

1951

# Gertrude Gibbs, Lynn P. Gibbs and Gaye Gibbs Smith v. Blue Cab, Inc. : Brief of Appellant

Utah Supreme Court

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Heber Grant Ivins; Robert B. Porter, Jr.; Delbert M. Draper, Jr.;

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# In the Supreme Court of the State of Utah

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GERTRUDE GIBBS, LYNN P.  
GIBBS and GAYE GIBBS SMITH,

*Plaintiffs and Appellants,*

— vs. —

BLUE CAB, INC., a corporation,

*Defendant and Respondent.*

Civil No. 7710

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## BRIEF OF APPELLANT

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FILED

DEC 3 1951

U. Supreme Court, Utah

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and Appellants.*

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## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	3
STATEMENT OF POINTS .....	5
ARGUMENT .....	5
Point I. The Trial Court erred in directing a verdict against plaintiffs upon the ground that deceased was contributorily negligent as a matter of law, in that deceased was presumed to have been acting with due care, and said presumption was not overcome.....	5
Point II. The Trial Court erred in directing a verdict against plaintiffs upon the ground that deceased was contributorily negligent as a matter of law, in that contributory negligence was a question of fact for the jury .....	16
Point III. The Trial Court erred in directing a verdict against plaintiffs upon the ground that deceased was contributorily negligent as a matter of law, as the question of whether or no deceased's contributory negligence, if any, proximately contributed to his death was an issue of fact for the jury.....	24
CONCLUSION .....	31

## CASES CITED

Amos vs. Remington Arms Co., 117 Colo. 399, 188 Pac. 2nd 896	28
Atkins, vs. Morton, 164 Kan. 626, 191 Pac. 2nd 909 .....	28
Baker vs. Western Casualty and Surety Co., 164 Kan. 376, 190 Pac. 2nd 850 .....	28
Barker vs. Savos et al, 52 Utah 262, 172 Pac. 672.....	11
Blackmore vs. Brennan, 43 Cal. App. (2d) 280, 110 Pac. 2nd 723	12
Briggs vs. United Fruit & Produce Inc., 11 Wash. (2d) 466, 119 Pac. 2nd 687 .....	30
Carlson vs. Whelan, 197 Wash. 104, 84 Pac. 2nd 1001 .....	29
Chavez vs. Worley, 48 N. M. 449, 152 Pac. 2nd 393.....	29
Clark et al vs. Union Pacific Ry Co., 70 Utah 29, 257 Pac. 1050.	10
Compton et al vs. Ogden Union Ry. & Depot Company, (Utah-1951), 235 Pac. 2nd 515 .....	7, 18
Coray vs. Ogden Union Ry. & Depot Co., 111 Utah 541, 180 Pac. 2nd 542 .....	9
Davis vs. Denver & Rio Grande Western Railway Co., 45 Utah 1, 142 Pac. 705 .....	9
Douglas vs. Hoff, 82 Cal. App. (2d) 82, 185 Pac. 2nd 607.....	28
Duehren vs. Stewart, 39 Cal. App. 201, 102 Pac. 2nd 784 ....	12
Evans vs. Oregon Shortline Ry. Co., 37 Utah 431, 108 Pac. 638.	10

	Page
Flynn vs. Helen Cab & Bus Co., 94 Mont. 204, 21 Pac. 2nd 1105	23
Genola vs. Barrett, 14 Cal. (2d) 217, 93 Pac. 2nd 109	29
Green vs. Uarte, 87 Cal. App. (2d) 75, 196 Pac. 2nd 63	29
Greenfield vs. Bruskas, 41 N. M. 346, 68 Pac. 2nd 921	25
Greenslitt vs. Three Brothers Baking Co., 170 Ore. 345, 133 Pac. 2nd 597	14
Hart vs. Farris, 218 Cal. 69, 21 Pac. 2nd 432	30
Hess vs. Robinson, 109 Utah 60, 163 Pac. 2nd 510	25
Hickock vs. Skinner, 113 Utah 1, 190 Pac. 2nd 514	25
Hunter vs. Michaelis, (Utah-1948), 198 Pac. 2nd 245	19
Lawrence vs. Kansas City Power & Light Co., et al, 167 Kan. 45, 204 Pac. 2nd 752	19, 28
Lewis vs. Rio Grande Western Ry. Co., 40 Utah 483, 123 Pac. 97	8
Lowder vs. Holley, (Utah-1951), 233 Pac. 2nd 350	17
Maier et al vs. Minidoka County Motor Co., et al, 61 Ida. 642, 105 Pac. 2nd 1076	24, 30
Martin vs. Harrison, 182 Ore. 121, 186 Pac. 2nd 534	20
Martin vs. Sheffield, 112 Utah 478, 189 Pac. 2nd 127	19
Mingus vs. Ollson, (Utah-1949), 201 Pac. 2nd 495	7
Nielson vs. Mauchley, (Utah-1949), 202 Pac. 2nd 547	18
Nikoleropoulos vs. Ramsey, 61 Utah 465, 214 Pac. 304	26
Pollard vs. Wittman, 28 Wash. (2d) 367, 183 Pac. 2nd 175	30
Prentis vs. Johnson, 119 Colo. 370, 203 Pac. 2nd 733	21
Rios vs. Bennett, 88 Cal. App. (2d) 919, 200 Pac. 2nd 73	11, 21
Schoen vs. Schroeder, 53 N. M. 1, 200 Pac. 2nd 1021	21
Smith vs. Zone Cabs, 135 Ohio St. 415, 21 N.E. (2d) 336	27
Spackman vs. Carson, (Utah-1950), 216 Pac. 2nd 640	18
Stickel vs. San Diego Electric Co. et al, 32 Cal. (2d) 157, 195 Pac. 2nd 416	20
Styris vs. Folk, 62 Nev. 209, 146 Pac. 2nd 782	27
Warren vs. Hynes, 4 Wash. (2d) 128, 102 Pac. 2nd 691	22
Wiswell vs. Shinnars, 47 Cal. App. (2d) 156, 117 Pac. 2nd 677	15, 22, 29
Wright vs. Maynard, (Utah-1951), 235 Pac. 2nd 916	26
Wright vs. Sniffin et al, 80 Cal. App. (2d) 358, 181 Pac. 2nd 675	11
Yellow Cab Corporation vs. Henderson, 178 Va. 207, 16 S.E. 2nd 393	27
Young vs. Boy Scouts of America, 9 Cal. App. (2d) 760, 51 Pac. 2nd 191	29

