

1951

Lynn W. Martin v. Paul H. Stevens : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Martin v. Stevens*, No. 7731 (Utah Supreme Court, 1951).
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7731
Case No. 7731

IN THE SUPREME COURT
of the
STATE OF UTAH

LYNN W. MARTIN,
Plaintiff and Appellant,

— vs. —

PAUL H. STEVENS,
Defendant and Respondent.

FILED

DEC 19 1951

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

FACTS

We shall refer to the parties as they appeared in the court below.

The statement of facts set forth in appellant's brief is substantially correct, but we desire to make the following comments:

At the bottom of page 1 of plaintiff's brief, it is stated that plaintiff looked to the east and saw that it was clear and then proceeded into the intersection. Although

the plaintiff testified that he looked to the east it is manifest that it was not clear. From the testimony of plaintiff's own witness, Lawrence B. Rogers, an engineer, and from plaintiff's Exhibit D, it is determinable that at a point 20 feet north of the south sidewalk on Stratford Avenue, the plaintiff had good vision to the east for a distance of 205 feet and at a point 15 feet north of the sidewalk, he had vision to the east to a distance of 465 feet. After clearing the line of trees between the sidewalk and the road, he had an unobstructed and unlimited vision to the east. It follows therefore, that either the plaintiff failed to look at all to the east at any point in his line of travel where he would have a good view to the east, or else, having looked to the east failed to take heed of the defendant's approaching automobile.

It is also stated in plaintiff's brief that plaintiff's automobile was knocked west on Stratford Avenue over two front yards and a hedge, coming to a rest at a distance of 156 feet from the point of impact. While it appears that plaintiff's car came to rest 156 feet from the point of impact, there is absolutely no evidence whatsoever to warrant the conclusion that it was knocked that distance by the force of defendant's automobile striking it. It is at least equally probable that plaintiff's car traveled this distance under its own power while out of the control of the plaintiff who was knocked unconscious in the collision.

Plaintiff has failed to mention the testimony of plaintiff himself, that he traveled at least 20 feet south on 18th East Street with a clear view to the east, and by his own testimony he could stop within a distance of five feet

at the rate of speed at which he was traveling. (R. 48, 49). By his own testimony he never saw the defendant's car until he heard its brakes squeal, which would have been when it was no further than 57 feet away (R. 42), and he admitted that he might have told the defendant that he never did see him. (R. 51). Plaintiff has also failed to mention in his brief the testimony of Harold Peterson the investigating police officer who testified that at the time he investigated the accident, immediately after its occurrence, that the plaintiff admitted to him, that he never did see the defendant's car. (R. 86). The testimony of Officer Peterson was not contradicted or rebutted by the testimony of any other witness and Officer Peterson having been called by the plaintiff and being a disinterested witness, the plaintiff is bound by his testimony. The plaintiff's own testimony, and that of the witnesses called by him, clearly established that the accident was caused, at least in part, by the plaintiff's own failure to keep a proper look-out.

POINTS TO BE ARGUED

I.

THE PLAINTIFF'S EVIDENCE SHOWED CONCLUSIVELY AND AS A MATTER OF LAW THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH WAS A SUBSTANTIAL PROXIMATE CAUSE OF THE ACCIDENT AND THE INJURIES AND DAMAGES SUSTAINED BY THE PLAINTIFF.

ARGUMENT

Since the decision of this Court in the case of *Bullock*

v. Luke, 98 Pac. (2d) 350, rendered on January 22, 1940, this court has decided a number of cases involving the respective rights, duties and liabilities of the parties to an intersection collision. We have carefully examined all of the cases which we have been able to discover from this court which deal with that question, in an attempt to determine the rules applicable to the drivers involved in intersection collisions.

From our study of the decisions we believe that the following rules are deducible and may be said to be the established law of this state.

