you observe whether or not this front car, or the car farther south, gave any indications of his intention to make a turn?

A. Never give no signals at all. (Tr. 359)

Q. Well, about how far off the hard surface did he drive to the right?

A. From my place, right about in here is where he made that turn.

Q. How far to the right of the hard surface did he drive?

A. Just off to the cement there is about all. (Tr. 364)

Q. Was the truck about on the center of the highway when you claimed the impact occurred?

A. Near as I could tell, yes. Passing a car.

Q. So part of the truck was over on the east side?

A. I wouldn't say that, no. (Tr. 365)

Q. I see, and you heard the truck honking back here in Lou's vicinity? (indicating).

Q. Whether it was north or not you don't know?

A. I know where it—It was coming from the north.

Q. You don't know how far north of Lou's?

A. Right around Lou's Place.

Q. Could it have been north of Lou's Place?

A. A little. Not much.

Q. And from that time on, while that car was traveling almost a thousand feet, it had its horn constantly down? (Tr. 369)

A. That's right.

Q. Didn't it?

A. Yes.

Q. And it didn't let up until the impact?

A. Until the impact, when I went in the house.

Q. And during that time the road was unobstructed, you say, to the east, and the truck had plenty of room during all that time except immediately before the accident, when you say the car turned?

A. Yes. (Tr. 370)

A. No cars coming from Springville. From the south. (Tr. 371)''

HEATH H. CORNETTE testified:

“Q. Now at that time did you observe any vehicles proceeding south ahead of you?

- A. I did.
- Q. And how many did you see at that time?
- A. Well, there was two of them. The one I passed and this one I was attempting to pass were the only cars in the vicinity.
- Q. Where was the vehicle which was nearest to you, that is the car farthest north, with reference to Lou's Place, at about the time you passed it?
- A. Well, it was the first car north.

\* \* \* \*

- A. I flashed my lights a couple of times and blew my horn to let them know I was attempting to pass.
- Q. You say you flashed your lights?
- A. From low beam to high beam.
- Q. And then what?
- A. And blew my horn.
- Q. And what beam did you have your lights on when you passed the car that was furthest north and nearest to you? (Tr. 261)
- A. I had it on low beam.
- Q. And in what lane of traffic was that car traveling in?
- A. The outside lane.
- Q. Then about how far was the other car south of this first car that you were approaching?
- A. I would give no exact answer, but I would say around one hundred and fifty feet, maybe

a little further or maybe a little closer. I wouldn't know definite.

\* \* \* \*

- Q. \* \* \* After you passed this first car, then what did you do with respect to the portion of the highway upon which you drove the truck?
- Q. I say after you passed this first car did you stay in the same lane, or did you go into another lane?
- A. Stayed in the same lane.
- Q. Now what happened as you approached this second car which was farther south?
- A. Well, as I got up near him, why he made a left-hand turn in front of me.
- Q. Now prior to the time that he made this turn, did you observe whether or not there were any signals or indications made by him that he was going to turn in front of you? (Tr. 262)
- A. There was not.
- Q. What part of the truck and what part of the car came together? Came in contact?
- A. Well, it was about right on the corner of the right-hand side of the bumper. Kind of diagonal.
- Q. And then what happened after that?
- A. Shoved the car straight in front. It shoved the car straight in front of the truck, and knocked in the front wheels to the right out of control.
- Q. And then what did you do after that?
- A. I tried to get back in control.
- Q. You tried to get—

- A. Tried to get control of it.
- Q. Did you come to a stop after the impact?
- A. Yes, on the east side of the road. (Tr. 263)
- Q. When you observed the car turning in front of you, were you able to do anything about stopping your truck or turning aside or anything of that nature?
- A. It happened too quick. I didn't have time. (Tr. 266)
- Q. Do you recall whether or not there were any northbound cars on the highway about the time you attempted to pass the first car?
- A. In what location?
- Q. Coming towards you? Going north on the highway?
- A. There was not. (Tr. 267)
- Q. When you say this car turned in front of you, at the time of the impact was it straight across the highway or was it sideways or diagonal?
- A. You mean the car?
- Q. Yes.
- A. It was in kind of diagonal shape. (Tr. 281)
- Q. Did you attempt to apply your brakes?
- A. I hit the brakes as fast as I could. (Tr. 286)
- Q. At the time of the impact did you try to turn to the right?
- A. I tried to get stopped.
- Q. Did you try to turn to the right?
- A. I tried to get stopped. (Tr. 302)''

In summarizing the remaining portion of the evi-



dence, we call the court's attention to the fact that counsel for plaintiffs produced no actual or direct evidence that deceased was traveling north. True, through members of deceased's family and close friends and relatives, counsel attempted to calculate time and show that deceased left Springville some five or ten minutes before the actual time of collision, around 8:20 to 8:35 P.M. (Tr. 145) and that he, deceased, was intending to go to Provo to bowl. The collision occurred 3.7 miles north of Springville and .9 miles south of the intersection of Seventh East and the Highway in Provo. (Tr. 159) However, even assuming deceased was intending to go to Provo to bowl, no one could possibly calculate what was actually in deceased's mind when he left Springville, much less what ran through his mind thereafter. He had never bowled before (Tr. 162), had never taken any interest in it and it wasn't shown that he even knew where to go. (Tr.161) His wife, Marcella, was going to a basketball game in Springville and he evidently had some change in plans or intention after leaving home. While one or two witnesses said they had seen a northbound car some distance from the point of collision, there was no evidence that any such car, if there was one, was involved in the collision. No one testified that they saw any northbound car at the time and immediate scene of the accident, which was involved therein. Counsel also attempted, through Beardall and Holt, to prove that their car was the first to arrive at the scene of the accident and, therefore, that the Stevenson car was not the first to arrive. This contention, obviously aimed to confuse the jury, at

most created a dispute as to which of the two cars mentioned arrived first. There was never any actual evidence or proof that deceased was traveling northbound.

CAROL ELLIS, occupant of the Stevenson automobile, was admittedly a regular client of plaintiffs' attorneys. (Tr. 93) She testified the car she was riding in came to a stop on the west side of the highway. Her efforts were principally directed toward claiming that the car immediately ahead of them was not involved in the accident. She attempted to so infer by testifying that after stopping she observed another car parked on the east side of the highway. (Tr. 82) To the contrary, however, she described how the truck passed the car she was in, (Tr. 79) how the electric wires came down directly in front of them, (Tr. 81, 88, 89) acknowledged that she did not see the actual collision, (Tr. 80) admitted there was a car immediately ahead of the one in which she was riding traveling in the same direction. At the time of the accident it is clear she was of the opinion that the car immediately ahead of her was the one involved in the accident, and was of the same opinion for two or three days thereafter. (Tr. 96-97, 92) Prior to the accident she had observed the tail lights of the car ahead. Such tail lights were gone after the impact. (Tr. 87) We quote a portion of her testimony:

“Q. And then what happened, Mrs. Ellis?

A. We were driving along in the car and a truck passed us, and he was on the left side of us, out in the middle of the street. It passed us and went up the hill and an accident occurred.