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GERTRUDE GIBBS, LYNN P.  
GIBBS and GAYE GIBBS SMITH,

*Plaintiffs and Appellants,*

— vs. —

BLUE CAB, INC., a corporation,

*Defendant and Respondent.*

Civil No. 7710

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## BRIEF OF APPELLANT

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Appeal from the Second Judicial District Court of  
the State of Utah  
Honorable Charles G. Cowley, Judge

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### STATEMENT OF FACTS

On the morning of the 24th day of November, 1948, about 6:40 A.M., one of the defendant's taxicabs driven by one Ronald D. Mullen, its agent, was proceeding easterly on 23rd Street in Ogden, Utah, at a rate of speed between 20 and 25 miles per hour (TR-55). The street

was damp and the morning was dark and rainy (TR-55). As the taxicab came to the intersection of 23rd Street and Jefferson Avenue the driver, Ronald D. Mullen, observed the front wheel of a bicycle in his left front headlight approximately ten to fifteen feet ahead of the taxicab (TR-55, 56). The taxicab struck the bicycle and one F. Parley Gibbs in the southwest quadrant of the intersection, and the bicycle and taxicab came to rest easterly of the area of impact (Stipulated Diagram). The intersection was lighted on the north-east corner by a street lamp (Stipulated Diagram). After the impact F. Parley Gibbs, wheeled his bicycle northward on Jefferson Avenue (TR-52). The taxicab then proceeded one-half block east on 23rd Street and picked up a passenger (TR-58). The taxi-driver then and there admitted to the passenger that he did not see Mr. Gibbs until he hit him, and that his vision was obscured (TR-7).

F. Parley Gibbs died as a result of this collision. There is absolutely no evidence in the record as to the deceased's conduct prior to the collision in question. There is no evidence in the record regarding which direction the deceased was moving prior to the impact, or whether he was riding his bicycle or merely pushing it or standing still in the intersection.

The only heirs of F. Parley Gibbs brought this action against the defendant to recover damages for his wrongful death. The case was tried before a jury, and the trial court directed a verdict for the defendant against the plaintiffs upon the ground that deceased

was contributorily negligent as a matter of law in failing to keep a proper lookout prior to the collision (TR-89, 90).

## STATEMENT OF POINTS

I. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT DECEASED WAS PRESUMED TO HAVE BEEN ACTING WITH DUE CARE, AND SAID PRESUMPTION WAS NOT OVERCOME.

II. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT CONTRIBUTORY NEGLIGENCE WAS A QUESTION OF FACT FOR THE JURY.

III. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, AS THE QUESTION OF WHETHER OR NO DECEASED'S CONTRIBUTORY NEGLIGENCE, IF ANY, PROXIMATELY CONTRIBUTED TO HIS DEATH WAS AN ISSUE OF FACT FOR THE JURY.

## ARGUMENT

I. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT DECEASED WAS PRESUMED TO HAVE BEEN ACTING WITH DUE CARE, AND SAID PRESUMPTION WAS NOT OVERCOME.

The question to be determined in deciding this point is: Was there sufficient evidence introduced to show decedent was contributorily negligent as a matter of law? Let us review such evidence as shown by the record.

The only testimony regarding decedent's conduct was given by the driver of respondent's vehicle. His testimony was that decedent's bike was first seen in his left front headlight (TR-55 and 61) some 10 feet to 15 feet away (TR-60), and that at no time did he see the decedent prior to hitting him (TR-58), and that the front wheel of the bike was turned in a southeasterly direction (TR-62) or very nearly parallel to respondent's vehicle (TR-62). This testimony of respondent's agent, along with the physical evidence (Stipulated Diagram) are all that the Court can consider in overcoming the presumption of due care. It should be noted that there is no evidence showing what the decedent was doing at the time of impact; whether he was mounted upon his bike or afoot; whether he was stopped or moving in a forward direction.

