

1951

## O. K. Clay v. Stephen L. Dunford et al : Brief of Respondent

Utah Supreme Court

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Moreton, Christenson & Christensen; Attorneys for Defendants and Respondents;

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

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**O. K. CLAY, Administrator of the  
Estate of ARNOLD KARTCHNER,  
also known as ARNOLD G.  
KARTCHNER, also known as  
ARNOLD GRANT KARTCHNER,**

*Plaintiff and Appellant,*

— vs. —

**STEPHEN L. DUNFORD, PAUL  
H. STEVENS, BURNS L. DUN-  
FORD and L. CLAYTON DUN-  
FORD, doing business as THE  
DUNFORD BREAD COMPANY,**

*Defendants and Respondents.*

**FILED**

SEP 21 1951

Clerk, Supreme Court, Utah

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**RESPONDENT'S BRIEF**

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**MORETON, CHRISTENSEN &  
CHRISTENSEN,**

*Attorneys for Defendants  
and Respondents.*

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# INDEX

	Page
STATEMENT OF FACTS .....	1
POINTS TO BE ARGUED .....	8
ARGUMENT .....	8
POINT I. THERE WAS NO ERROR IN THE COURT'S INSTRUCTION NO. 7. ....	18
POINT II. THERE WAS NO ERROR IN THE COURT'S INSTRUCTION NO. 10. ....	15
POINT III. THE COURT DID NOT ERR IN SUBMITTING TO THE JURY THE QUESTION OF ASSUMP- TION OF RISK ON THE PART OF THE DE- CEASED. ....	21
POINT IV. THE COURT DID NOT ERR IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRU- TION NO. 3, EITHER IN THE LANGUAGE RE- QUESTED OR IN MODIFIED FORM. ....	24
POINT V. THE COURT ERRED IN REFUSING TO GRANT DEFENDANTS' MOTION FOR A DIRECTED VERDICT. ....	25
CONCLUSION .....	40

## TEXTS CITED

5 Am. Jur. 610, 612, Automobiles, Secs. 191, 196 .....	27
38 Am. Jur. 845-6, Negligence, Sec. 171 .....	11
38 Am. Jur. 859, Negligence, Sec. 182 .....	12
38 Am. Jur. 865, Negligence, Sec. 189 .....	16
38 Am. Jur. Negligence, Sec. 193 .....	39
53 Am. Jur. 454, Trial, Sec. 576 .....	22
Shearman & Redfield, Vol. 1, Negligence, 242 .....	39
Shearman & Redfield, Vol. 1, Negligence, 249-250 .....	17
Shearman & Redfield, Vol. 1, Negligence, 324, 5 Am. Jur. 610, 764 .....	30
Automobiles, Secs. 191, 462 .....	21
Rule 51 U. R. C. P. ....	16
Blacks Law Dictionary 1817 .....	

## CASES CITED

Beaucage v. Roak, 130 Me. 114, 153 A. 894 .....	38
Bishard v. Engelbeck, 180 Ia. 1132, 164 N.W. 203 .....	29
Caselegno v. Leonard, 105 Pac. (2d) 125 .....	19
Chase v. Thomas (Cal. App.) 46 Pac. (2d) 200, 201 .....	33

# INDEX—(Continued)

	Page
Chipokas v. Peterson, 219 Iowa 1072, 260 N.W. 37 .....	28
City Ice & Fuel Co. v. Center, 54 Ohio Appeals, 116, 6 N.E. (2d) 580 .....	19
Conklin v. Walsh (Ut.), 193 Pac. (2d) 437, 439 .....	19
Conrad v. Green (N. J. Sup.), 94 A. 390 .....	38
Cooper & Co. v. American Can. Co., 130 Me. 76, 153 Atl. 889 .....	35
Covaleskie v. Schimpf, 322 Pa. 65, 185 A. 196 .....	32
Crutchley v. Bruce, 214 Ia. 731, 240 N.W. 238 .....	29
Dando v. Brobst, 318 Pa. 325, 177 A. 831 .....	31
Deal v. Snyder, 203 Mich. 273, 168 N.W. 973 .....	37
Di Stephano v. Smith, (R.I.), 102 A. 817 .....	38
Dobrowolski v. Henderson, 15 La. App. 79, 130 So. 237 .....	37
Fulton v. Mohr, 200 Mich. 538, 166 N.W. 851 .....	38
Grein v. Gordon, 280 Pa. 576, 124 A. 737 .....	29
Hadley v. Simpson (Wash.), 115 Pac. (2d) 675 .....	15
Hamblet v. Soderburg, 189 Wash. 449, 65 Pac. (2d) 1267, 1269 ....	33
Harder v. Matthews, 67 Wash. 487, 121 Pac. 983 .....	38
Hayes v. Gunter Bros. Lbr. Co., 14 La. App. 402, 129 So. 401 .....	38
Hoffman v. Southern Pac. (Cal. App.) 258 Pac. 397.....	23
Howk v. Anderson, 218 Ia. 358, 253 N.W. 32 .....	29
Hughes v. Torregrossa, 278 Mass. 530, 180 N.E. 304 .....	38
James v. Florios, 248 Mich. 153, 226 N.W. 852 .....	11, 31, 38
Jarvin v. Stone, 216 Ia. 27, 247 N.W. 393 .....	38
Johnson v. Gaughren (Wash.), 104 Pac. 170 .....	22
Klink v. Bany (Ia.), 224 N.W. 540 .....	29
Koock v. Goodnight (Tex. Civ. App.) 71 S.W. (2d) 927 .....	38
Letts v. Cole, 310 Pa. 509, 165 A. 847 .....	37
McAtter v. Highland Coffee Co., 291 Pa. 32, 139 A. 585 .....	29, 37
Maranta v. Wezelberg, 241 App. Div. 420, 272 N.Y.S. 710 Affd. 267 N.Y. 510, 196 N.E. 554 .....	38
Matassa v. Economy Cab Co. (La. App.), 158 So. 239 .....	32
Mathews v. Dudley (Cal.), 297 Pac. 544 .....	17
Mertens v. Lake Shore Yellow Cab & Transfer Co. 195 Wis. 646, 218 N.W. 85-86 .....	31, 38
Messick v. Mason, 156 Va. 193, 157 S.E. 575 .....	29
Mingus v. Olsson, (Ut.) 201 Pac. (2d) 495, 499 .....	35
Monroe v. Eager, 16 La. App. 540, 131 So. 719 .....	29
Owens v. Tisdale, (La. App.) 153 So. 564.....	38
Pettijohn v. Weede, (Ia.) 227 N.W. 824.....	38
Pierce v. Hosman, 201 Ky. 278, 256 S.W. 397 .....	37
Ponder v. Carroll, 193 Ark. 1120, 105 S.W. (2d) 72 .....	38
Raymond v. U. P. R. Co. (Ut.), 191 Pac. (2d) 137 .....	39
Rittle v. Zeller, 100 Pa. Super Ct. 516 .....	29, 38