1. Regardless of which driver technically has the right of way, both drivers have the duty to exercise vigilance for other traffic which may be approaching or entering the intersection, and failure to exercise that duty is negligence as a matter of law. If that principle had not been previously established it was definitely laid down as the law of this state in *Bullock v. Luke*, supra. We find no dissent from that proposition in any of the cases subsequently decided by this court; it has been reiterated in most of the decisions subsequent to the *Bullock* case, and in the most recent expression of opinion, we find the principle reaffirmed. This Court speaking through Mr. Justice Wade in the case of *Lowder v. Holley*, 233 P. (2d) 350 said:

“Appellants are correct in stating that before entering an intersection the driver of a car must look and determine whether it is safe to enter.”

We do not understand that plaintiff questions this

rule, and we mention it here merely for the purpose of developing our argument.

2. In most situations both parties to an intersection collision are guilty of negligence as a matter of law. In making this assertion, we are fully mindful of the decisions of this court in the cases of *Martin v. Sheffield*, 112 Ut. 478, 189 Pac. (2d) 127; *Hess v. Robinson*, 109 Ut. 60, 163 P. (2d) 510 and *Lowder v. Holley*, 233 Pac. (2d) 350. We think it requires no extended argument to show that in the case of *Bullock v. Luke*, supra; *Sine v. Salt Lake Transportation Co.*, 147 Pac. (2d) 875; *Hickok v. Skinner*, 113 Utah 1, 190 Pac. (2d) 514; *Conklin v. Walsh*, 113 Ut. 276, 193 Pac. (2d) 437; and *Gren v. Norton*, 213 Pac. (2d) 356, it was held that both of the drivers involved in the intersection collisions in those cases were guilty of negligence as a matter of law. In each of those cases it was further held that the negligence of the plaintiff was a proximate cause of the accident and in each case he was denied recovery.

In the cases of *Martin v. Sheffield*, *Hess v. Robinson* and *Lowder v. Holley*, there is language which somewhat indicates that the question of the plaintiff's negligence was for the trier of fact. However, we believe that a careful study of the opinions of this court in those cases will reveal that the true holding was that the question reserved for the trier of fact was not whether or not the plaintiff was guilty of negligence, but whether or not the negligence of the plaintiff was a proximate cause of his injuries.

In *Hess v. Robinson*, the plaintiff was proceeding

southerly on an arterial street in Ogden. Streets intersecting with the street on which he was driving were stop signed. The plaintiff failed to observe the defendant's ambulance approaching from his right, and the ambulance ran through the stop sign and into and against the plaintiff. The trial court held that both parties were guilty of negligence and specifically held that the plaintiff was negligent in failing to observe the approach of the defendant's vehicle. However, the trial judge took the position that even though the plaintiff had observed the defendant's vehicle, he would have been justified in assuming that it would stop for the stop sign, and that therefore he was entitled to proceed into and through the intersection until it became apparent to him that the defendant would not respect his right of way. The court reasoned that by the time it became apparent to the plaintiff that the defendant would not obey the stop sign it might have been too late for the plaintiff to avert the accident, and therefore, it was for the jury to determine whether his failure to observe the defendant's automobile was a proximate or legal cause of the accident. The jury returned a verdict in favor of the plaintiff which was affirmed by this court. In the leading opinion, written by Chief Justice Larson and concurred in by Justice Turner, the theory of the trial judge was followed. Justice Wade concurred in the result, saying that it was a jury question whether the plaintiff was guilty of negligence which proximately caused the injury. It is not altogether clear in the opinion of Justice Wade whether it was intended to hold that the question of negligence

was for the jury, or merely whether the question for the jury was whether the negligence of the plaintiff was the proximate cause of the accident. The implication from his language as we understand it, is that the negligence was recognized to exist and his concurrence was based on the view that only the question of proximate cause was for the jury. Justice Wolfe concurred in the result on the theory that the question of negligence of the plaintiff, as well as the question of proximate cause was for the jury, and in this opinion Mr. Justice McDonough concurred.