Therefore, we must ask ourselves: Is the testimony that the front wheel of a bike is seen and struck in the center of an intersection sufficient evidence to overcome the presumption of due care to which the decedent was entitled and hold that he was negligent as a matter of law? It is the contention of the appellant that this is not sufficient evidence to overcome such presumption and the following cases are cited in support of such con-



tention. In the recent case of *Mingus v. Ollson*, (*Utah-1949*), *201 Pac. 2nd 495*, the decedent, a pedestrian, was killed while crossing 13th East Street on Westminster Avenue in Salt Lake City at night-time. The Court ruled that the presumption of due care was overcome because of concrete testimony by the decedent's wife, who was walking with him when he was struck, to the effect that decedent failed to look in any direction before stepping into the street. The concurring opinion says: (Page 499)

“Of course, if there was a complete absence of evidence as to whether he took any precautions to avoid the accident, then the law creates a presumption that he took reasonable precautions for his own safety and that he was injured in spite of such precautions.

“But here there was evidence from which the jury could reasonably find that he took no precaution for his own safety, and on the production of such evidence the presumption disappears from the case and the question must be determined from the evidence. *Of course the facts upon which the presumption is based are still in evidence and if they have a logical tendency to prove that the decedent used reasonable care for his own safety, they may be considered in determining the question.*” (Italics added).

In another recent decision, *Compton et al v. Ogden Union Ry. & Depot Company*, (*Utah-1951*), *235 Pac. 2nd 515*, the decedent was killed when struck by defendant's engine in its yard at Ogden, Utah. The trial court entered

judgment of dismissal at conclusion of plaintiff's case. In this case, decedent was walking with a companion who accounted for all her movements immediately prior to, and at the time she was struck.

The court in its opinion said that there is a strong presumption based on the instinct of self-preservation that the deceased was exercising due care for her own safety and which may take the place of evidence sufficient to make findings on, in the absence of other evidence. It then goes on to say:

“The presumption is applicable where there is no evidence as to care used, or perhaps where the evidence comes from an adverse witness who may be subject to disbelief by the jury, or where there is sufficient uncertainty in the evidence as to cast doubt on the testimony.”

There are several Utah cases sustaining instructions that the presumption must be considered by the jury in cases where no witnesses have seen the mishap and physical evidence alone must be relied upon by defendants to sustain a finding by the jury of contributory negligence.

In *Lewis v. Rio Grande Western Ry. Co.*, 40 Utah 483, 123 Pac. 97, decedent was killed at night at defendant's crossing. No eye witnesses of the accident testified, and the body was found at the side of defendant's tracks on the morning following the mishap. Decedent was walk-

ing when killed, and it was admitted by plaintiff that the train could have been seen some 200 to 250 feet from the crossing. An instruction was given and sustained that it must be presumed that deceased used due care. The court states:

“The important question is: does the evidence when viewed in the light most favorable to respondents, overcome this legal presumption of ordinary care on the part of Lewis? We think not.”

See also *Coray v. Ogden Union Ry. & Depot Co.*, 111 Utah, 541, 180 Pac. 2nd 542, which is a similar case in which a switchman was killed while on duty and his body later found lying near the tracks. See also *Davis v. Denver & Rio Grande Western Railway Co.*, 45 Utah 17, 142 Pac. 705, a case in which the deceased was hit by defendant's train and no witnesses testified regarding the facts surrounding the mishap. The court in this case gave the following instructions and it was held proper upon appeal:

“There is a presumption of law that every man exercises due care for his own safety when in a place of danger and that deceased did so at the time and place when and where he met death, so that plaintiff was not required to prove affirmatively that deceased looked and listened for the train, the presumption being that he did so, and burden on defendant to prove otherwise, which was bound to establish that fact by a preponderance of the evidence.”

In *Evans v. Oregon Shortline Ry. Co.*, 37 Utah 431, 108 Pac. 638, decedent was killed while crossing defendant's tracks with team and wagon. The court upon appeal held:

"It is a presumption of law that every man exercise due care for his own safety when in a place of danger, and the presumption is that deceased did so when he approached the crossing."

In *Clark et al v. Union Pacific Ry. Co.*, 70 Utah 29, 257 Pac. 1050, the lower court directed a verdict for defendant, plaintiffs appealed and the trial court was reversed. Plaintiff brought action to recover for wrongful death resulting from a collision at a public crossing. There was considerable variance in the testimony of witnesses regarding warnings given by defendant. However, it was determined that visibility was relatively poor, and a fireman testified he saw decedent's truck some 125 feet from the crossing; that he supposed that the driver would stop and let the train go by, but that he failed to do so and was struck. The court states:

"The burden of proving contributory negligence, of course, was on the defendant. In absence of evidence, there is a presumption that the deceased looked and listened, and did all that prudence and due care required . . .

"The question thus is, does the record conclusively show that deceased failed to look and listen, and that by looking and listening he could have discovered the approach of the train in time to have stopped and let it pass?"

The court considering the evidence in the light most favorable to the plaintiffs found the question of contributory negligence to be for the jury and remanded for rehearing.

In *Baker v. Savos et al*, 52 Utah 262, 172 Pac. 672, a child was killed on Redwood Road near Taylorsville by an overtaking motor truck. No witnesses were found and the defendant denied knowledge of hitting the child. However, the jury basing their decision upon circumstantial evidence found for plaintiff, and in so doing considered the presumption of due care as to the dead child.

There are numerous cases in other jurisdictions dealing with this point and the following are leading California decisions.