# INDEX—(Continued)

	<b>Page</b>
Rodriguez v. Abadie, (La. App.) 168 So. 515.....	29
Runge v. Haller, 236 Ky. 423, 33 S.W. (2d) 317 .....	38
Shannon v. Thomas (Cal. App.), 134 P. (2d) 522 .....	14
Standard Oil of Kentucky v. Noakes, 59 Fed. (2d) 897 .....	30
Stawsky v. Wheaton, 220 Ia. 981, 263 N.W. 313 .....	37
Stephenson v. Parton (Wash.), 155 Pac. 147 .....	15
Sundbery v. Ber, (La. App.) 162 So. 85.....	29
Watson v. Home Mut. Ins. Assoc., 215 Ia. 670, 246 N.W. 655 .....	29
Weaver v. Pickering, 279 Pa. 214, 123 A. 777 .....	11, 38
Whalen v. Mutrie, 247 Mass. 316, 142 N.E. 45 .....	26
Will v. Boston Elevated Railroad Co., 247 Mass. 250, 142 N.E. 44 .....	34
Woods v. Moore, (Mo. App.) 48 S.W. (2d) 202.....	32
Woods v. Pace, 220 App. Div. 386, 222 N.Y.S. 157 .....	32
Woodward v. City (Mass.), 76 N.E. (2d) 656 .....	35

# IN THE SUPREME COURT of the STATE OF UTAH

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O. K. CLAY, Administrator of the  
Estate of ARNOLD KARTCHNER,  
also known as ARNOLD G.  
KARTCHNER, also known as  
ARNOLD GRANT KARTCHNER,

*Plaintiff and Appellant,*

— vs. —

Case No. 7705

STEPHEN L. DUNFORD, PAUL  
H. STEVENS, BURNS L. DUN-  
FORD and L. CLAYTON DUN-  
FORD, doing business as THE  
DUNFORD BREAD COMPANY,

*Defendants and Respondents.*

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

The statement of facts set forth in the appellant's brief does not fully reflect all of the material facts of the case, and particularly those upon which the theory of defense was based, and for that reason we deem it necessary to supplement the statement with the following:

As stated in the appellant's brief, this is a wrongful death case commenced by the personal representative of Arnold D. Kartchner, deceased, against the defendants as co-partners. The deceased suffered fatal injuries in an automobile accident occurring at about 316 East 13th South Street, Salt Lake City, Utah, at about 4:50 P.M. on the afternoon of June 24, 1950. There is little or no dispute in the testimony of the witnesses, and such differences as to the facts as there are between the two parties are largely differences in the inferences to be drawn from the established facts.

Immediately prior to the accident the deceased had parked his station wagon automobile on the south side of 13th South Street, facing in an easterly direction and in front of the above mentioned address. (R. 104.) Deceased stepped from the left hand side of his automobile and was immediately struck by a delivery truck owned by the defendants and operated by Montel Mangum, defendant's employee. (R. 105, 107, 108.) It was admitted in the pleadings that the truck was owned by the defendants, that the driver, Mangum, was an employee of the defendants, and was engaged in the course of his employment at the time the accident occurred. (R. 1, 4.) Immediately prior to the accident Mangum had made his last delivery of the day at Jack Milner's Grocery Store, 203 Hampton Avenue. At the time of the occurrence of the accident, Mangum was returning to his employers' place of business after having completed his last call. (R. 170, 171.) After leaving Milner's Grocery, Mangum

proceeded easterly on Hampton Avenue to 3rd East Street and then turned right and proceeded southerly along 3rd East to its intersection at 13th South Street. (R. 171.) He stopped at the stop sign and waited for traffic on 13th South Street to clear and then made a left hand turn onto 13th South Street. Because traffic was somewhat heavy at the time, Mr. Mangum made a rather wide turn so that his truck went over the southerly edge of the hard surface portion of the road and on to the dirt or gravel shoulder. (R. 171.) After completing this turn, Mangum proceeded easterly along 13th South Street to the point of collision which was some 167 feet east of the east curb line of 3rd East Street. (R. 67.) As Mangum proceeded easterly along 13th South Street, he was looking straight ahead along his direction of travel. He observed the station wagon automobile parked along the south side of the road, but he did not at any time see the deceased. (R. 171, 172.) According to his own testimony he was going about twenty miles per hour (R. 179.) Roberg testified that the truck was traveling "pretty slow." (R. 106.) There is no evidence in the record to the contrary. As he passed the station wagon he heard a thud on the right side of his truck and he thought that possibly "some kid" had thrown something at the truck. On stopping to investigate, he saw the deceased lying in the road. (R. 123.)

The plaintiff's theory at the trial of the case was that defendants' driver failed to keep a proper lookout; that the deceased was standing by the station wagon auto-



mobile as the defendants' driver approached the scene of the accident, but that Mangum failed to observe the deceased and negligently ran into him.

It was and is the defendants' theory that the deceased stepped suddenly from his station wagon and directly into the defendants' truck; that there was no opportunity whatsoever for Mangum to avoid the accident, and that the deceased failed to observe oncoming traffic or to take any precautions whatsoever for his own safety. Moreover, the deceased stepped from the left hand side of his automobile directly into the street and the hazards of approaching traffic, when he could have, with equal convenience and much greater safety, alighted on the right side of his vehicle to the sidewalk, and free of vehicular traffic hazards. The case was submitted to the jury on the question of the defendants' negligence and deceased's contributory negligence and assumption of risk, and the jury returned a verdict in favor of the defendants, no cause of action.

There are some statements in the appellant's brief, to the effect that the evidence conclusively shows negligence on the part of Mangum. To these statements we take exception. There is abundant evidence in the record to justify a finding of non-negligence upon the part of Mangum. Besides the testimony of Mangum above set forth, there is considerable corroborating testimony as

to the truth and accuracy of his version of the accident. Indeed there is no evidence to the contrary except the impeaching testimony of Mrs. Roberg.

Officer Harold Peterson of the Salt Lake Police Force, one of the officers who investigated the accident, testified that the truck left track marks along the south shoulder of 13th South Street and that these track marks were gradually moving from the shoulder of the road back toward the center of the road at the point of impact. (R. 70.) This is corroborative of Mangum's testimony that he made a wide turn.

The plaintiff introduced in evidence at the trial, some photographs taken by Officer Snell immediately after the accident, including pictures of the front and right side of the defendants' truck. (Ex. B & D.) Exhibit B is a view of the right side of the defendants' truck, and it shows an indentation on the right hand door post about three feet back from the front of the truck and about five feet nine inches high. Near this indentation were some colored marks which appeared to be blood spots. (R. 47, 48, 54, 55, 63, 72, 73, 87.) There are other marks, assumed to be blood spots, lower down on the same door post. (R. 48.)