Q. Did you see any other car, Mrs. Ellis?

A. We were following a car.

Q. Where did you first see that car?

A. Oh, I think it was on the highway all the time, in front of us as long as we were on the highway. (Tr. 79)

\* \* \* \*

Q. Did you see the impact?

A. No, I didn't see him hit anything. (Tr. 80)

\* \* \* \*

Q. I see. Now what happened after? Just go on and tell the Court and jury what happened.

A. Well, the electric light wires came down across the street. We drove up to them, and Mr. Stevenson was undecided as to whether to try to go underneath them or to back up, and we stopped. And finally lights went out and wires came down, and he got out of the car and I stayed in the car, and he was gone a few moments and came back and decided to move his car out of the highway, so he pulled over into the snowbank and left me, and I stayed in the car.

Q. Which snowbank was that?

A. On the right side of the road. (Tr. 81)

Q. And when the truck passed you about how far did it pass you to the east, as it went past you?

A. Well, he swerved all around us, and we gave him plenty of room.

Q. And at that time you could still see the headlights of this car proceeding south in front of you; is that right?

A. I don't recall looking. I was watching the truck. (Tr. 86)

\* \* \* \*

Q. Did you see the taillights of that car after the truck went out of control?

A. I was watching the truck at all times.

Q. Answer my question if you will, please.

A. No, *I did not*. (Tr. 87)

\* \* \* \*

Q. Will you estimate the distance from the wires the front of your car was when you stopped. The Stevenson car?

A. Oh, ten or fifteen feet.

Q. Was there any car in front of you at that time?

A. *I didn't notice*.

Q. Was there a car in back of you?

A. Shortly thereafter *a car pulled in*. (Tr. 89)

\* \* \* \*

Q. Where were you, with respect to Lou's Place, when the truck passed you?

A. Well, I could see his lights from his bright sign. Close to his place. One side or the other. (Tr. 91)

\* \* \* \*

Q. How long did you have the assumption that the car in front of you, the car proceeding south in front of you, was the car involved in the accident? How long after the accident did you continue to have that assumption?

A. Two or three days. (Tr. 92)

\* \* \* \*

Q. Can you tell us now, calling your attention

again to the taillights of this car which was proceeding south in front of your car, can you tell us about how far south of you the taillights of that car were when you saw the car last, or saw the taillights last, I'll put it that way? If you can give us an estimate. Two hundred feet? Two hundred and fifty feet? Fifty feet?

A. Two hundred to two hundred and fifty feet.

Q. Then I think you told us yesterday that you were watching the truck as it went down the road?

A. Yes.

Q. And then did you say—correct me if I'm wrong on this—the truck seemed to be out of control? It went out of control?

A. Yes, I did say that.

Q. That was after the truck went past you?

A. That's right.

Q. You didn't see the taillights of the car proceeding after that, did you?

A. *Didn't see that.*

Q. Did you see any other vehicle at that time, other than the truck you saw skidding out of control?

A. No, I didn't notice it.

Q. You didn't see any northbound cars in that vicinity at all, did you? (Tr. 95)

A. No.

Q. Did you see the lights of any northbound vehicles?



A. *No.*

\* \* \* \*

Q. I see. And at that time you were under the assumption that the car you were following had been involved in this accident with the truck, were you not?

A. *That's right.*

Q. And that was based upon the impression you received there that night?

A. *That's correct.* (Tr. 96)

Q. Just before the impact occurred do you recall whether or not you saw any pedestrians walking along the highway, or on the west side of the highway?

A. Yes. I believe that Mr. Stevenson was concerned about them.

Q. Did you see them?

A. Yes, I did. Our headlights—

Q. How many were there?

A. I think there were two or three.” (Tr. 98)

The statement given by Mrs. Ellis to the investigator January 17th, two days after the accident, when the facts were still fresh in her mind, (Tr. 99-100) received in evidence without objection (Tr. 102) is significant. It (See Defendant's Exhibit 14), the correction having been duly initiated by Mrs. Ellis at the time the statement was taken (Tr. 100) read as follows:

Defendant's Exhibit “14”

“Provo, Utah  
January 17, 1949

“My name is Carol Ellis I am 25 years of age.



My home address is 251 East 3rd South in Springville, Utah. On January 15, 1949, I was riding in a car driven by Mr. Stevenson he lives in Payson, Utah. We were traveling south on Highway 91 We were driving along at thirty five (35) miles an hour We were following another car at a distance of about one hundred (100) feet. A large truck passed us. We were in the west lane of traffic the truck was passing in the center of the road. the truck had been blowing its horn. while it had come up behind us. and it was blowing its horn when it went by us and it seemed to keep blowing its horn after it passed us. After the truck got by us the truck seemed to skid out of control the truck throwed up a lot of

C.E. When it got even with the other car. C.E. snow(when it went by us) We did not see the car and the truck actually hit. We saw the lights of the car disappear and then we could see the car on the other side of the truck. the truck seemed to Jackknife and the truck also stopped over on the East side of the road. I got the impression the truck was out of control. the car had been going along in a straight line. We had followed it for several blocks. the accident envolved the car that was directly in front of us and the truck that was passing. As far as I know there was no traffic coming from the south. the first car that stopped after we stopped was a car going south that was following us. there was also some people walking along the road. the snow that flew up did not block our view until the truck was up by the car that was in front of us. the reason we were unable to see the car was that the rear of the truck was swinging across the Highway and the rear of the

truck was what blocked my view.

I have read this statement and it is correct.

CAROL ELLIS''

The same facts were related by Mrs. Ellis to Officer Halladay at the scene of the accident. She was quite sure that the car immediately ahead was the same car that was involved in the accident. (Tr. 229)

OFFICER ELMO HALLADAY, of the Provo City Police Department, investigating officer, arrived shortly after the accident and noted the physical facts, making the usual measurements. He identified scratch marks south of the point of impact near or crossing the center of the highway and indicating the cars had skidded from the west toward the east side of the highway. These marks were fresh as though something had slid or dragged across and could have originated from the Tuttle car or from the defendants' truck as it swerved. To indicate the general location of these marks the officer wrote "scratches" on the map, Exhibit GG. (See Tr. 226-7-8, 233-4, 237)

For the convenience of the court we have inserted herein a photostatic copy of the officer's original drawing, Exhibit 17, received in evidence, which was prepared by him through what he learned at the scene of the accident, including the interviewing of witnesses and examining the scene at that time. (Tr. 246)



It is readily observed that Officer Halladay was satisfied that the accident was caused when deceased turned in front of the truck. There is only one feature of the report which requires explanation. While Officer Halladay originally marked in his report that the Tuttle car was going south, he explained that he was later induced to strike the word "south" and insert the word "north" after talking with Mr. Beardall (a friend of the Tuttle family). In this connection, however, Officer Halladay explained that the basis of his change was *solely by reason of his conversation with Beardall* (subsequent to the accident) and that as to his own opinion he said: "*I really don't know myself.*" (Tr. 240-241) He had not talked with McPhies and as to his original opinion, based "on the facts that I found at the scene of the accident and also the witnesses that I talked to there" (Stevenson, Carol Ellis and Cornette) *he was of the opinion Tuttle was driving south and turned in front of the truck.* (Tr. 240)

Perhaps the most amusing witness during the trial was the elderly gentleman, ELMER M. ROBERTS, whose testimony (Tr. 420-433) was really not worth anything either way. His efforts to repudiate his original statement (Exhibit 2) (Tr. 427-8) were on the ridiculous side as he clearly acknowledged, both in his original signed statement and in his direct testimony, that while he was aware the truck passed (Tr. 421) *he didn't see the collision.* (Tr. 423) He "was not especially watching the vehicles after they passed us" (Exhibit 2) and he did

not know whether “a northbound or a southbound car was involved in the collision.” (Tr. 431)

In his efforts to dispute that the Stevenson car was the first southbound automobile to reach the scene of the accident counsel produced Clifford Beardall and Ernest L. Holt, associates in the slot machine business, both former employees of the state tax commission. Beardall, while claiming his car was first to reach the scene, acknowledged he didn’t observe the pedestrians (Tr. 130-1) and that he didn’t see the accident. He could not say that he saw any car either northbound or southbound that was definitely involved in the collision. This witness, a friend and neighbor of the Tuttle family, (Tr. 109) at most gave negative testimony. We quote:

“Q. You say you saw the impact between the two cars?