In *Wright v. Sniffin et al*, 80 Cal. App. (2d) 358, 181 Pac. 2nd 675, plaintiff's daughter was killed on a bicycle as she turned left into defendant's vehicle without signaling. The court held:

"In spite of the evidence of the defendants that Norma failed to give left arm signal or any warning of her intention to cross the highway, plaintiff was entitled to the presumption that the deceased used due care for her own safety. . . . which created a conflict of evidence regarding that subject."

*Rios v. Bennett*, 88 Cal. App. (2d) 919, 200 Pac. 2nd 73, is a case in which decedent was killed by defendant's

vehicle at night as he walked diagonally across the street out of the pedestrian lane. Witness testified that deceased walked into the path of defendant's vehicle which witness had seen some 70 to 75 feet away. The court held that:

"A presumption existed that a pedestrian struck. . . by an automobile used ordinary care for his own safety and that in doing so he looked before he stepped out into the street."

The case of *Blackmore v. Brennan*, 43 Cal. App. (2d) 280, 110 Pac. 2nd 723, is another California case of wrongful death of a motorist in an open intersection. The court in this case said:

"In the absence of evidence overcoming the presumption it should prevail . . . In other words the jury was told in effect that it must determine whether sufficient evidence had been adduced to overcome that presumption."

*Duehren v. Stewart*, 39 Cal. App. 201, 102 Pac. 2nd 784, is a case in which decedent, a pedestrian, was killed while crossing in a crosswalk at an intersection. The mishap occurred at 8:00 P.M. Witnesses testified that decedent walked "pretty fast" and "didn't turn his head or look in the direction from which they were approaching." The lower court instructed the jury regarding the presumption of due care and appellant complained that it was error to give such instruction since

“Actions of deceased at time of accident were seen and amounted to contributory negligence as a matter of law . . . that they have (speaking of the instructions) no place in the record when evidence clearly demonstrates the action of injured or deceased party.

“It is contended that there is no conflict in the evidence as to the actions of the deceased from the time he was first observed on the sidewalk until he was struck; that he stepped down into the street and walked across the same at a moderate gait and at no time turned his head to look in the direction in which oncoming traffic might endanger his safety; that the appellate courts have held that ‘to look and fail to see’ what is perfectly obvious and apparent is negligence; that Mr. Watt testified that he saw the deceased on the sidewalk before he stepped into the street; that he saw him step into the street and that he was looking straight ahead at all times and walking at a moderate gait; that where all the facts and circumstances were proven, the court was not authorized to cast a presumption into the scales in favor of the plaintiff.

“Appellant does not argue that the evidence does not establish appellant’s negligence. The law gave to the deceased the right of way in a marked crosswalk. The appellant not only drove at an excessive rate of speed but passed another car at the intersection under circumstances where he could not have seen whether there were pedestrians in the crosswalk or not. That he was not keeping an accurate or sufficient lookout is conclusively demonstrated by his statement. No witness testifying on behalf of the respondents saw Mr. Duerhan at all as he approached Hill Street,

nor did any of respondent's witnesses observe him until he was first seen by Mrs. Watt some 10 or 15 feet out into the crosswalk. The presumption therefore, arose in the absence of evidence on the subject. There is therefore nothing to call that presumption to the attention of the jury unless the court did instruct them relative to its existence.

"It has been repeatedly held that disputable presumptions are evidence in a case . . . , and such presumption may be controverted by other evidence. . . . It has also been repeatedly held that it is a question for the jury to determine whether the presumption has been overcome by evidence offered in contradiction thereof. . . . Respondents produced no evidence to determine what observations Mr. Duehren made just before he attempted to cross the street. Appellant offered no evidence as to whether the deceased looked *prior to the time he stepped off the curb*. (Italics by court). Respondents were therefore entitled to the presumption above mentioned as their own evidence was reconcilable with it, and such presumption remained as evidence in the case until dispelled by evidence offered in contradiction thereof."

In *Greenslitt v. Three Brothers Banking Company*, 170 Ore. 345, 133 Pac. 2nd 597, decedent was struck by defendant's vehicle in daylight when decedent ran diagonally across a highway into the path of a truck. The court held:

"The evidence tending to show negligence on his part is not of such conclusive character as to overcome such presumption as a matter of law. The issue of contributory negligence was properly submitted to the jury."



The case of *Wiswell v. Shinnors*, 47 Cal. App. (2d) 156, 117 Pac. 2nd 677, deals with a pedestrian versus a motorist. In this case the pedestrian was struck and killed and there was evidence that he was not in a cross-walk when the accident occurred. At page 680, the Court says:

“In urging that the direct evidence furnished by an eye-witness in this case dissipated the presumptions established by law, respondents fail to appreciate the limitations upon the power of the trial court when directing a verdict as such limitations are laid down in *Estate of Flood* and *Estate of Lances*, supra. Under the familiar rules there enunciated, when there is a showing on behalf of the plaintiff of certain facts as in the instant case, certain physical facts, such as skid marks and their relation to the point of collision and the point at which the driver first applied his brakes; the speed of the automobile; the failure of the driver to sound his horn or otherwise give warning; the unobstructed view of deceased on the part of the driver for some considerable distance; the clearness of the weather and the dryness of the street, together with the presumptions relied upon; and when on the other hand, evidence both direct and circumstantial, favorable to their cause, is introduced by defendants, the latter evidence must be eliminated from consideration by the court for the purpose of ruling upon a motion for a directed verdict.