Exhibit D, which is a front view of the defendants' truck shows no marks of any kind. (R. 54, 73, 86.) The investigating officers examined the front of the truck and found no marks or indentations of any kind.

The testimony of Keith Roberg, is also illuminating. Roberg testified that immediately prior to the accident, he was engaged in conversation with the deceased. Roberg was standing on the right hand side of the station wagon. His testimony as to what then transpired is as follows:

“Q. And then what happened?

“A. And then *as he got out he got hit.*

“Q. When he got out what did he do?

“A. He just closed the door and got hit.” (R. 105.)  
(Italics ours.)

His testimony was to the same effect on cross examination:

“Q. And *just as he got out he got hit, is that right?*

“A. Yes.” (R. 108.) (Italics ours.)

From the testimony of Roberg that the deceased was struck immediately upon his alighting from his automobile, together with the undisputed evidence that the impact was upon the side rather than on the front of the truck, and the undisputed evidence that at the point of impact the truck was moving away from the station wagon and toward the center of the road, plus the testimony of Mangum that although he was looking straight up the street and he observed the station wagon automobile but never observed the deceased, we believe that the conclusion is irresistible that the deceased stepped

suddenly and without looking, directly in the defendants' truck; that the defendant's driver had no opportunity to avoid the accident and that the deceased himself was guilty of negligence which was the sole cause of his fatal injuries. No other explanation can be reconciled with the facts, most of which are undisputed.

## POINTS TO BE ARGUED

### POINT I.

THERE WAS NO ERROR IN THE COURT'S INSTRUCTION NO. 7.

### POINT II.

THERE WAS NO ERROR IN THE COURT'S INSTRUCTION NO. 10.

### POINT III.

THE COURT DID NOT ERR IN SUBMITTING TO THE JURY THE QUESTION OF ASSUMPTION OF RISK ON THE PART OF THE DECEASED.

### POINT IV.

THE COURT DID NOT ERR IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 3, EITHER IN THE LANGUAGE REQUESTED OR IN MODIFIED FORM.

### POINT V.

THE COURT ERRED IN REFUSING TO GRANT DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

## ARGUMENT

As we understand the appellant's argument, there is no contention made that the evidence is not sufficient to support the verdict. If we understand his position correctly, appellant's only contention is that the Court committed error in its instructions to the jury. It is respondents' theory that there was no error committed by the Court in instructing the jury and further, if there were any error, such error would be immaterial, because the defendants were entitled to a directed verdict on the evidence adduced.

## POINT I.

THERE WAS NO ERROR IN THE COURT'S INSTRUCTION NO. 7.

Appellant first complains that the Court erred in giving its Instruction No. 7, which is as follows:

"You are instructed that a person cannot deliberately incur an obvious risk of personal injury, particularly when there is a safe course of action open to him, and then hold the author of the danger liable in damages for any injuries sustained.

"If you find from the evidence in this case, that the deceased, Arnold Kartchner, placed himself in a position of obvious peril when there was no reasonable justification therefor, then the said Arnold Kartchner is deemed to have assumed the risk of his course of conduct and your verdict must be in favor of the defendants and against the plaintiff, no cause of action."

It is not altogether clear upon what theory appellant attacks this instruction. Under Point I of his argument he apparently treats the instruction as one on contributory negligence and seems to argue first, that there was no evidence sufficient to warrant the giving of the instruction, and secondly, that the instruction did not correctly define the standard of care imposed upon the deceased. Under Point III of his argument, appellant seems to treat the instruction as one on the doctrine of assumption of risk. We believe that it was the intention of the Court in giving Instruction No. 7, to charge the jury on the defense of assumption of risk. The jury were adequately instructed by other instructions on the doctrine of contributory negligence. However, we shall attempt to meet appellant on his own ground and show that there is no merit to any of his arguments.

It is recognized in appellant's brief (page 32) that the same state of facts may give rise to both the defenses of contributory negligence and assumption of risk. There could of course, be no impropriety in instructing the jury on both theories if the evidence warranted. It is further pointed out in the plaintiff's brief that assumption of risk involves a deliberate choice of a course of action with full knowledge of the danger. We think there can be little doubt that the conduct of the deceased amounted both to contributory negligence and assumption of risk, and certainly the evidence justified instructions on both defenses.

Appellant argues that there is no evidence in the record from which any reasonable inference can be drawn that the deceased placed himself in a position of obvious peril or that he deliberately incurred an obvious risk. The record shows without dispute that the deceased resided at 316 East 13th South Street and had resided there for a number of years prior to the occurrence of the fatal accident. He must, therefore, be presumed to have known what the traffic conditions were on the street immediately in front of his residence. Certainly the jury would be warranted in inferring that the deceased had knowledge of these facts. There is also abundant evidence in the record that traffic along 13th South at the time of day and place where the accident occurred was generally heavy.

Mangum testified that he had to stop at the stop sign at 3rd East Street, to allow traffic on 13th South to clear. He also testified that it was necessary for him to make a rather wide left hand turn on to 13th South Street because the traffic was heavy.

The investigating police officers testified that traffic along 13th South Street at that hour of the day was quite heavy, and the plaintiff's Exhibit E, which is a photograph taken shortly after the occurrence of the accident, shows a heavy stream of traffic proceeding along 13th South Street. Deceased must have known these facts;

and he would be chargeable with the common knowledge as to the danger of stepping from the safety of an automobile into a heavily traveled street without observing to determine whether any traffic was approaching.

As said by the Supreme Court of Michigan in the case of *James v. Florios*, 248 Mich. 153, 226 N.W. 852:

“Walking from behind and going beyond a standing vehicle into a pathway open to traffic is a fruitful source of accident and an ordinarily prudent man will in view of the possible danger in doing so, exercise the essential precaution of ascertaining whether the way is open and may reasonably be expected to remain open to his crossing.”

In *Weaver v. Pickering*, 279 Pa. 214, 123 Atl. 777, the Court said:

“In the instant case plaintiff seemed oblivious to danger and chose to walk by faith across a busy city street; in so doing *he assumed the risk.*” (Italics ours.)

It is next argued by the appellant that the language of the instruction placed upon the deceased a higher degree of care for his own safety than that of reasonable care under the circumstances. In making this argument appellant has apparently misconstrued the language of the instruction. The first paragraph of the instruction was taken almost verbatim from 38 *Am. Jur.*, pp. 845-6, *Negligence*, Sec. 171, and reads as follows:



“One cannot deliberately incur an obvious risk of personal injury, especially when preventive measures are at hand, and then hold the author of the danger for the ensuing injury.”