We are unable to harmonize the concurring opinion of Justice Wolfe with the rules laid down before and since. In his opinion he did not depart from the principle above stated, i.e. that both parties have a duty to observe for other traffic approaching or entering an intersection. On the contrary he stated: "but we held it a salutary rule that one who had the right of way still has the duty not to exercise it if he did or could have ascertained that another was not going to give it to him and that his insisting upon his right of way under those circumstances was contributory negligence." It was admitted in the case of *Hess v. Robinson* that the plaintiff did not see the defendant's approaching vehicle, and we are therefore unable to understand how it can be said that it was a question for the trier of fact whether or not he was guilty of negligence. However, we are in full agreement with the view that the question of whether or not the negligence of the plaintiff was a proximate cause of the accident was a question for the jury in that

case, since the plaintiff was entitled to assume that the defendant would yield to him until it became apparent to the plaintiff that the defendant would not yield, which might have been too late for the plaintiff to avert the accident.

In the case of *Martin v. Sheffield*, 189 Pac. (2d) 127, the plaintiff who had been traveling west on Wilson Avenue, testified that she observed to her left when she was about 50 feet east of the intersection with Tenth East and that at the time she could see about 75 feet south of the intersection and that she saw no car approaching. She did not look again until after she was in the intersection and she did not observe the defendant's vehicle approaching until immediately before the accident. Although there is language in the opinion of the court which indicates that the question of the plaintiff's negligence was for the jury, we think that the true holding of the court was that the question for the jury was whether the plaintiff's failure to look to the left at any time between the time she first observed and the time she entered the intersection was a proximate cause of the accident. This court, speaking through Mr. Justice McDonough said:

“There was a conflict in the evidence as to her speed, as to the defendant's speed, and as to whether defendant stopped before the collision or stopped after the impact with plaintiff's car. These factors would all have bearing *on whether failure of plaintiff to look to her left the instant she entered the intersection contributed to the accident or prevented her from stopping her car short of the point of impact or prevented her*

from turning to the right to avoid the collision."
(Italics ours).

The court further observed as follows:

"If reasonable minds might differ as to which version of events shall be believed, then reasonable minds might likewise differ as to whether plaintiff's own conduct contributed to the accident."

The fair purport of this language, as we understand it, is that the question of proximate cause was for the jury. To say that it was a question for the jury whether plaintiff was negligent in failing to keep a proper lookout, in the face of her admission that she looked only once before entering the intersection and did that when her field of vision was limited to a distance of 75 feet and when she, herself, was about 50 feet from the intersection, would seem to fly squarely into the face of the apparently well established rule that the plaintiff must keep a proper lookout for other automobiles entering the intersection and that such observation should be made at a point where observations will be reasonably efficient for, and conduce to protection. *Bullock v. Luke*, *supra*.

In the recent case of *Lowder v. Holley*, 233 Pac. (2d) 350, the plaintiff failed to observe the defendant's vehicle approaching from the plaintiff's right. However, in that case there was evidence from which the court could find that at the time the plaintiff entered the intersection, the defendant was at least 250 feet away, and that the plaintiff would be entitled to assume that the defendant

would yield the right of way to him, and therefore, his failure to observe the defendant's approaching vehicle was not a proximate cause of the accident. We are unable to harmonize the holding of the court in this case with the holdings of the court in *Hickok v. Skinner*, supra; *Conklin v. Walsh*, supra; and *Gren v. Norton*, supra, wherein it was held that not only does the driver have a duty to make observations before entering the intersection, but also to reobserve and to reappraise as he proceeds through the intersection. Whether or not it was the intent of the court to overrule or modify those cases, we do not know. Neither does it particularly matter so far as the result of this case is concerned. We find nothing in *Lowder v. Holley* which is inconsistent with the earlier cases of *Bullock v. Luke* and *Sine v. Salt Lake Transportation Company*, upon which we rely. We merely invite the court's attention to this matter to point out that the *Lowder* case leaves the law in a somewhat unsettled state that should be clarified when the matter is again presented to the court in an appropriate case.

3. Under certain circumstances the question of whether the negligence of the party having the right of way was the cause of the accident would be a jury question.

We have heretofore reviewed the decisions of this court, observing that the question of proximate cause was held to be for the jury, in three of the decided cases. We are unable to deduce a general rule from those three decisions. Perhaps the best that can be said is that where, under the facts of the particular case, reasonable minds

might conclude that the favored driver might have entered the intersection, even though he had observed the approach of the defendant, with the expectation that the defendant would yield the right of way to him, the question of whether or not the plaintiff's negligence was a proximate cause of the accident must be for the trier of fact and not be determined by the court as a matter of law. Conversely, where the evidence is such that all reasonable minds would agree that the failure of the favored driver to observe the approach of the defendant's automobile was a proximate cause of the accident, the plaintiff is precluded as a matter of law from recovering.