A. I seen the collision and the lights. *I didn’t see the impact, but I heard the collision.*

\* \* \* \*

Q. I mean at the scene of the accident. Was either vehicle moving when you came up there?

A. No sir.

Q. They had both come to a stop, hadn’t they?

A. That’s right. (Tr. 124)

\* \* \* \*

Q. Mr. Beardall, wasn’t the flashing of these wires the first thing that called your attention to the accident?

A. *Yes sir.* That isn’t what you asked a second ago.

\* \* \* \*

Q. At the time you heard the impact you saw neither of the two vehicles involved skidding from the west side to the east side of the highway, did you?

A. I didn't see any skidding across, no. (Tr. 125)

\* \* \* \*

Q. And at that time you didn't see any lights of northbound vehicles when you arrived at the scene, or just before the accident occurred, did you?

A. I couldn't see the lights due to the obstruction.

Q. *You didn't see any?*

A. No." (Tr. 131)

The same can be said of ERNEST L. HOLT. He testified:

"Q. And if there were pedestrians walking just west of the concrete edge, and just to the east of the snowbank, along the side of it, you didn't see them?

A. No.

Q. You didn't see the two vehicles come together, did you?

A. No.

Q. And when you saw the truck and the car they were both stopped over on the east side of the highway, weren't they?

A. Yes.

Q. Your first intimation of the accident was when you saw these wires sputtering?

A. That's right." (Tr. 140)

The other witnesses called by plaintiff, whose testi-



mony we have not quoted, clearly did not see the accident and could not have known of any knowledge what car was involved nor in which direction it was traveling.

Charles M. Roberts was three-fourths of a mile north of the accident. (Tr. 25) The only knowledge he had was of the P. I. E. truck passing him, the snow covering his windshield so he had to get out and wipe the windshield in order to continue. He further said, "When I got out there the condition was there. That's all I know about that." (Tr. 26)

Douglas A. Payne saw the truck pass when he was about one and one-half blocks north of where the accident occurred. (Tr. 35)

Dellis Elliott was about a block north of Lou's Place, (Tr. 43) saw the truck pass but didn't observe the truck after it passed Lou's Place. (Tr. 46)

Jean Elliott, mother of Dellis, was standing on her porch some distance north of the accident and saw the truck pass. (Tr. 54) Clearly she did not see the accident nor what passenger car was involved.

Gordon Elliott observed the truck pass and turned his back. (Tr. 57) He didn't see the accident. (Tr. 66)

Other witnesses called were not near the scene of the accident when it occurred.

**(A) THE COLLISION WAS PROXIMATELY CAUSED OR PROXIMATELY CONTRIBUTED TO BE BY DECEASED'S OWN NEGLIGENCE.**

In summarizing all of the evidence, we do not overlook the fact that plaintiffs claim that defendants' truck

was traveling slightly in excess of 50 m.p.h. in a 50 mile zone, although the evidence varied from 40 or 45 m.p.h. to a possible maximum of 55. On the other hand, eye witnesses without question, observed the accident and saw deceased's Plymouth as it passed them and saw him suddenly and unexpectedly turn in front of defendants' truck. Speed under such circumstances does not constitute the proximate cause. See *Cederlof v. Whited*, 110 Utah 45, 169 Pac. (2d) 777.

Plaintiffs's sole claim or basis of liability was the contention that deceased was traveling north upon the highway and, therefore, did not turn left in front of defendants' truck. No claim of liability was made in the later event, as the authorities are clear that contributory negligence existed either as a sole cause or at least a proximately contributing cause.

In *Verrill v. Harrington*, (Me.) 163 Atlantic 266, both cars were traveling along a three laned highway on the outskirts of a town. Defendant, who was driving the rear car turned left into the center lane and blew her horn to indicate that she intended to pass. Before turning left, the plaintiff, in the lead car looked in the rear view mirror and saw cars in the distance but did not see defendant's car in the middle lane. Plaintiff made a signal and started to turn left. Defendant applied her brakes and threw her car to the left but still ran into plaintiff. A verdict was returned for the plaintiff. Defendant entered a motion for a new trial with the state Supreme Court. The court granted the motion holding as a matter of law that plaintiff's negligence was the sole proximate

cause of the accident. In so holding, they said:

“It is familiar law that the operator of a motor vehicle intending to cross the highway in front of a car coming from the opposite direction on its own right of way must give notice of the intention to cross in order to charge the driver of the other car with negligence in pursuing its course. The law charges the driver of the car making such a crossing with the duty of so watching and timing the movements of the other car as to reasonably insure himself of a safe passage either in stopping and waiting if necessary. (Maine cases cited). No less strict rule can be applied to operators attempting to cross the right of way of cars coming from behind. Reasonable care must be exercised in ascertaining their presence in the passing lane. The precautions above stated must then be taken.

“The argument of counsel, as we understand it, is that, when Mrs. Verrill looked in her mirror just before she turned, the Harrington car was one of those following behind several hundred feet, and so great was its subsequent speed that it traveled that distance and reached the point of collision with the Verrill car, going at the rate of 15 miles an hour, went diagonally across 20 feet of cement in little, if any, more than a second of time. The mechanical perfection of automobiles of today has not yet produced such speed. A reasonable interpretation of the evidence places the Harrington car close up to the Verrill car as the latter made its turn. They were traveling the main trunk line highway and not in the compact or built up section of town. There were no cars approaching from the opposite direction, and as already stated, the conduct of the driver of the car ahead indicated to Mrs. Harrington that two

lanes were and would continue to be open and unobstructed. Under the circumstances there is no credible evidence that she was driving at excessive speed when she started to pass or thereafter failed to exercise the care which could be reasonably expected of a person confronted with the turn of a car directly in front of him, creating an emergency requiring the quickest of judgment and instant action.

“We are convinced that the weight of the evidence clearly indicates that the negligence of the defendant Mattie C. Verrill was the sole proximate cause of this accident. The verdicts in all these cases are based on a finding directly to the contrary. They are manifestly wrong and must be set aside. In each case, a new trial is granted and the entry is

Motion Sustained.”