See also the same authority at page 859, *Negligence* Sec. 182:

“A person who, by his own act, subjects himself unnecessarily to danger violates the duty imposed upon all men to use ordinary care for their own safety and is guilty of contributory negligence. The law imposes upon a person, sui juris, the obligation to use ordinary care for his own protection, the degree of which is commensurate with the dangers to be avoided; and one who voluntarily and unnecessarily assumes a position of danger, the hazards of which he understands and appreciates, cannot recover for an injury from a risk incident to the position.”

We do not see how appellant can argue, with any degree of logic, that this instruction is tantamount to a directed verdict for the defendants. The language clearly states that *if* the jury finds that the deceased placed himself in a position of obvious peril and that there was no reasonable justification therefor, then, in that event, the deceased assumed the risk. Under the language of the instruction, the jury was not bound to find that by stepping from his automobile into the path of the defendants' approaching automobile, the deceased placed himself in obvious peril. The jury was merely permitted, (not required) under the language of the instruction, so

to find. Of course, in admitting that the language of the instruction, would permit the jury to find that the deceased did not place himself in a position of obvious peril we do not admit that the evidence would have warranted a finding to that effect.

At the conclusion of his argument under Point I, plaintiff cites a number of cases. We have carefully examined all of these authorities and we do not see that they are at all germane to the argument. In all of the cases cited by the plaintiff the question presented to the appellate Court was whether there was sufficient evidence to warrant the submission to the jury of the issue of the defendant's negligence or whether the evidence showed that the plaintiff was guilty of contributory negligence as a matter of law. In none of the cases cited by appellant is there any discussion of any instruction in any wise similar to the instruction of which plaintiff complains in the case at bar. The holdings of the various courts in the cases cited by the plaintiff merely hold that under the particular facts of those cases, that the evidence warranted a finding of negligence on the part of the defendant, or, that the plaintiff was not guilty of contributory negligence as a matter of law, or both. In the instant case both the issues of defendants' negligence and deceased's contributory negligence were submitted to the jury, and decided adversely to the plaintiff. Appellant having had the benefit of a jury determination of those issues, he is entitled to nothing more under the holdings of his own authorities.

It should also be observed here, that all of the cases cited by appellant are quite different on their facts from the case at bar. The most important difference is the fact that in *all* of the cases cited by the plaintiff, the evidence clearly showed that the plaintiff was in a position along side the road for a sufficient length of time that he could have been and should have been observed by the defendant. As has been pointed out in our statement of facts, the evidence in the case at bar shows without dispute that the deceased was not in a position where he could have been observed by the defendants' driver, but, on the contrary, that he stepped suddenly and without warning from a place of safety directly into the pathway of defendants' approaching vehicle. We shall develop this point more fully under Point V hereof. Suffice it at this time to quote from two or three of the cases cited by appellant wherein the difference between the two classes of cases is shown.

In *Shannon v. Thomas* (Cal. App.), 134 P. (2d) 522, cited in appellant's brief, at page 26, the Court said:

"The situation here present is not akin to that which exists where a pedestrian is about to cross a street and thereby places himself in the path of danger or suddenly steps out in front of and in the path of an oncoming automobile or walks into the street or upon a railway track without looking at all as was the situation in several of the cases relied upon by respondent."

In *Stephenson v. Parton*, (Wash.), 155 Pac. 147, cited in plaintiff's brief, at page 23, the Court said:

"\* \* \* If, as is contended by the appellants, the deceased was in a place of safety, and stepped in front of the automobile where there was no chance to avoid being struck, the deceased was guilty of negligence."

In *Hadley v. Simpson*, (Wash.), 115 Pac. (2d) 675, the difference was pointed out in the following language:

"The facts differentiate this case from such cases as *Hamblet v. Soderburg*, 189 Wash. 449, 65 P. (2d) 1267, and *Estill v. Berry*, 193 Wash. 10, 74 P. 2d 482, upon which respondent puts much reliance. Decisions of which those are typical, hold that a pedestrian is guilty of contributory negligence as a matter of law (1) where he walks into the side of an automobile which was in plain sight at the time he said he looked and did not see it; (2) where, without looking he steps from behind a parked automobile or other object into the path of an oncoming car."

The Court's Instruction No. 7 was based upon ample evidence and correctly stated the law.

## POINT II.

THERE WAS NO ERROR IN THE COURT'S INSTRUCTION NO. 10.

For the convenience of this Court we set forth the trial court's Instruction No. 10, which was as follows:

"You are instructed that every person is bound to the exercise of vigilance with the view to discovery of perils by which he may be menaced and their avoidance after they are ascertained. Every person is bound to use due diligence to save his person from injury by the negligent act of another.

"If you find from the evidence in this case that the deceased, Arnold Kartchner, failed to exercise vigilance to discover the approach of traffic and particularly to discover the truck being then and there operated by Montel Mangum and that such failure to exercise vigilance was a proximate cause of the fatal injury sustained by the said Arnold Kartchner, then your verdict must be in favor of the defendants and against the plaintiff, no cause of action."

It is apparently the position of appellant that the language of this instruction placed upon the deceased a higher duty of care than ordinary or reasonable care. Appellant has apparently construed the word "vigilance" to mean a degree of care higher than ordinary or reasonable care. Although the word "vigilance" has various meanings, we do not believe that it can be construed to mean anything other than ordinary care, as used in the language of the instruction, taken in its context and in light of the other instructions of the Court. The word is defined in the American College Dictionary, page 1356 as watchfulness. It is given the same definition in Black's Law Dictionary at page 1817. The first paragraph of Instruction No. 10 was taken from 38 *Am. Jur.*, page 865, *Negligence* Sec. 189, which reads as follows:

“Every person is bound to the exercise of vigilance with a view to the discovery of perils by which he may be menaced and their avoidance after they have been ascertained. Every person is bound to use due diligence to save his person from injury by the negligent act of another.”

In *Shearman & Redfield on Negligence*, Vol. 1, pp. 249-250, it is stated that ordinary care implies the use of such *watchfulness* and precaution to avoid coming into danger and such effort to escape from or mitigate it when actually in danger, as a person would ordinarily use for his own protection under the same circumstances.

A very similar case on this point is *Mathews v. Dudley* (Cal.), 297 Pac. 544. In that case the court instructed the jury with respect to a driver's duty as follows:

“You are instructed that a driver has no right to assume that the road is clear, but under all circumstances and at all times he must be *vigilant* and must anticipate the presence of others. *The fact that he did not know that anyone was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway.*

“I further instruct you that a person lawfully and carefully driving upon a highway has the right to assume that all persons using the highway will also use ordinary care and caution. This rule allows drivers of motor vehicles to as-

sume that motor vehicle drivers will obey and abide by the traffic laws and regulations." (Italics ours).