“We therefore conclude that appellant was entitled to the benefit of the presumptions here claimed until dispelled by evidence opposed to them, and that it was for the jury to determine whether the presumptions had been overcome

by evidence offered in contraction thereof, and which last-named evidence the court was not permitted to consider in ruling upon the motion for a directed verdict.

“Cases cited by respondents in support of their claim that the presumption is destroyed by evidence in contradiction thereof are all cases where appeals were taken from final judgments, in the rendition of which the court or jury was entitled to pass upon the weight of all the evidence submitted and to judge of the credibility of witnesses. Such power is not within the province of a court in ruling upon motions for non-suit or directed verdict.”

It will be noted that in many of the cases cited herein actual eye-witnesses testified regarding conduct of deceased which, if proven true, would definitely establish contributory negligence. However, even under these circumstances the court entertains the presumption and allows the jury to determine if the evidence has been sufficient to overcome it. In the case at hand there is no evidence regarding decedent's actions and it is mere conjecture that he failed to stop or that he failed to see what he should have seen. For this reason the court erred in directing a verdict for the defendant.

II. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT CONTRIBUTORY NEGLIGENCE WAS A QUESTION OF FACT FOR THE JURY.

Even assuming that had Mr. Gibbs looked he would have seen the approaching taxicab, it is strongly urged

by appellants that the question of the deceased's contributory negligence is one of fact and not one of law. The most recent Utah pronouncement upon this problem appears to be contained within the case entitled *Lowder v. Holley* (Utah-1951) 233 Pac. 2nd 350. In that case the plaintiff and defendant collided in an open intersection during the daytime. The negligence of the defendant was clear but there was ample evidence that had the plaintiff looked he would have seen the defendant and hence he was contributorily negligent. The court stated that it is true:

“That before entering an intersection the driver of a car must look and determine whether it is safe to enter. However, had plaintiff observed the truck (defendant's) just before he entered the intersection he would have been justified in considering it safe to enter because at that point the truck was being driven at the rate of fifty miles per hour and plaintiff was driving at from five to ten miles per hour . . . then the truck would have been at least 250 feet from the intersection since his car had traveled almost the entire distance across the intersection before the impact, and this being so, he could have assumed and acted under the assumption that the driver of the truck would exercise ordinary and reasonable care in his driving and that it would be safe to cross the intersection. Had defendant exercised such reasonable and ordinary care, the collision would not have occurred. Under such state of facts plaintiff's failure to see the truck would in no way have contributed to the accident. The Court therefore did not err in finding that plaintiff was not contributorily negligent.”

It is urged in the case herein that had deceased observed defendant's taxicab, because of the great disparity in speed between these two vehicles, he would have been justified in considering it safe to enter the intersection. In any event the Lowder case states that whether or no he acted as a reasonable man in entering the intersection after having seen the approaching danger was a question within the province of the jury. This is so even though the only reasonable inference to be drawn from all of the evidence is that had plaintiff looked he would have seen.

The case at bar however is even stronger than the Lowder case as several inferences regarding lookout might reasonably have been drawn by the jury from all the evidence. It might well have been inferred that deceased looked and could not see, or that he saw and, as a reasonable man, misjudged the danger. The trial court therefore committed error in taking this vital factual issue from the determination of the jury.

The general doctrine of the Lowder case is reannounced in a more recent Utah case, *Compton v. Ogden Union Railway Co.*, (*Supra*):

“Only in a clear case, where all reasonable minds agree, should the issue of contributory negligence be taken from the jury.”

The doctrine of the Lowder case is not novel to Utah. It was earlier announced in the following cases: *Spackman v. Carson*, (*Utah-1950*) 216 Pac. 2nd 640, *Nielson v. Mauchley* (*Utah-1949*) 202 Pac. 2nd 547, *Hun-*

*ter v. Michaelis (Utah-1948) 198 Pac. 2nd 245, and Martin v. Sheffield, 112 Utah 478, 189 Pac. 2nd 127.*

It is true that the fact situation in most of the above cases are not identical with the Lowder case or the case before this court. However, in the forgotten case of *Martin v. Sheffield*, (*Supra*), which opinion has apparently not been cited since, the fact situation was very close to the case before this Court. There was an additional element of contributory negligence evidenced in that there was testimony that the plaintiff did not look at all upon entering the intersection. Nevertheless, the unanimous court held that the question of contributory negligence is a jury problem.

In the case of *Hunter v. Michaelis (Supra)*, a pedestrian was struck while crossing Wilshire Boulevard in Los Angeles, California, in the night-time. Though it is true the Utah Supreme Court applied California substantive law in deciding this case, it nevertheless held that there was no contributory negligence as a matter of law for the pedestrian's failure to see.

It appears that the rule of law announced in the Lowder case is also the rule of law in Colorado, Kansas, California, New Mexico, Oregon, Washington, Idaho and Montana.