In *Probst v. Smith Hardware Co.*, (La.) 141 So. 508, the plaintiffs were in a sedan driving along the highway. Defendant's truck was following. The driver of the truck sounded his horn and turned out to the left to pass when the plaintiff suddenly signalled for a left turn and turned in front of the truck, which crashed into the Plaintiff's car. From a judgment for the plaintiff, the defendant appealed. The appellate court set aside the judgment and rejected the plaintiff's demands, saying:

“Here the testimony of Silver and Daniels shows that the sedan made an abrupt, unexpected, and sudden turn to its left directly into the pathway of the truck, and even if Probst gave the proper signal, as it is stated by him and the others who were in his car, the turn was so rash and so

sudden that the defendant cannot be held to have been negligent.”

See also: *Litherbury v. Kimmet*, (Cal.) 195 Pac. 660, *Young v. Cerrato*, (Cal.) 37 P 2d. 1063; *Madron v. McCoy et al.*, (Idaho) 126 P 2d. 566; *Dudley v. Surles*, (La.) 11 So. 2nd. 70.

#### (B) FAILURE TO PROVE ALLEGATIONS AND DIRECTION OF TRAVEL.

We ask specifically *what evidence establishes that deceased was going north upon the highway?* True, counsel attempted to confuse the matter by offering testimony of friends and members of deceased's family that deceased left Springville about 8:25 P.M. to go to Provo to bowl. He also attempted to confuse, through Beardall and Holt which car, Beardall's or Stevenson's, arrived first at the scene of the accident. These matters do not establish the actual direction of deceased's travel. They are necessarily of such a nature that after the lapse of several months following an accident, people sometimes naturally differ, and *are not of such a character as to prove in fact how and in what manner the accident occurred.* Disinterested eye witnesses standing beside the road saw the accident. Their testimony corroborated by physical facts is beyond reasonable doubt.

In face of the actual evidence, there was a total lack of proof of the allegations of the Complaint that deceased was travelling north, and consequently a failure to sustain the burden of proving a cause of action.

#### (C) FAILURE TO PROVE PROXIMATE CAUSE.

Even if it were assumed that deceased was travelling



north, we ask *what evidence establishes any proximate cause?* Isn't it true plaintiffs' theory rests in speculation and conjecture?

In *Tremelling v. Southern Pacific Co.*, 51 Utah 189, 170 Pac. 80, this court placed particular emphasis upon the fact that the verdict should not be based upon speculative evidence, and where the evidence was conjectural and speculative as to the proximate cause of deceased's death the verdict in plaintiff's favor was reversed. The court, in the following language, further pointed out that inferences must not be based upon assumed or supposed facts:

“\* \* \* Where, however, as in this case, the inference is based upon an assumed or supposed fact, which fact the evidence shows did not exist, then the inference is left without support. The rule in that regard is stated by the Supreme Court of Oregon in the case of *Goss v. Northern Pac. Ry. Co.*, 48 Or. 439, 87 Pac. 149, in the headnote, thus:

“ ‘Where the evidence of negligence is entirely inferential, and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff's case is overcome as a matter of law, and it becomes the duty of the judge to take the case from the jury.’ ”

Plaintiffs take comfort in relying upon a presumption that deceased was in the exercise of due care. However, this rule *does not relieve plaintiffs of the duty or burden to prove proximate cause—facts upon which liability can be based.*



Furthermore, this court in several decisions has wisely determined that legal rights should be judicially determined upon evidence where the facts can be so established, and that *where there is actual evidence the case must be decided upon the evidence and any presumption of due care must then not be considered.*

In *Re Newell's Estate*, 78 Utah 463, 5 Pac. (2d) 230, it was said:

“When, however, the facts and circumstances were shown concerning which the presumption was indulged, the presumption ceased and the controversy was to be decided upon the evidence adduced independently of the presumption.” (Citing cases, including *State v. Green*, 78 Utah 580, 6 Pac. (2d) 177).”

And in *Saltas v. Affleck* (Utah), 102 Pac. (2d) 493, it was said:

“And the settled rule in this jurisdiction is that *as soon as evidence is offered on the question, the presumption ceases and does not longer exist.*”

Similarly, a presumption of negligence based on the fact that a collision may have occurred on defendant's wrong side of the highway (which it did not in the instant case) is completely rebutted by evidence showing the collision was proximately caused by reason of other causes. See, *Larkey v. Church* (Okla.), 192 Pac. 569; *Kennedy v. Opdenweyer* (La.), 121 So. 636 and *Bragdon v. Kellogg* (Maine), 105 Atl. 433.

In the latter case the court said:

“Do the law and the evidence rebut the pre-

sumption against the defendant in this case? We think they do.”

Another reason why plaintiffs have failed to prove facts sufficient to constitute a cause of action is that if it be assumed that deceased were travelling north, the evidence shows the collision took place just west of, or at best straddled, the center line. Deceased's Plymouth was struck broadside (see Exhibits 3 and 4), which of necessity showed it to be partly, if not entirely, on its wrong side of the road. So even if it be assumed that deceased was travelling north, facts are not proven establishing liability.

Another well established principle is that the burden of proof cannot be sustained by plaintiff by predicating inferences on assumed facts. That is to say the burden of proof is not sustained by plaintiff where it is necessary to base inference upon inference to reach the ultimate conclusion.

Utah Foundry & Machine Co. v. Utah Gas &  
Coke Co., 42 Utah 533, 131 Pac. 1173;  
Karren v. Bair, 63 Utah 344, 225 Pac. 1094;  
Prentice Packing & Storage Co. v. United  
Pacific Ins. Co. (Wash.), 106 Pac. (2d) 314;  
Goodloe v. Jo-Mar Dairies Co. (Kan.), 185  
Pac. (2d) 158.

The jury should not be permitted to infer or speculate that deceased was travelling north; further infer that he was proceeding in the exercise of reasonable care when there were eye witnesses to the contrary and

also infer that facts existed establishing liability without actual proof.

We respectfully submit that defendants' motions for a directed verdict duly made before and after verdict should have been sustained.

## (2) ERRORS IN INSTRUCTING THE JURY

The court in instructing the jury in effect gave plaintiffs' requested instructions and practically none requested by defendants. The instructions given were erroneous in several substantial particulars. For the most part, those given were mere abstract statements of law without any application to the facts and evidence of the case.

### A. INSTRUCTIONS IMPROPERLY DEFINING DUTIES OF DEFENDANT.

When instructions are given to the jury defining the legal duties of defendant which place a greater duty than the law requires, then such instructions are necessarily prejudicial to defendant's rights and a new trial should be granted to afford defendant a fair trial on the issues of liability. The instructions hereinafter referred to were induced and given at the specific request of counsel for the plaintiffs and *specific exceptions were duly taken by the defense* (Tr. 461-73).