In holding that the word "vigilant" was synonymous with ordinary reasonable care, the Supreme Court of California said :

"The gravamen of defendants' objection is directed against the use of the word 'vigilant' in the foregoing instruction, and counsel for the appellants quotes certain definitions of that word as given in several dictionaries. The word, however, has numerous significances and synonyms, depending upon the particular place and context in which it is used and also to the subject to which in its various uses it relates. One of the meanings given to this word 'vigilant' is that contained in the Century Dictionary, wherein it is defined as 'watchful, awake and on the alert; attentive to discover and avoid danger, or to provide for safety; circumspect; cautious; wary.' If each of these synonyms of the word 'vigilant' has been employed in the instruction complained of, it could hardly, in respect to the duties of the driver of an automobile upon the public highways, be said to have been erroneous. But, however that may be, the instruction complained of has been approved by the appellate tribunals of this state in a number of decisions, some of which are the following: Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471; Wright v. Salzberger, 81 Cal. App. 690, 701, 254 P. 671; Truitner v. Knight, 83 Cal. App. 655, 661, 257 P. 447; Alkus v. Davies, 86 Cal. App. 355, 260 P. 894; Rush v. Lagomarsino, 196 Cal. 308, 317,

237 P. 1066, and Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 99, 239 P. 709, 41 A.L.R. 1027. We discover no prejudicial error in the giving or refusing to give any of the instructions of which the appellants complain, nor any other error on the part of the trial court which would warrant a reversal of this case.

“The judgment is affirmed.”

This holding has been consistently followed by the California Courts. See the recent case of *Caselegno v. Leonard*, 105 Pac. (2d) 125, reviewing the decisions and reaffirming the doctrine.

In the case of *City Ice and Fuel Co. v. Center*, 54 Ohio Appeals 116, 6 N.E. (2d) 580, the trial court instructed the jury that the driver of a backing vehicle should exercise “vigilance” not to injure those behind. The instruction was in the language of a state statute. On appeal the defendant contended that the statute was unconstitutional as not laying down a definite standard of care. The appellate Court held that the language of the statute could only be interpreted to mean reasonable care, which was a sufficiently definite standard. The Court also quoted with approval from the above cited case of *Mathews v. Dudley*.

The word “vigilance” was used by this court synonymously with “proper look-out” in *Conklin v. Walsh* (Ut.) 193 Pac. (2d) 437, 439.



The Court's Instruction No. 10 must be read in conjunction with the Court's Instruction No. 1, whereby the jury was instructed that the defendants relied upon contributory negligence as a defense; Instruction No. 3 which defined contributory negligence as want of ordinary care; and Instruction No. 11 which advised the Jury in effect that one negligent party could not recover against another.

The use of the word "vigilance" in the Court's Instruction No. 10, did not have the effect of imposing upon the deceased any higher duty than that of reasonable care, nor of misleading the jury as to the degree of care to which deceased should be held. The word "vigilance" could not import anything other than ordinary care, particularly when interpreted in the light of the Court's other instructions and the generally accepted meaning of the word.

At the conclusion of his argument under Point II, appellant states that the cases cited under his Point I are equally applicable to his Point II. We can only say in response, that they are equally inapplicable. All that was said under our Point I with respect thereto, is applicable with the same force under this point. As previously observed, appellant's cases do not involve the interpretations of any instructions.

## POINT III.

THE COURT DID NOT ERR IN SUBMITTING TO THE JURY THE QUESTION OF ASSUMPTION OF RISK ON THE PART OF THE DECEASED.

As heretofore noted, appellant take the position under Point I of his argument, that the Court's Instruction No. 7 was an instruction on contributory negligence. Under Point III of his argument appellant contends that Instruction No. 7 was an instruction on assumption of risk, and from this premise he argues that the Court erred in giving the instruction for the reason that the defendants did not plead in their answer the defense of assumption of risk. Appellant then cites the general rule that instructions to the jury should conform to the issues presented by the pleadings and that ordinarily it is error to instruct the jury on issues not raised by the pleadings.

It should first be observed that in taking exception to the Court's Instruction No. 7, the plaintiff did not assign as one of the reasons therefor, the submission to the jury of an issue not pleaded. Rule 51 U.R.C.P. provides as follows:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction the party must state distinctly the matter to which he objects and the grounds of his objection."

The manifest purpose of this rule is to draw to the attention of the trial court the particular grounds upon which an instruction is claimed to be erroneous, and to give the trial court an opportunity to correct any error which may have been committed. Although appellant excepted to the giving of Instruction No. 7, he did not state as one of his grounds therefor, that this instruction submitted to the jury an issue not raised by the pleadings. For this reason appellant is now foreclosed from raising the issue, and appellant's Point III is not entitled to be, and should not be considered by this Court.

However, there was no error in the giving of this instruction. While it is the general rule that the instructions of the trial court to the jury should be limited to the issues made by the pleadings, there is a well recognized exception to this rule. Where evidence is received without objection, or where the plaintiff's evidence shows that he is guilty of contributory negligence or assumption of risk, the other party is entitled to an instruction on those matters, even though not pleaded. In other words, the trial court may properly charge the jury as to matters which at the trial are treated by both parties as being in issue, and concerning which substantial evidence is introduced without objection, although such matters may have been insufficiently pleaded, or may not have been pleaded at all. 53 *Am. Jur.* 454, *Trial*, Sec. 576.

See also *Johnson v. Gaughren* (Wash.), 104 Pac. 170, where the Court said:

"The principal objections to the instructions given are that they are not based on issues made by the complaint and answers, but it is a sufficient answer to these objections to say that the instructions were based on evidence admitted without objection as if upon sufficient pleadings. In such cases the court will treat the pleadings as the parties themselves have treated them, as sufficiently broad to warrant the introduction of the evidence."

See also *Hoffman v. Southern Pac.* (Cal. App.) 258 Pac. 397, where the Court said:

"As a general rule the contributory negligence of the plaintiff must be specially pleaded by the defendant in order that he may rely upon this defense. 19 Cal. Jur. 681, #104. But where plaintiff's contributory negligence appears from the allegations of his complaint or from the evidence introduced in his behalf, this plea is available to the defense, although it is not pleaded in the answer. 19 Cal. Jur. p. 681, #104, p. 697, # 119; 20 R.C.L. 182, #151; 20 Standard Enc. of Proc. 317; *Green v. S. P. Co.*, 132 Cal. 254, 64 P. 255; *Kenny v. Kennedy*, 9 Cal. App. 350, 99 P. 384."

The purpose of requiring a defendant to plead an affirmative defense is to give the plaintiff notice of what the defendant will contend at the trial, so that he may have adequate opportunity to meet the evidence. However, where, as in this case, the plaintiff's own evidence shows conduct on his part which would prevent him from recovering, it is not only proper to instruct on such matters, but to fail to do so would be error.