If we are correct in our interpretation of the decisions of this court, there can be no doubt in this case that the plaintiff was guilty of negligence as a matter of law, under the general rule above stated that both drivers involved in an intersection collision are guilty of negligence as a matter of law. However, if we are mistaken in our understanding, and the rule is not so broad as we have above stated, we are still of the opinion that the facts and the evidence in this case compel a conclusion that the plaintiff failed to exercise a proper lookout or any lookout whatsoever, and he was therefore negligent as a matter of law.

By his own admission the plaintiff never observed the defendant's automobile until after the defendant had applied his brakes, and it was the noise of the defendant's squealing brakes that attracted plaintiff's attention to his approach. Thus the plaintiff never observed the

defendant until after the emergency had arisen and the defendant had already taken steps to avert or at least to minimize the effects of the impending accident. There is other evidence in the record and particularly the testimony of Officer Peterson, that the plaintiff never did see the defendant. And the plaintiff himself admitted that he might have told the defendant that he never saw him. Plaintiff testified that he left only two feet of skid marks and that he could stop in a distance of less than five feet at the rate of speed at which he was traveling. It is apparent, therefore, that had the plaintiff observed the defendant's approach only a second before he did, this accident would have been averted.

It is mathematically demonstrable that during the last $43\frac{1}{2}$ to $48\frac{1}{2}$ feet of plaintiff's course along 18th East Street, the defendant's approaching automobile was within his field of vision.

At a point 20 feet north of the south edge of the sidewalk on the north side of Stratford Avenue, plaintiff would have a field of vision for a distance of 205 feet east of the intersection (more than 218 feet east of the point of impact). At this point the plaintiff would be $48\frac{1}{2}$ feet from the point of impact. This distance is calculated as follows: 20 feet from the point of observation to the south edge of the sidewalk, plus $12\frac{1}{2}$ feet from the edge of the sidewalk to the edge of the hard surfaced portion of Stratford Avenue plus 14 feet from the edge of the hard surfaced portion of the road to the center line of the road plus 2 feet (22 inches) from the center of the road to the northern-most skid marks left by the defendant's

automobile. These distances are taken from the plaintiff's Exhibits C and D and from the testimony of the plaintiff.

Taking the evidence in the light most favorable to the plaintiff, as we must in this case, let it be assumed that the plaintiff was traveling at a rate of speed of 10 miles per hour, (15 feet per second) the lowest speed at which he testified to traveling. At that rate of speed plaintiff would require about three seconds to travel from a point 20 feet north of the intersection to the point of impact. If the defendant was traveling at a speed of 30 miles per hour (44 feet per second), he would at the time when plaintiff was 20 feet north of the intersection be 132 feet east of the point of impact; at 35 miles per hour or 51 feet per second he would be 153 feet east of the point of impact; at 40 miles per hour or 59 feet per second he would be 177 feet east of the point of impact; at 45 miles per hour or 66 feet per second he would be 198 feet east of the point of impact and at 50 miles per hour or 74 feet per second he would be 222 feet east of the point of impact (about 209 feet east of the intersection). All of the above calculations are based upon the assumption that the defendant traveled at a constant rate of speed up to the point of impact. However, it is undisputed that for at least the last 57 feet prior to the moment of impact, the defendant was decelerating, so that at the various speeds assumed he would have been several feet closer to the point of impact, than indicated in the calculations. It is thus obvious and not open to dispute that if the defendant were traveling at any rate of speed up to 50

miles per hour, he was within the plaintiff's field of vision at all times after the plaintiff was within 48½ feet of the point of impact.

As plaintiff proceeded southerly from a point 20 feet north of the intersection his field of vision rapidly expanded. At a distance only five feet further to the south, that is at a point 15 feet north of the intersection, his field of vision had had more than doubled and had increased to a distance of 465 feet east of the intersection. From this point the defendant's automobile would have been within plaintiff's field of vision even had defendant been traveling at a rate of 100 miles per hour.