(a) The court's Instruction No. 13 (Tr. 233, duly excepted to, Tr. 465), defining the duties of defendant with respect to lookout, among other things said: "Included in this duty to use due care and diligence is the duty to *constantly keep a lookout not only ahead, but to*

*the sides of his vehicle.*” We quote the paragraph complained of:

### COURT’S INSTRUCTION No. 13

“You are instructed that it is the duty of a driver of a motor vehicle upon the public highways of this State to at all times exercise due care and diligence in order to prevent injury to persons or property lawfully upon the highway. *Included in this duty to use due care and diligence is the duty to constantly keep a lookout not only ahead, but to the sides of his vehicle*, and to actually see, as well as to look for, all persons, objects and things which are reasonably within the range of his vision, and which may constitute a hazard. It is then his further duty after having seen, or after he should have seen, to use such care and diligence as a reasonable and prudent person, having due regard to all conditions of the highway, the presence of intersections, obstructions or any other condition which may produce a hazard, would use to prevent injury. And in the event that a driver fails or neglects at any time to exercise such reasonable care and diligence, he is negligent. *And if, as a proximate result of such negligence, injury or damage is caused to any person, the driver so causing the injury or damage is liable to the person thus injured for all damages sustained by reason of such negligence*, unless such person is himself negligent and his negligence proximately contributes to produce the injury.” (Tr. 233)

This Court, in reversing the case for a new trial in *Morrison v. Perry*, 104 Utah 151, 140 Pac. (2d) 772, at page 160 of the Utah Report, said:

“In Instructions Nos. 15 and 21, the court



told the jury that it was the duty of each driver to keep a *constant lookout* and that if either failed to do so he would be negligent. The law requires a motorist to maintain a reasonably careful lookout so as to avoid a collision with persons or objects on the highway. 5 Am. Jur. 599, Sec. 167; *Cunnien v. Superior Iron Works Co., et al.*, 175 Wis. 172, 184 N.W. 767, 18 A.L.R. 667; *Boccalero v. Wadleigh*, 113 Cal. App. 376, 298 P. 526. What constitutes a reasonably careful lookout varies with the varying circumstances, and it is for the jury to determine whether or not a person maintained such a lookout under all of the facts as shown by the evidence. It may well be that under certain circumstances a 'constant' lookout would be required and any lookout less than that would constitute a lack of due care. From the evidence in this case it cannot be said that reasonable minds would reach only one conclusion, that is, that the exercise of reasonable care under the circumstances would require a 'constant' lookout. The court erred in instructing the jury that a '*constant*' lookout would be required."

In *Azzaro v. O'Connell* (Cal.), 9 Pac. (2d) 345, it was held reversible error to instruct the jury that there was a duty on the part of a pedestrian to be *constantly* on the alert for vehicles approaching. Said the court:

"We conclude that the giving of this instruction was error, because it was an incorrect statement of the legal duty of the appellant and of the deceased."

In *Neidig v. Fisher* (M.H.), 8 Atl. (2d) 564, a finding of the jury for plaintiff was sustained, notwithstanding he failed to keep a constant lookout for an approach-

ing automobile. The court pointed out that due care might require him to make observation momentarily in some other direction, and, furthermore, "this failure to constantly observe is not itself controlling, but is only an element to be considered with other testimony in the case."

In *Kaiser Co., Inc. v. American Individual Laundry Co.* (Pa.), 10 Atl. (2d) 64, it was held plaintiff in proceeding into an intersection, although the disfavored driver, under the right of way rule, was not negligent as a matter of law in not keeping a *constant* lookout in defendant's direction.

See, also, *Prato v. Snyder* (Cal.), 55 Pac. (2d) 255.

The court's Instruction No. 13 was particularly prejudicial not only in stating that defendant was required to "constantly keep a lookout" but even went further and required defendant to keep a *constant lookout in every direction*, "*not only ahead, but to the sides of his vehicle.*" It was further improper in that it permitted the jury to find that defendant was negligent in not keeping a lookout, when the only evidence was that he was keeping a lookout, and, in the absence of evidence to the contrary, he is presumed to have kept a lookout.

In *Azarro v. O'Connell* (Cal.), 9 Pac. (2d) 345, it was held reversible error to instruct upon the issue of contributory negligence as to lookout, where there was no evidence of failure to look to overcome a presumption of due care.

See, also:



Tyng v. Constant-Lorraine Investment Company, 37 Utah 304, 108 Pac. 1109, at p. 1111;

State Bank of Beaver County v. Hollingshead, 82 Utah 416, 25 Pac. (2d) 612, at p. 618;

Woodward v. Spring Canyon Coal Company, 90 Utah 578, 63 Pac. (2d) 267, at p. 273.

(B) THE COURT'S INSTRUCTIONS NUMBERED 14 (Tr. 234) AND 15 (Tr. 235) WERE SIMILARLY ERRONEOUS IN REQUIRING DEFENDANT TO EXERCISE A GREATER DEGREE OF CARE THAN THE LAW REQUIRES.

The court instructed, No. 14:

“You are instructed that in addition to the duty to keep a proper lookout, a driver *must* at all times maintain such control over his automobile and *must* take such measures as are reasonable to stop or turn to avoid a collision with another vehicle or person upon the highway reasonably within the range of his vision. And in the event such driver fails or neglects to so keep his vehicle under control as set forth above, he is negligent. And where such negligence proximately causes injury or damage to any other person or property, the driver of such vehicle is liable for all resulting damage, unless such person is himself guilty of negligence which proximately contributes to produce the injury.” (Tr. 234)

The foregoing effectually told the jury that defendant was required to drive so that he could avoid colliding with any one. This type of instruction was condemn-

ed and the case reversed in *Saltas v. Affleck*, 99 Utah 381, 105 Pac. (2d) 176. We quote:

“Appellant assigns as error the giving by the court of instruction numbered 11, and particularly that part which reads as follows: ‘In this case it was the duty of the defendant Kenneth Butte to drive his automobile on said highway, using reasonable care and prudence so that he could avoid injuring anyone or colliding with any person on the highway.’”

“The instruction if followed practically instructed the jury that the defendant in addition to keeping a proper lookout and requiring the exercise of ordinary care and prudence having in consideration due vigilance commensurate with the circumstances and surroundings required him to use such care and prudence so that he could avoid colliding with anyone, regardless of whether such one were or were not guilty of negligence.

“That part of the instruction failed to take into consideration the right of defendant to assume that all other persons upon the highway would use ordinary care and reasonable precaution for their own own safety until the contrary appeared.”

Counsel for plaintiff acknowledged the error when he requested the court to substitute the original instruction No. 14 by incorporating the word “reasonable.” However, the use of the word “reasonable” does not cure the harmful effect of the instruction, as we call attention to the statute from which the instruction was apparently derived, namely, Sec. 57-7-113 U.C.A. 1943, which reads:

“In every event speed shall be so controlled

as may be necessary to avoid colliding with any person, vehicle or other conveyance *on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*”

Just as this Court pointed out in the Saltas case, *supra*, the instruction fails to take into consideration the right of defendant to assume that all other persons upon the highway will use ordinary care and reasonable precaution for his own safety until the contrary appears.

The error existing in the court’s instruction No. 14, is re-emphasized by the court’s instruction No. 15 (Tr. 235), the first paragraph of which reads:

“You are instructed that it is further provided by law that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. *In every event, speed shall be so controlled, by using due care and caution, so as to prevent or avoid colliding with any person, vehicle or other conveyance on or entering the highway.*” (Tr. 235)

It is significant that instruction No. 15 entirely eliminated that qualification of the statute which reads: “entering the highway in compliance with legal requirements and the duty of all persons to use due care.”

(C) SPEED NOT A PROXIMATE CAUSE.