## POINT IV.

THE COURT DID NOT ERR IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 3, EITHER IN THE LANGUAGE REQUESTED OR IN MODIFIED FORM.

For the convenience of the Court we set forth in full the text of plaintiff's requested Instruction No. 3:

"If you believe from the evidence that the deceased, Arnold G. Kartchner, was standing at the left front door of his automobile or was in the act of leaving or had just left his car by the said left front door at the time of the accident, and that said car was parked on or near the sidewalk running in an easterly and westerly direction on the south side of 13th South, then the court instructs you that the said Arnold G. Kartchner was in a place where he had a legal right to be, and if you believe from the evidence that he was struck by defendants' truck at said time and place and thereby was injured and died as a result of the injury, then the court instructs you that the plaintiff in this case would have a right to recover for the death of said Arnold G. Kartchner in such an amount as you shall find under all of the circumstances as may be just."

It requires no extended argument to show that this request was wholly erroneous and was properly refused by the Court. The request is tantamount to a directed verdict for the plaintiff. All of the premises set forth in the request were admitted or conclusively shown to be facts at the trial. The evidence shows without dispute that the deceased was in the act of leaving or had just

left his car by the left front door at the time of the accident, that the car was parked near the sidewalk in an easterly and westerly direction on the south side of 13th South; and that the deceased was struck by defendants' truck and sustained fatal injuries. These facts all being established, it would necessarily follow under the language of the request, that the plaintiff was entitled to prevail. Moreover, in the language of the request there is not even the slightest suggestion that the jury should be required to find negligence imputable to the defendants, as a necessary prerequisite to a verdict for the plaintiff, nor that such negligence upon the part of the defendant was the cause of the accident. Neither is there any suggestion that the plaintiff would be prevented from recovering if the deceased were guilty of contributory negligence. The request is tantamount to saying if you find that an accident occurred the plaintiff has a right to recover. We believe that no citation of authority is required to show that this is not the law.

#### POINT V.

#### THE COURT ERRED IN REFUSING TO GRANT DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

We believe that there was no error in the instructions of the trial Court, and that as a necessary consequence, the judgment of the trial Court should be affirmed. If the Court is in agreement with us in this view, there will be no occasion for the Court to consider our argument under Point V. If, however, the Court is of

the opinion that the trial court committed reversible error in instructing the jury, it is our position that such error would be immaterial, because the defendant was entitled to a directed verdict under the evidence adduced.

(A) Plaintiff Failed to Sustain The Burden of Proving That The Deceased's Fatal Injuries Were Proximately Caused By Any Negligence Upon the Part Of The Defendants.

It is a fundamental rule of law, too well established to require citation of authority, that the plaintiff in a personal injury action has the burden of proving by a preponderance of the evidence that the defendant was guilty of some act or omission constituting negligence, and that such negligence was the proximate cause of the injury or death. See *Whalen v. Mutrie*, 247 Mass. 316, 142 N.E. 45, where it was held that in an action for the death of a pedestrian struck by a motor truck, the burden of proof to show defendant's negligence is on the plaintiff, and such negligence cannot be inferred from the mere happening of the accident.

It is the general rule that the driver of an automobile is not liable for injuries to a pedestrian received when such pedestrian collides with the side of the automobile when alighting from another automobile or stepping suddenly from in front of or behind another automobile. A driver of an automobile is not bound to anticipate that a pedestrian may suddenly run from behind a parked automobile into his car or into the

path of it, or do the same in alighting from a car, in the absence of anything to put him on notice that such an event is likely to occur. 5 Am. Jur. 610, 612, Automobiles, Sec. 191, 196.

As has been pointed out in our statement of facts, the evidence in this case is clear and undisputed that the deceased stepped suddenly from his parked station wagon automobile directly into the side of the defendants' truck. The accident occurred almost simultaneously with deceased's alighting from his car. There is no evidence in the record whatsoever to show that the deceased had been standing at the side of his car for a sufficient length of time to have been observed by the defendants' driver. All of the evidence is to the contrary.

There were only three eye witnesses to the accident. The driver of defendants' truck, Mangum, testified that although he was looking straight ahead along the road and observed the parked station wagon automobile, he did not see any person standing in the vicinity of the station wagon. Keith Roberg, a nine year old boy who was talking to the deceased immediately prior to the occurrence of the accident, testified that as deceased got out he was hit. His testimony quite clearly showed that there was no substantial interval between the moment that the deceased alighted from his station wagon and the moment of impact. Ross Bradshaw, who was driving westerly along 13th South Street and ap-



proached the scene of the accident from the east, testified that he observed the deceased for less than a second prior to the actual occurrence of the accident.

The evidence also shows quite conclusively that the point of impact was on the side of the defendants' truck and not on the front, and the testimony of the investigating police officers shows that the truck was moving away from deceased's station wagon and toward the center of the road at the point of impact.

The only evidence in the record, which in any wise tends to indicate any negligence on the part of Mangum is the testimony of Mrs. Roberg to the effect that a few days after the occurrence of the accident, Mr. Mangum stated in her presence that he was looking down at the seat at the time of the accident. But even if from this shred of evidence the jury would be justified in finding that the defendants' driver was guilty of negligence in failing to keep a proper lookout, there is still no evidence whatsoever that such negligence was the cause of the accident. All of the facts and circumstances show quite clearly that no matter how vigilant Mangum might have been, he could not possibly have averted the accident.

The case of *Chipokas v. Peterson*, 219 Iowa 1072, 260 N.W. 37, is somewhat similar on its facts. There, as here, it was contended by the plaintiff that the defendant failed to keep a proper lookout. In that case the plaintiff, a child, ran either in front or in back of a car parked along side the curb about one foot from the

curb line. The defendant never did see the child who ran suddenly and unexpectedly into the path of his automobile. Under these circumstances the Supreme Court of Iowa held that the plaintiff had failed to prove negligence on the part of the defendant.

In *Rittle v. Zeller*, 100 Pa. Super. Ct. 516, the Court said:

“Our courts have repeatedly and consistently held that drivers of autos cannot be expected to anticipate the sudden appearance of a child from behind an automobile or some similar obstruction to view.”

For other cases to the same effect see:

*McAteer v. Highland Coffee Co.*, 291 Pa. 32, 139 A. 585;

*Grein v. Gordon*, 280 Pa. 576, 124 A. 737;

*Monroe v. Eager*, 16 La. App. 540, 131 So. 719;

*Rodriquez v. Abadie* (La. App.), 168 So. 515;

*Sundbery v. Ber* (La. App.), 162 So. 85;

*Watson v. Home Mut. Ins. Assoc.*, 215 Ia. 670, 246 N.W. 655;

*Messick v. Mason*, 156 Va. 193, 157 S.E. 575;

*Howk v. Anderson*, 218 Ia. 358, 253 N.W. 32;

*Crutchley v. Bruce*, 214 Ia. 731, 240 N.W. 238;

*Klink v. Bany* (Ia.), 224 N.W. 540;

*Bishard v. Engelbeck*, 180 Ia. 1132, 164 N.W. 203.