In the case of *Lawrence v. Kansas City Power & Light Co., et al*, 167 Kan. 45, 204 Pac. 2nd 752, the plaintiff and defendant collided in an open intersection, after the plaintiff had pre-empted the intersection. The Supreme Court of Kansas stated:

“Before a court can rule as a matter of law that negligence has been established, the evidence should be so clear that reasonable minds could have but one opinion, namely: that the party was negligent. The question whether the auto driver was contributorily negligent in proceeding across the intersection after seeing the bus was for the jury, and the jury might well have found the acts of the defendant to be the proximate cause of plaintiff’s injury—i.e.—defendant not watching enough to know whether plaintiff was in the intersection.”

This opinion was rendered by the Kansas Supreme Court after the trial court had directed a verdict for the defendant upon the ground that plaintiff was contributorily negligent as a matter of law.

In the case of *Martin v. Harrison*, 182 Ore. 121, 186 Pac. 2nd 534, the plaintiff, a pedestrian, was killed while crossing a highway, not at a crosswalk. The Supreme Court of Oregon stated:

“Contributory negligence becomes a question of law only when from the facts reasonable men can draw only one inference and that inference points unerringly to negligence of plaintiff contributing to the injury, and in other cases the question of contributory negligence is one of fact for the jury. If a pedestrian crossing a street fails to look or looks straight ahead without glancing to either side . . . he is guilty of contributory negligence as a matter of law, but if he looks but does not see approaching automobiles, or seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself the question of contributory negligence is for the jury.”

In the case of *Prentis v. Johnston*, 119 Colo. 370, 203 Pac. 2nd 733, the plaintiff and defendant collided in an open intersection and the Supreme Court of Colorado said:

“There is no contributory negligence as a matter of law for failure to exercise due care because the plaintiff looked to the right and failed to see, but the question of contributory negligence is for the jury.”

In the case of *Stickel v. San Diego Electric Co. et al*, 32 Cal. (2d) 157, 195 Pac. 2nd 416, the plaintiff and defendant collided in an intersection after the plaintiff pulled into the intersection from a stop sign. The Court held:

“The evidence was insufficient to establish as a matter of law that plaintiff negligently failed to yield the right of way and that such negligence contributed to the collision. The jury could have decided that when defendant started across the intersection she reasonably believed that the bus was not an immediate hazard.”

In the case of *Schoen v. Schroeder*, 53 N. M. 1, 200 Pac. 2nd 1021, plaintiff and defendant collided in an intersection after plaintiff had preempted. Held:

“The mere fact that plaintiff motorist drove into the intersection from the left when defendant was traveling down the street at some undisclosed point on his right, did not establish as a matter of law that plaintiff was guilty of contributory negligence, although plaintiff did not see defendant when he looked in his direction.”

In the case of *Rios v. Bennett*, (*Supra*), a pedestrian was struck and killed at night while crossing

a highway, though there was no evidence of whether the pedestrian looked before stepping onto the highway. The California Court stated :

“Whether a mistake in judgment by a pedestrian when crossing a street, as to speed and danger of approaching vehicles, constitutes contributory negligence is a question for the jury. As there was no evidence whether the pedestrian looked or not a presumption existed that he used ordinary care for his own safety and that in doing so he looked before he stepped out into the street.”

In the case of *Warren v. Hynes*, 4 Wash. (2d) 128, 102 Pac. 2nd 691, plaintiff had crossed the center line of an intersection after looking and not seeing and was struck by the defendant approaching the intersection at a ninety degree angle. The Washington Court held:

“Whether plaintiff who looked to the left when he was between 150 and 180 feet from the intersection, saw no approaching auto, and did not again look in that direction until his auto was in the center of the intersection, was contributorily negligent was for the jury.”

In *Wiswell v. Shinnars*, (*Supra*), the Court concludes :

“On the record presented to us herein, we feel that the question whether decedent's behavior and conduct, that is to say, whether he looked and either did not see the approaching automobile, or saw it and misjudged either its speed or distance, constituted contributory negligence under the particular circumstances then existing, was one of fact, as was also the question of whether



decedent's conduct measured up to the requirements of that of a reasonable man in complying with the aforesaid Vehicle Code provision. The question of contributory negligence is always one of fact for the jury to decide under proper instructions, except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. It is only in these last-named cases that failure to adhere to that common standard is as a matter of law contributory negligence. Where different conclusions may reasonably be drawn by different minds from the same evidence, the decision must be left to the triers of fact. Therefore, under the facts and circumstances here present, the questions of the negligence of the defendant and the contributory negligence of the deceased, as well as the important question of proximate cause, were all for the jury to determine in the light of all the facts, circumstances and presumptions presented by the evidence.

“It should be understood that throughout this opinion we have followed the rule applicable to cases where the appeal is taken from a judgment following a directed verdict or non-suit, which rule requires that evidence, and presumptions as a species of evidence, shall be taken by the appellate tribunal in the light most favorable to the losing party in the court below. We are therefore expressing no opinion as to the weight of the evidence or its truth or falsity.”

In the case entitled *Flynn v. Helena Cab & Bus Co.*, 94 Mont. 204, 21 Pac. 2nd 1105, plaintiff proceeding at 12 miles per hour, saw defendant, proceeding at 40 miles per hour some distance from intersection, but neverthe-

less entered the intersection and was struck. The court stated:

“Plaintiff seeing defendant, approaching street intersection from right, travel 150 ft. while plaintiff went 40 feet not contributorily negligent as a matter of law in proceeding forward when defendant was 150 ft. away.”