(c) The court’s instruction No. 15 was further improper in that there was no evidence that defendant’s

speed was a proximate cause of the collision.

See:

Cederlof v. Whited (Utah), 169 Pac. (2d) 777;  
Stobie v. Sullivan (Me.), 105 Atl. 714;  
Whalen v. Dunbar (R.I.), 115 Atl. 718;  
Burlie v. Stephens (Wash.), 193 Pac. 684;  
Bain v. Fuller (Nova Scotia), 29 D.L.R. 113.

The foregoing cases hold that speed not proven to be a proximate cause of the collision cannot be considered.

Had there been any basis on which it could have been a proximate cause which we contend there was not, defendants were at least entitled to a qualifying instruction as a guide to the jury so that the jury would not predicate liability on speed if it was not a proximate cause. Defendants' requested instructions Nos. 16 (Tr. 213) and 17 (Tr. 214), if given, would have aided the jury in determining the proximate cause. Exception was duly taken to the court's refusal to give such requests which read as follows:

#### DEFENDANTS' REQUESTED No. 16

"You are instructed that the posted speed at the time and place of the accident was 50 miles per hour. You are further instructed that the laws of the State of Utah do not require unqualifiedly that a driver must not exceed the posted or prescribed speed but only provide that speed in excess thereof shall be prima facie unlawful and speed slightly in excess of the prescribed limit does not necessarily constitute negligence,

although a driver is required to drive at a speed which is reasonable and prudent under all of the existing conditions. You are further instructed that if you find from the evidence that the deceased, Dale Tuttle, just prior to the accident, was driving south on or near the west edge of the highway and suddenly and unexpectedly made a left turn in front of defendant's approaching truck, under such circumstances that the driver and operator of defendant's truck could not reasonably have expected or anticipated that the deceased, Dale Tuttle, was going to so turn to the left, then the speed, if any, of defendant's truck would not be a proximate cause of the collision." (Tr. 213)

#### DEFENDANTS' REQUESTED No. 17

"You are instructed that if you find from the evidence that the deceased, Dale Tuttle, was driving his Plymouth automobile south near the west edge of the highway and that he, Tuttle, negligently turned to the left in front of defendants' truck, and that said deceased, Dale Tuttle, was not driving north upon the highway just prior to the collision, then the fact that part of defendants' truck may have been partially east of the center line of the highway would not be a proximate cause of the collision." (Tr. 214)

We respectfully submit there was reversible error in the court's instructions numbered 13, 14 and 15, and in the refusal of the court to give defendants' requested instructions numbered 16 and 17.

(D) ERROR IN ALLOWING THE JURY TO PRESUME DECEASED WAS EXERCISING DUE CARE.

Throughout the trial, counsel for plaintiff continued

to insist that plaintiff was presumed to be in the exercise of reasonable care. This was not only improper, but too much emphasis entirely was given to the so called *presumptions and inferences not warranted by the evidence.*

This is particularly true with respect to the court's Instruction No. 9 given to the jury as follows:

“You are instructed that negligence, proximate cause and other issues in this case may be proved by circumstantial evidence, as well as direct evidence, and it is for you to judge from all of the evidence received in the case together with the inferences that can be fairly and reasonably drawn therefrom, how the collision, in which the decedent, Dale Tuttle, lost his life, occurred.”  
(Tr. 229)

And the court's Instruction No. 6, which, in part, reads as follows:

“There is a presumption that the deceased used due care for his own protection and did all that reasonably was required for his own safety.”  
(Tr. 226)

While the portion of number 6 quoted was qualified by the preceding words, “In the absence of evidence to the contrary,” it is highly improbable that the jury would understand the significance of those words and in all probability gave some weight to the presumption mentioned. Had the court given defendants' requested instruction No. 19 (Tr. 216) the jury would have been clearly instructed *that any presumption that deceased*



*was in the exercise of due care could not be considered by them as evidence or at all but that their verdict should be based solely on the evidence.*

Furthermore, had the court given the first paragraph of defendants' requested instruction No. 7 (Tr. 204), in substance cautioning the jury not to determine the facts by speculation or guesswork, defendants would have been afforded some protection as against the court's instruction No. 9 which permitted the jury too great a latitude to speculate and base inference upon inference.

**(E) ERROR IN SUBMITTING NUMEROUS AND REPETITIOUS ALLEGATIONS UNSUPPORTED BY EVIDENCE.**

(d) The court's instruction No. 1 (Tr. 219-21), likewise induced by plaintiff's requested instruction No. 2 (Tr. 151), duly excepted to by defendants, simply copied all of the allegations of plaintiff's complaint verbatim with respect to every alleged ground of negligence, several of which were mere repetitions of the other, and all of which were enumerated without any regard to whether there was actual evidence to support a finding of negligence or proximate cause based on the particular grounds alleged. Instructions of this kind were condemned as constituting reversible error notwithstanding the fact that the jury was instructed that the allegations did not constitute evidence.

In *Shields v. Utah Light & Traction Co.* (Utah), 105 Pac. (2d) 347, the court said:

“\* \* \* In setting forth the claims of the parties to the jury, only that portion of the pleadings on which evidence had been introduced, should be mentioned at all, \* \* \*

“We conclude that the reading of the long and involved complaint to the jury as part of the charge was error not altogether corrected by the mere admonition that the foregoing is not to be construed as evidence but merely sets forth the claims of the plaintiff.

“\* \* \* the conclusion must be reached that appellant's substantial rights were in fact affected and prejudiced in a material manner.”

Plaintiff's allegations of negligence numbered (a) to (k) in the instant case were extremely repetitious as follows:

- A. Driving in excess of 40 miles per hour.
- B. Driving at an excessive speed, having due regard to the conditions then existing.
- C. Operating carelessly and heedlessly without due caution and circumspection.
- D. Failing to keep a proper lookout.
- E. Failing to keep their truck under control.
- F. Failing to drive on the right side of the roadway.
- G. Driving across the center line of the highway.
- H. Swinging the trailer out of control.
- I. Passing other cars going in the same direction when they could not do so with reasonable safety as to other vehicles proceeding in the opposite direction.

J. Failing to control speed to avoid collision.

K. Flashing lights on and off, interfering

with the vision of the deceased.

Speed is mentioned in three sub-paragraphs, namely (a), (b) and (j). Control is repeated in sub-paragraphs (e), (h) and (j). Certainly by no stretch of the imagination were lights a proximate cause of the collision, and it was error to incorporate sub-paragraph (k) in the court's instructions.

Lights were not shown to have been a cause of the accident and there was error in submitting the issue of lights to the jury under the court's instruction No. 16.

Undue emphasis is further placed upon all plaintiff's allegations of negligence notwithstanding the failure of proof with respect thereto, in that the court throughout its instructions continuously by reference refers back to the court's instruction No. 1 referring to sub-paragraphs (a) to (k), inclusive, hereinabove mentioned.

The authorities are numerous holding that it is error to submit alleged grounds of negligence to the jury when there is not supporting evidence. See *State Bank of Beaver County v. Hollingshead* (Utah), 25 Pac. (2d) 612, and others.