(B) The Plaintiff Was Guilty of Contributory Negligence As A Matter Of Law.

It is well settled that a pedestrian who suddenly steps into the street from behind a standing automobile, immediately in front of a car being driven along the highway is guilty of contributory negligence as a matter of law and is not entitled to recover for the resulting injuries. The rule is, of course, the same where a pedestrian steps into the pathway of an approaching vehicle from inside a parked vehicle. The basis of the rule is that the plaintiff has failed to exercise a proper lookout for his own safety. 1 *Shearman & Redfield on Negligence*, 324; 5 Am. Jur. 610, 764, *Automobiles*, §§ 191, 462.

The cases in support of the rule are legion. As illustrative, we quote below from a few of the cases on this point:

*Standard Oil of Kentucky v. Noakes*, 59 Fed. 2nd, 897:

“There can be no doubt that one who crosses a street between intersections and from behind a parked car, which not only obstructs his view but also the view of drivers of approaching cars, is under a duty to look in the direction from which danger may be expected, and the failure to do so is negligence which will defeat recovery if accident results. This must be so if reason and common sense are to be applied in measuring human conduct, and if experience and observa-

tion are of aid to judgment. 'Walking from behind and going beyond a standing vehicle into a pathway open to traffic is a fruitful source of accident.' *James vs. Florios*, 248 Mich. 153, 226 N.W. 852, 853. 'The time has come when ordinary care requires a pedestrian to look for approaching automobiles before he leaves the zone of safety.' *Mertens v. Lake Shore Yellow Cab & Transfer Co.*, 195 Wis. 646, 218 N.W. 85, 86."

*Dando v. Brobst*, 318 Pa. 325, 177 A. 831 :

"The accident occurred about one o'clock in the afternoon of a dry day, and it is not claimed that plaintiff's vision was in any way obscured. *Under these circumstances, plaintiff must inevitably have seen the car if she had looked*, and if she saw nothing she could not have been looking. As we have repeatedly pointed out it is vain for a person to say he looked when, in spite of what his eyes have told him, he moved into the path of an approaching car or train by which he was immediately struck.

"The duty to look rests at all times upon everyone in the use of streets \* \* \* [citations omitted] \* \* \* *and when one steps into a busy street and is immediately struck by a passing vehicle which he could have seen had he looked, he is barred by his own negligence* \* \* \* [citations omitted].

"In any case, however, plaintiff was under a duty to look before stepping into the street, and since the '*incontrovertible physical facts*' show that the car was almost upon her when she stepped from the curb and that she would certainly

*have seen it if she had looked, it is plain that she must have failed to look. Her own negligence \* \* \* bars her recovery.*" (Italics ours).

The above case was quoted with approval in *Coval-eskie v. Schimpf*, 322 Pa. 65, 185 A. 196.

*Woods v. Moore* (Mo. App.), 48 S.W. 2nd 202:

"Not to see what is plainly visible when there is a duty to look constitutes negligence. If, on the other hand, as all the defendant's witnesses testified, plaintiff did not look at any time, until just before he was struck, when there was a duty imposed upon him to look, he was likewise guilty of negligence."

*Matassa v. Economy Cab Co.* (La. App.), 158 So. 239:

"\* \* \* we are satisfied that *plaintiff had the same opportunity of seeing the cab that its driver had of seeing plaintiff*; \* \* \* that the proximate cause of the accident was the negligence of plaintiff in passing behind the bakery truck into the line of the approaching cab so close to it that the driver could not see him in time to give warning or to avoid striking him; \* \* \*" (Italics ours).

*Woods v. Pace*, 220 App. Div. 386, 222 N.Y.S. 157:

"If it could be argued that the defendant ought to have seen plaintiff in this place, where pedestrians were not expected to be, how can the plaintiff be excused from seeing the automobile where west bound traffic would be expected to be.

If a jury could find that defendant should have seen the plaintiff and avoided hitting him, it must likewise find that the plaintiff should have seen the defendant's automobile and avoided being hit."

*Hamblet v. Soderburg*, 189 Wash. 449, 65 Pac. (2d) 1267, 1269:

"Present-day traffic upon our streets and highways is of such a nature that the duty of reasonable care, which rests upon all, requires in almost any conceivable situation, a fairly efficient attempt at observation before a pedestrian steps into the path of vehicular traffic.

"Where, as here, no attempt at observation is made and especially where one steps out from behind an obscuring object, the pedestrian is guilty of negligence as a matter of law.

"This conclusion seems to be self evident, but reference may be had to the following of our cases which, in principle at least, sustain our present holding: *Jones v. Seattle*, 144 Wash. 188, 257 P. 393; *Gottstein v. Daly*, 166 Wash. 582, 7 P. (2d) 610.

"Even had there been testimony that Mrs. Hamblet had looked but did not see the approaching automobile, still there could have been no recovery. *Silverstein v. Adams*, 134 Wash. 430, 235 P. 784; *Steinheim v. Nicholas*, 171 Wash. 614, 18 P. (2d) 836."

In *Chase v. Thomas* (Cal. App.), 46 Pac. (2d) 200, 201, the Court, holding plaintiff guilty of contributory negligence as a matter of law, observed:

“It appears from the evidence that plaintiff had gone to the rear of his truck, where he took out a laundry bag, closed the doors, and stepped further into the street toward the north. He testified that he was not more than a foot or 18 inches from the fender of his truck at the time he was struck by the automobile, which was traveling east.”

A case strikingly similar in point of fact to the case at bar is *Will v. Boston Elevated Railroad Co.*, 247 Mass. 250, 142 N.E. 44. In that case the plaintiff was a guest passenger in the rear seat of an automobile. The driver of the car stopped the automobile on the right hand side of the street and as close to the edge of the street as he could get. The plaintiff opened the door on the left side of the automobile, and, as he was getting out, a trolley car approaching from the rear struck the automobile on the left hand side and injured the plaintiff. The street was straight for a distance of some 400 feet to the rear of the parked automobile. The court held the plaintiff guilty of contributory negligence as a matter of law.