See also *Maier et al v. Minidoka County Motor Co., et al* 61 Ida. 642, 105 Pac. 2nd 1076.

It should be noted that many of the above cases involved fact situations wherein there was considerable evidence of plaintiff's failure to exercise due care in his own behalf. In the case at bar, however, the sole factual basis of the legal determination of decedent's contributory negligence was the inference from the physical facts that had he looked he would have seen the approaching taxicab.

It is respectfully urged, therefore, by virtue of the above authority, that the trial court committed error.

III. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFFS UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, AS THE QUESTION OF WHETHER OR NO DECEASED'S CONTRIBUTORY NEGLIGENCE, IF ANY, PROXIMATELY CONTRIBUTED TO HIS DEATH WAS AN ISSUE OF FACT FOR THE JURY.

It is appellants' further contention that, under the facts of this case, the proximate cause of the death of F. Parley Gibbs was a question for the jury and that it con-

stituted error for the trial court to direct a verdict against the plaintiffs.

In the case of *Greenfield v. Bruskas*, 41 N. M. 346, 68 Pac. 2nd 921 at page 926, proximate cause was defined as follows:

“Proximate cause is an ultimate fact and is usually an inference to be drawn by the jury from the facts proved, and only becomes a question of law when the facts regarding causation are undisputed and all reasonable inferences that can be drawn therefrom are plain, consistent and uncontradictory.”

The leading case in Utah dealing with causation is that of *Hess v. Robinson*, 109 Utah 60, 163 Pac. 2nd 510, and in that case the trial court held that both the plaintiff and the defendant were negligent as a matter of law but submitted to the jury the question of proximate cause. A verdict for the plaintiff was affirmed on appeal. The dissenting opinion in the case of *Hickock v. Skinner*, 113 Utah 1, 190 Pac. 2nd 514, said the following with respect to *Hess v. Robinson*:

“Even if it be conceded that plaintiff was contributorily negligent as a matter of law, the question of whether or not such negligence was a substantial causative factor in producing the collision was one of fact. Even if plaintiff had taken a second or third look, such might not have revealed to him that defendant would not yield the right-of-way to him, until too late for plaintiff to avert the accident. This case is somewhat similar to *Hess v. Robinson*. In that case plaintiff was driving

on a through highway and did not see defendant's ambulance approaching from the right. The ambulance went through the stop sign and crashed into plaintiff's automobile. The trial court held both parties negligent as a matter of law, but submitted the case to the jury on the question of whether or not plaintiff's contributory negligence was a proximate cause of the damage. From a verdict and judgment for plaintiff, defendants appealed. We affirmed. Although this court divided on the question of whether or not plaintiff was guilty of contributory negligence as a matter of law, we agreed unanimously that the question of proximate cause was one for the jury. I recognize that the facts of this case are somewhat different from those in the Hess case, but the underlying reasoning should be the same.

In the case of *Nikoleropoulos v. Ramsey*, 61 Utah 465, 214 Pac. 304, the trial court refused to give the following instructions as requested by the plaintiff:

"You are instructed that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects on the highway in front of him."

This refusal was held error on appeal. However, in the recent case of *Wright v. Maynard* (Utah-1951), 235 Pac. 2nd 916, the validity of the foregoing rule of law was affirmed but it was held that the question of proximate cause was a question for the jury.

In the case of *Styris v. Folk*, 62 Nev. 209, 146 Pac. 2nd 782, the plaintiff, a pedestrian, was struck by the defendant, a motorist, while crossing the street in the middle of the block in violation of a city ordinance. The Court at page 786 of the Pacific Reporter says:

“Appellant’s contention that the continual negligence rule should apply because of the violation of the ordinance, cannot be allowed. That rule, like the rule requiring actual knowledge of peril, is too harsh to be consonant with justice. As stated in *Yellow Cab Corporation v. Henderson*, supra (178 Va. 207, 16 S. E. 2nd 393): ‘The antecedent negligence of a plaintiff does not of itself preclude his recovery. Starkly stated, the reason for the rule is this: One cannot kill another merely because he is negligent.’

“In other words, a drunken or speedy motorist may not run down a careless pedestrian with impunity.

“There is no difference in principle as to the effect of negligence whether arising by violation of an ordinance, or by ordinary negligence. In either instance, whether it is the remote or proximate cause of an accident, is a question of fact in each particular case . . . Although, as to the former, the negligence is presumed as a matter of law, yet whether it is the proximate cause of an accident is always a matter of fact. *Smith v. Zone Cabs*, 135 Ohio St. 415, 21 N.E. 2d 336, 338. In that case, in which the violation of an ordinance was involved, the court said: ‘However, the negligence which the law attributes to appellant is not, in and of itself, sufficient to preclude his recovery. To operate as a bar, his negligence must be shown as a matter of fact to have had a causal relation

to and connection with his injuries. In other words, the negligence which the law here attributes to appellant must be shown to have been the proximate cause of his injuries. Negligence per se and proximate cause are two separate and distinct issues. While one is presumed as a matter of law, the other must nevertheless, be proved as a matter of fact. Although appellant crossed the street between intersections, in violation of an ordinance, he cannot be held as a matter of law to have reasonably apprehended that in so doing injury would result. Even to a pedestrian, thus crossing, a motorist owes the duty of exercising ordinary care. It is true that such ordinance gives to a motorist the right of way between intersections. However, that right is not absolute but preferential only, and the motorist is not absolved from his duty of exercising ordinary care for the safety of pedestrians, rightfully or wrongfully on the highway between such intersections. Whether the cab driver in the instant case exercised such care was a question of fact for the jury.' ”