#### (F) FAILURE TO INSTRUCT A JURY ON DEFENDANTS' THEORY OF THE CASE.

Defendants' requested instructions were, in practical effect, refused in their entirety and defendant was thereby deprived of the right to have the jury instructed

as to the *legal and statutory duties of deceased* in their application to the law of contributory negligence.

True, contributory negligence was referred to in a general sense but there was no instruction given explaining to the jury the general law of contributory negligence as expressly requested by defendants' requested instruction No. 5 (Tr. 202). Defendants were entitled to have that matter clearly instructed upon so that the jury would be enabled to apply the law and make proper application of the law to the particular facts.

(a) It is also true that the court, by its instructions numbered 17, 18 and 19 (Tr. 237-9), instructed the jury relative to certain statutory duties, but such instructions were mere abstract statements of law without application to the facts and without particular application to the specific duties of deceased as contained in defendants' requested instructions numbered 9 (Tr. 206) and 11 (Tr. 208).

It has frequently been held error to give abstract propositions of law without particular application to the facts and circumstances of the case. See *Everts v. Worrell*, 58 Utah 238, 197 Pac. 1043, and *Jensen v. Utah Ry. Co.*, 72 Utah 366, 270 Pac. 349. In the latter case the court, at page 385 of the Utah Report criticizes instructions, which while correct as abstract propositions, are at fault "in stating propositions \* \* \* unrelated and unrestricted to and regardless of conditions or circumstances." Said the court:

"As a general rule a trial court should not leave the jury to apply more general principles

of law to a case, as here was done by the defendant's requests. The court should give the jury what the law is as applied to the facts either stated or assumed, and if so found by the jury. The rule is well settled that instructing a jury, a mere abstract or general statement as to the law should be avoided, and that all instructions should be applicable to evidence on either one or the other of the respective theories of the parties. Instructions which are not so applicable, though abstractly they may be correct, are not helpful to the jury, are apt to be misleading and to be improperly applied."

We particularly direct attention to the court's instruction No. 18, for illustration, which reads:

"You are instructed that a driver proceeding upon a roadway of two or more traffic lanes in either direction, shall drive such vehicle upon the right half of such roadway."

Such instruction is such a mere abstract statement of law as to be of no aid to the jury in its application of the law to the facts. The instruction is also misleading in that the abstract proposition of law therein stated could have no possible application to the case *except upon the assumption that the vehicles were in fact travelling in opposite directions*. The court should not by its instructions assume facts to be true which are disputed in the evidence, in this case not proven at all.

The giving of such abstract statements of law was held to be reversible error in *Morrison v. Perry* (Utah), 140 Pac. (2d), 772. We invite attention to the following portion of the opinion:

“The court failed to properly separate the theories of the parties, but instead gave general instructions treating the rights and duties of each driver as being mutual, without regard to defendant’s theory as to deceased’s negligence in first being on his wrong side of the highway. Defendant is entitled to have his case submitted to the jury on any theory justified by proper evidence. *Morgan v. Bingham Stage Coach Line Co.*, 75 Utah 87, 283 P. 160; *Hartley v. Salt Lake City*, 41 Utah 121, 124 P. 522; *Pratt v. Utah Light & Traction Co.*, 57 Utah 7, 169 P. 868; *Smith v. Lenzi*, 74 Utah 362, 279 P. 893; *Martineau v. Hanson*, 47 Utah 549, 155 P. 432.

“Each party is entitled to have his theory of the case presented in such a way as to aid the jury and not confuse it. In *Toone v. J. P. O’Neill Construction Company*, 40 Utah 265, 121 P. 10, 16, the court suggests the better practice of presenting the parties’ theories of the case to the jury: ‘One way the court might have followed in charging the jury would have been to charge them in separate instructions, first, in accordance with respondent’s evidence; and, second, in accordance with appellant’s evidence which related to the proposition covered by the instruction in question, and in each instruction have directed the jury to return a verdict in accordance with their findings upon that question.’ ”

Defendants’ requested instructions were based upon *specific statutory duties* governing the conduct of deceased in the operation of the automobile he was driving. We direct the court’s attention to defendants’ requested instruction No. 8 (Tr. 205) based upon the provision of Sec. 57-7-122 of the Motor Vehicle Code as follows:



“You are instructed that the laws of the State of Utah where there is a four lane highway provide that a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance, and that the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal. Therefore, if you find from the evidence that the automobile driven by the deceased, Dale Tuttle, was traveling south in the west lane of traffic, and that the defendant Heath H. Cornette, was about to overtake and pass the Tuttle automobile and had sounded an audible signal for such purpose, but that said Dale Tuttle negligently failed to give way to the right in favor of defendants’ truck and negligently turned in front of the truck and that such negligence proximately contributed in any degree to cause the collision, then plaintiffs cannot recover and your verdict must be in favor of defendants and against the plaintiffs, no cause of action.” (Tr. 205)

Defendants were entitled to have the jury instructed upon such statutory duty and in such form as it could be applied by the jury to the rule of contributory negligence.

We direct attention to defendants’ requested instruction No. 9 (Tr. 206), which asked the court to instruct the jury relative to the duties of deceased as defined in Sec. 57-7-133 of the Motor Vehicle Code. The statute mentioned specifically places the duty upon the deceased if he was traveling South to not:

“turn \* \* \* from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only

after \* \* \* giving an appropriate signal \* \* \*”  
by, see Sec. 57-7-135, “hand and arm extended horizontally.”

We are not unaware of the fact that the court did give a semblance of part of the rule in its instruction No. 19, but such instruction was entirely in the abstract and did not present defendants’ theory of the defense to the jury.

We further direct the court’s attention to the fact that the jury was not instructed with respect to deceased’s obligation to keep a proper lookout and before turning to look and ascertain if there was any approaching traffic. Defendants’ by their requested instruction No. 10 (Tr. 207), made a specific request, defining deceased’s duty regarding lookout and its application respecting defendants’ theory of contributory negligence as follows:

“You are instructed that if the driver of an automobile undertakes to make a left hand or U turn upon the highway, or to turn his car to the left for any other purpose, it is his duty before doing so to look and ascertain if there is any traffic approaching from the rear and if there is any approaching which would constitute a hazard to wait or stop, if necessary, until it is safe to turn, and then only after indicating by an appropriate signal his intention to do so. In looking for approaching traffic, it is not sufficient to say that one looked but did not see that which should have been seen, because the driver of an automobile about to turn has the duty not only to look but to see and observe with sufficient care

as to see such vehicles as are approaching within plain view and to heed their presence. Therefore, if you find from the evidence that the deceased, Dale Tuttle, was proceeding south near the west edge of the highway and negligently turned in front of approaching traffic without first determining if there was any approaching from the north which would affect his safety, then he was negligent, and if you find that such negligence proximately contributed in any degree to cause the collision, then plaintiffs cannot recover and your verdict must be in favor of defendant and against the plaintiffs, no cause of action.” (Tr. 207)

Similarly, defendants’ requested instruction defining deceased’s duty under the terms of Sec. 57-7-128, should have been given in such form as to present defendants’ theory of defense instead of in the abstract as given by the court in its instruction No. 17.

There were other instructions requested by defendants which were not given by the court, or if given, were only given in part. Such requests were intended to present defendants’ theory of the case to the jury and we feel that the court must have lost sight of the established rule that “defendant is entitled to have his case submitted to the jury on any theory justified by proper evidence. \* \* \*” *Morrison v. Perry, supra*.