The Court said in that case :

“There was no evidence to support a finding of due care on the part of the plaintiff. His own testimony was that he alighted from the automobile into the pathway of the trolley car, without looking to see if any car was coming; that he did not hear or see the car or know anything about it until it struck him. His view was un-

obstructed \* \* \* *It is manifest that the slightest attention to his own safety would have prevented his injury.* While he might depend to a reasonable extent on the expectation that the motor-man would not be negligent, he was not justified in abandoning all precautions for self protection. \* \* \* It does not appear that the plaintiff had any knowledge of the precise position of the automobile with reference to the trolley car or relied upon it in any degree. *The plaintiff was in a place of entire safety within the automobile. He voluntarily and without exigency moved into a danger zone by getting in front of an oncoming trolley car, which must have been in plain sight and very near when he opened the door of the automobile and got out.*" (Italics ours).

The doctrine of the above case was reaffirmed in the recent case of *Woodward v. City* (Mass.), 76 N.E. (2d) 656.

A case citing and discussing many of the authorities on this question, which we commend to the Court, is *Cooper & Co. v. American Can Co.*, 130 Me. 76, 153 Atl. 889.

Although the case of *Mingus v. Olsson* (S. Ct. of Ut. 1949), 201 Pac. (2d) 495, is not precisely similar on its facts to the case at bar the language used by the Court in that case is similar to that used by other courts and is appropriate here:

Justice Wolfe, speaking for the Court, said at pages 498-9:



“More convincing than the direct testimony that deceased did not look, is the further evidence that deceased neither said nor did anything to indicate that he was at all aware of the danger presented by defendant’s approaching automobile. He seems to have been wholly unaware of its approach. Certainly he did nothing either to warn his wife, nor to rescue either himself or her from their position of peril. On this evidence, it must be said as a matter of law that deceased either failed to look, or having looked, failed to see what he should have seen.

“There can be no doubt that a pedestrian who undertakes to cross a busy street of a large city, without first observing for vehicular traffic is guilty of contributory negligence. \* \* \* A pedestrian crossing a public street in a crosswalk or pedestrian lane, although he may have the right of way over vehicular traffic, nonetheless has the duty to observe for such traffic. Clearly, decedent neglected that duty in this case. It follows that he was contributorily negligent as a matter of law. Of course we do not mean to imply that a mere glance in the direction of the approaching automobile would suffice. The duty to look has inherent in it the duty to see what is there to be seen, and to pay heed to it.”

See also the language in the concurring opinion of Mr. Justice Wade at page 499:

“I agree that under the evidence here, decedent was guilty of contributory negligence as a matter of law, because the evidence shows that he walked directly into the course of an approaching automobile without taking any precaution

to prevent being struck thereby, since the automobile had its headlights lighted so that he could have seen it approaching and waited in a place of safety and thereby avoided the accident. Even had decedent looked to see if there was an automobile approaching, this would not have exonerated him from negligence. As long as he walked directly into the course of an approaching automobile without taking any precaution for his safety, it would make no difference whether he looked or failed to look for approaching traffic. If he looked and inattentively failed to see the approaching car or absentmindedly failed to realize his danger, or he realized his danger but still continued on into the course of the car, he would be in the same situation as to contributory negligence as though he failed to look at all."

For other cases, illustrative of the proposition that a plaintiff who steps suddenly from a concealed position, immediately in front of an approaching car is guilty of contributory negligence as a matter of law, we invite the Court's attention to the following cases on this point:

Dobrowolski v. Henderson, 15 La. App. 79, 130 So. 237;

Stawsky v. Wheaton, 220 Ia. 981, 263 N.W. 313;

McAteer v. Highland Coffee Co., 291 Pa. 32, 139 A. 585;

Pierce v. Hosman, 201 Ky. 278, 256 S.W. 397;

Deal v. Snyder, 203 Mich. 273, 168 N.W. 973;

Letts v. Cole, 310 Pa. 509, 165 A. 847;

- Koock v. Goodnight (Tex. Civ. App.), 71 S.W. (2d) 927;  
 Jarvis v. Stone, 216 Ia. 27, 247 N.W. 393;  
 Runge v. Haller, 236 Ky. 423, 33 S.W. (2d) 317;  
 Pettijohn v. Weede (Ia.), 227 N.W. 824;  
 Hayes v. Gunter Bros. Lumber Co., 14 La. App. 402, 129 So. 401;  
 Hughes v. Torregrossa, 278 Mass. 530, 180 N.E. 304;  
 Maranta v. Wenzelberg, 241 App. Div. 420, 272 N.Y.S. 710; Affd. 267 N.Y. 510, 196 N.E. 554;  
 Ponder v. Carroll, 193 Ark. 1120, 105 S.W. (2d) 72;  
 Beaucage v. Roak, 130 Me. 114, 153 A. 894;  
 Rittle v. Zeller, 100 Pa. Super. Ct. 516;  
 James v. Florios, 248 Mich. 153, 226 N.W. 852;  
 Mertens v. Lake Shore Yellow Cab & Transfer Co., 195 Wis. 646, 218 N.W. 85;  
 Harder v. Matthews, 67 Wash. 487, 121 Pac. 983;  
 Weaver v. Pickering, 279 Pa. 214, 123 A. 777;  
 Conrad v. Green (N.J. Sup.), 94 A. 390;  
 Fulton v. Mohr, 200 Mich. 538, 166 N.W. 851;  
 Di Stephano v. Smith (R.I.), 102 A. 817;  
 Owens v. Tisdale (La. App.), 153 So. 564.

The plaintiff has effectually admitted contributory negligence on the part of the deceased in his own brief. At page 17 of plaintiff's brief it is said: "There is not a word of evidence to show that the deceased either knew the truck was approaching the parking area or

that it was coming toward his position." We are constrained to agree with this statement. In fact we might go further and say the evidence quite clearly shows that the deceased did not know of the immediate approach of the defendants' truck, notwithstanding there was nothing obstructing his vision and that the most casual glance to his rear would have revealed the danger. Appellant says further (also at page 17), "It is undoubtedly true that it would have been safer for the deceased to have gotten out of the right hand side of his car. \* \* \*" It is well settled that where a person has a choice of methods of doing an act which are equally available, he is deemed negligent if he selects the more dangerous of the methods, in the absence of any showing of the existence of an emergency, sudden peril or other circumstances justifying such choice. 38 Am. Jur., Negligence Sec. 193; *Raymond v. U. P. R. Co.* (Ut.), 191 Pac. (2d) 137.

Again on page 18 of appellant's brief, he states that there is nothing to indicate that when the deceased got out of his car that he knew the bread truck was going to strike him down. In Vol. 1, *Shearman & Redfield on Negligence*, 242, it is said:

"It is not enough that the plaintiff should act prudently in view of the knowledge which he actually had. He is responsible for his ignorance of that which he ought to have known."

## CONCLUSION

The trial court committed no error in its instructions to the jury. The plaintiff failed to sustain the burden of proving that the defendants were guilty of negligence which was the proximate cause of the accident; and the deceased's own contributory negligence was the proximate cause of his death. The judgment of the trial court should be affirmed.

Respectfully submitted,

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and Respondents.*