We have found three recent Kansas cases, namely, *Baker vs. Western Casualty & Surety Co.*, 164 Kan. 376, 190 Pac. 2nd 850, *Atkins vs. Morton*, 164 Kan. 626, 191 Pac. 2nd 909, and *Lawrence vs. Kansas Power & Light Co.*, (*Supra*), and in each of these cases the question of proximate cause was held to be a jury question. In a recent Colorado case, *Amos vs. Remington Arms Co.*, 117 Colo. 399, 188 Pac. 2nd 896, a directed verdict for the defendant was reversed on the ground that proximate cause was a question for the jury. In three recent cases decided by the California Appellate Court, namely, *Douglas vs. Hoff*, 82 Cal. App. (2d) 82, 185 Pac. 2nd 607,

and *Green vs. Uarte*, 87 Cal. App. (2d) 75, 196 Pac. 2nd 63 and *Wiswell vs. Shinnors* (*Supra*), a directed verdict, a non-suit, and a directed verdict respectively, for the defendants involved were reversed and the question of proximate cause was held to be a question for the jury. To the same effect were the cases of *Chavez vs. Worley*, a New Mexico case, found at 48 N. M. 449, 152 Pac. 2nd 393, and *Carlson vs. Whelan*, a Washington case, 197 Wash. 104, 84 Pac. 2nd 1001.

In the case of *Genola vs. Barrett*, 14 Cal. (2d) 217, 93 Pac. 2nd 109, the Supreme Court of California, in a case involving a pedestrian and an automobile where the pedestrian was crossing in violation of an ordinance, stated:

“Not only did the trial court hold in the case at bar, as a matter of law, that plaintiff was contributorily negligent, but that her negligence, was, per se, the proximate cause of her injury. Here, plaintiff was standing in the street, according to one eye-witness, about ten or twelve seconds. She then stepped back, at which time the car was not within an approximate eighty-foot range of vision of the witness. When defendant failed to see what was plainly visible, failed to slacken her speed, and failed to swerve her car a few inches to avoid striking plaintiff who had yielded the right of way, it cannot be said that, as a matter of law, the negligence of plaintiff was the proximate cause of her injury.”

And, in the case of *Young vs. Boy Scouts of America*, 9 Cal. App. (2d) 760, 51 Pac. 2nd 191, the Court said:

“Whether or not the minor plaintiff, in riding his bicycle after dark without a light, was guilty of contributory negligence which was a proximate cause of his injuries was also a question of fact and not one of law.”

The case of *Maier et al v. Minidoka County Motor Co.*, (*Supra*), involved a bicycle, with no headlight but with a rear reflector, that was struck from the rear at night by an automobile. The Supreme Court of Idaho held that the questions of negligence, contributory negligence and proximate cause were all properly for the jury.

In *Briggs vs. United Fruit & Produce Inc.*, 11 Wash. (2d) 466, 119 Pac. 2nd 687, a bicycle with both a headlight and a reflector, was struck from behind at night by a truck, and there it was contended that the bicycle was near the center of the road rather than on the side. The Court held that contributory negligence and proximate cause were jury questions.

And, in *Pollard vs. Wittman*, 28 Wash. (2d) 367, 183 Pac. 2nd 175, a motorcycle without lights was involved in an accident with a motorist crossing into the wrong lane. The court held that the proximate cause of the accident should be submitted to the jury.

The Supreme Court of California, in the case of *Hart v. Farris*, 218 Cal. 69, 21 Pac. 2nd 432, at page 433, makes the following statement:

“It was admitted that the bicycle carried no light at all. Appellants contend that such fact



establishes negligence per se upon the plaintiff's part barring recovery. A violation of the provisions of the statute by plaintiff would not bar her from recovery on the ground of contributory negligence unless such violation of law proximately contributed to the accident. \* \* \* Presumably the jury concluded that, in view of the lack of attention of the driver of the automobile to the road ahead and the good light which the headlights of the automobile reflected ahead for a distance of 300 feet, the absence of lights on the bicycle was not a contributing factor in the accident. Such was the view of the trial court as expressed in denying appellants' motion for a new trial. Such a conclusion had ample support in evidence."

## CONCLUSION

It is respectfully submitted that the trial court erred in directing a verdict in favor of the respondent and against the appellants for the reasons that the presumption of due care on the part of appellants' deceased was not overcome, and whether he was guilty of contributory negligence or not was a question for the jury as well as the question of proximate causation. The trial court inferred that said deceased either did not look or looking, did not see what he should have seen. We contend that that is not the only reasonable inference that can be drawn. It is just as reasonable to infer that he looked and saw and misjudged the distance and speed of the taxicab. It is also a perfectly proper inference that the deceased entered the intersection long before the taxicab

was in view, and for some reason was still in the intersection when the taxicab struck him. We maintain that the reasonable inferences that can be drawn from the facts of this case regarding causation are not plain, consistent and uncontradictory, but, on the contrary are inconsistent and contradictory, and upon proper instruction became issues of fact that could only be decided by the jury.

Respectfully submitted,

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