### 3. REFERENCE TO INSURANCE INDEMNIFICATION.

Counsel for plaintiff couldn’t resist the temptation throughout the trial in making reference to a Mr. Kunz,

an insurance adjuster who had taken some statements, and this matter was effectively driven home to the jury when Carol Ellis, plaintiffs' own witness and client of plaintiffs' counsel was cross-examined for the purpose of refreshing her memory as to what she had told Officer Halliday.

“Q. Did you tell anybody following the accident that the car which was involved in a collision with the truck was the car which had been preceding you going south before the accident?

A. Yes, I made that statement.

Q. Who did you make that statement to?

A. *To the insurance investigator.*

Q. And did you make a statement to anyone else?

A. I don't recall.” (Tr. 90)

Then when being questioned by plaintiffs' counsel respecting the statement given to Mr. Kunz, she volunteered:

“A. Oh, he came in and introduced himself and I introduced him to Mr. Creer, and he explained his being there. Wanted to talk to me about it and wanted me to give him a statement. He sat down at a desk and started chatting about the accident and talking it over with us, and insisted that I give him something definite, and I just was very reluctant to even discuss it because I didn't understand his position, who he was or why he was there. *Said he* (Tr. 105) *was from the insurance company.*

MR. HANSON: Just a moment. If Your

Honor, please, we object to that part, referring to the insurance company, as being improper and unfair. The witness has obviously talked to her counsel before, and he knows that's unfair. That issue has nothing to do with this case, and I object to it at this time and cite it as error, prejudicial error." (Tr.106)

The courts have repeatedly condemned the practice of permitting a friendly witness to make reference to an insurance adjuster or the insurance company either directly or indirectly. Such misconduct is held to be prejudicial and reversible error and is not cured by a mere statement to the jury to disregard the statement. See *Morrison v. Perry*, supra, and *Saltas v. Affleck*, supra.

In the *Morrison v. Perry* case, reference was made to insurance when a witness, Penrose, referred to the person who took a statement from him in the following manner:

"A. I understand from this other man here that he was an attorney with an insurance outfit. That is what he told me he was. He did not tell me he was an attorney."

In *Consolidated Motors Inc. v. Ketcham*, (Ariz.) 66 Pac. (2d) 246, on cross examination of one of the defendants, plaintiff's counsel concerning a statement, asked, "Who did you make it to?" The answer, "A lawyer for the insurance company, at that time, Charlie Young." In reversing the case, the court said:

"It will be seen that the rule laid down by us is, that unless it appears that the plaintiff was entirely without blame in creating the situation

which caused the reference to the question of insurance, we have always reversed the case whenever the matter was in any way brought to the attention of the jury, regardless of whether it came through a witness, for plaintiff or defendant, or upon direct or cross-examination. It is not sufficient that plaintiff did not mean to bring out the prohibited matter, but he must mean not to.

“It is evident from the cross-examination, which referred to a specific signed statement made at a certain time, that counsel for plaintiff had in mind one particular statement of which he had knowledge. We are of the opinion that since this must have been true, it was the duty of counsel,

even if the statement itself might be admissible for any purpose, to so carefully guard the manner in which it was introduced as to, if possible, avoid any reference to the insurance company. This he might easily have done by issuing a subpoena duces tecum to the person to whom he knew it was made, and then, since it was a signed and written statement, identifying it through the testimony of the defendant, and if it in any particular thereof was admissible, offering or using it in evidence. He chose not to do this but went into the matter in such a manner that he should have known it was but natural for the question of insurance to come out during the cross-examination. \* \* \* In view of what we have said as to the highly prejudicial effect of allowing a jury even to surmise from statements made during the trial that back of the nominal defendants there stands an insurance company, and the great care which a plaintiff must use to see that the matter does not come into the case through any fault of his, we are of the opinion that the case must be reversed for a new trial



on this ground, regardless of the other assignments of error.”

In *Poland v. Dunbar*, (Maine) 157 Atl. 381, counsel for the defense had introduced without objection a statement of the plaintiff unfavorable to her case. On cross-examination, plaintiff’s counsel after having plaintiff identify her signature asked: “ ‘After the statement was made and signed, did you then learn who this man represented?’ A. ‘I did.’ Q. ‘And whom did he represent?’ ” and over defendant’s objection, she answered, “ ‘The insurance company.’ ” The court held this reversible error, being prejudicial hearsay.

See also *Simpson v. Foundation Company*, (N. Y.) 95 N.E. 10; *Fleming v. Hartrick*, (W. Va.) 141 S.E. 628; *Lavigne v. Ballantyne*, (R. I.) 17 Atl. (2d) 845; *Levy v. J. L. Mott Iron Works*, 127 N. Y. S. 506; *Hankins v. Hall*, (Okla.) 54 Pac. (2d) 609; *Bratten v. White*, (Okla.) 75 Pac. (2d) 474; *Cameron v. Pacific Lime and Gypsum Company*, (Ore.) 144 Pac. 446; and *Manigold v. Black River Traction Company*, 80 N. Y. S. 861.

#### 4. ERROR IN DENYING MOTION FOR NEW TRIAL.

This Honorable Court is undoubtedly aware of the rule respecting the duty of the lower court to grant a new trial when the verdict is contrary to the weight of the evidence as well as when a verdict is unsupported by probative evidence. Such duty is especially important when the jury was improperly instructed to the prejudice of defendants denying their right to a fair trial. The

verdict being contrary to the only evidence which showed how the accident occurred, a new trial should have been granted on several grounds.

#### IV.

### SUMMARY AND CONCLUSION

In conclusion may we say that the extreme ends to which counsel for plaintiffs went in making every conceivable allegation of negligence, thirteen in all, which were in no sense connected with the cause of the accident and in no possible sense of the word shown to have proximately caused the collision, is proof that such allegations were not founded on fact.

When one considers the court's instructions consisting of abstract propositions of law without application to the facts and circumstances and which were adopted almost verbatim from plaintiffs' requests, together with the confusion caused by the unfounded arguments of counsel based upon the erroneous assumption that the Tuttle car was traveling north, it is no small wonder that the jury, out of such confusion and sympathy and in the belief there was insurance, erroneously returned the verdict it did.

It is fundamental and the first obligation of the courts that cases be decided upon the actual and probative evidence. The burden of proof cannot be said to be sustained by confusion created through collateral matters and assumed inferences and conclusions not proven by evidence.

The truth is, as the parties to this suit and eye witnesses know full well, that the collision was caused when deceased, *proceeding south*, suddenly turned left in front of defendants' truck, and defendants' motion for a directed verdict made both before and after the verdict, should have been sustained on each of the grounds herein assigned.

When the court decided to submit the case to the jury, surely if there was any such justification, defendants were entitled to have instructions given which would not place upon defendants a greater duty than the law required and were likewise entitled to have correlative instructions given *defining the legal and statutory duties of deceased respecting the law of the road*.

These and several other errors herein discussed effectually precluded defendants from obtaining a fair trial and the lower court failed in its obligation to direct a verdict—in any event, to grant a new trial.

Respectfully submitted,

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