Of course, there is no evidence in the record whatsoever to warrant a finding that defendant was traveling at a rate of speed greatly in excess of 32 miles per hour. Officer Farnsworth testified that skid marks 57 feet in length would indicate that the defendant was traveling about 32 miles per hour. Since he had not come to a full stop at the end of the skid marks he would have been going somewhat faster than 32 miles per hour but as to how much faster there is no evidence whatsoever in the record. We are unable to find any evidentiary basis for plaintiff's suggestion that the defendant was traveling 45 to 55 miles per hour. However, if he were traveling at that speed, as claimed by the plaintiff, defendant was within the plaintiff's field of vision for at least the last 43½ feet of his progress toward the point of impact, and if he was traveling at that rate of speed it would be fair notice to the plaintiff that the defendant had no intention of yielding the right of way to him.

Plaintiff testified that he could stop in a distance of less than five feet at the rate of speed at which he was traveling. On his own testimony, therefore, he could have averted the accident had he observed the defendant's car at any time before he was within 5 feet of the point of impact. Under these circumstances the conclusion appears to us inescapable that not only was the plaintiff guilty of negligence but that that negligence contributed substantially, directly and proximately to the accident and to its unfortunate consequences to the plaintiff. We believe that this case falls squarely within the principles of *Bullock v. Luke* and *Sine v. Salt Lake Transportation Co.* and not within the principles of *Hess v. Robinson*, *Martin v. Sheffield* and *Lowder v. Holley*.

The facts of this case directly parallel those in *Bullock v. Luke*. In both cases the accident occurred early in the morning, in broad daylight, on dry roads, and with good visibility. In both cases the plaintiff was the driver on the right and therefore technically entitled to the right of way. In *Bullock v. Luke*, under the evidence most favorable to him, the plaintiff failed to observe the defendant's approaching vehicle until he (plaintiff) was 20 feet south of the intersection line, notwithstanding that he had a view of 200 feet to the west when he was 60 feet south of the intersection line and 800 feet to the west when he was 20 feet south of the intersection line. In the instant case, the facts make an even stronger case of contributory negligence. Here the plaintiff failed to observe the defendant until the plaintiff was actually within the intersection, notwithstanding the fact that he had a view

of 205 feet to the east at a point 20 feet north of the intersection and 465 feet to the east when he was 15 feet from the intersection and he was traveling at a rate of speed of less than half of that of the plaintiff in the *Bullock* case, and thus had greater opportunity to make observations. The language of this court in *Bullock v. Luke* would seem to be applicable with equal force to the case at bar. It was there said:

“At 20 feet south of that line, he could have seen 800 feet west. Why, then, didn’t he see Luke before the time claimed by him? There is but one conclusion. He, Bullock, was not looking. By reason of his failure to look, he did not discover Luke until it was too late.”

See also the language in the concurring opinion of Justice Wolfe:

“And the evidence shows that not only was he not sure that another would not be in his way but that he never looked in time to determine how he should regulate his speed. Such driving through intersections is a constant occurrence. *The law should pronounce it indisputably negligent.*” (Italics ours.)

And as observed by Justice Wolfe in conclusion:

“This rule encourages both drivers to be careful; * * *”

The facts in the case of *Sine v. Salt Lake Transportation Co.*, 147 Pac. (2d) 875, also closely parallel those

in the case at bar. In that case the plaintiff was a passenger for hire in a taxi cab owned and operated by the defendant. The cab was proceeding westerly on Sixth South Street in Salt Lake City, and was involved in a collision with another automobile at the intersection of 3rd West Street. The intersection was not controlled by either a stop sign or a semaphore. The driver of the defendant's cab had a view of 200 feet to the south of the intersection when he was at a point 50 feet east of the intersection. Notwithstanding this fact, he failed to observe the approach of the other automobile from the south until he was within the intersection, at which time it was too late to avoid a collision.

In a long and well considered opinion by District Judge Baker, it was held, as a matter of law, that the defendant was guilty of negligence which was a proximate cause of the accident. While we dislike to burden the Court with lengthy quotations, we feel that the following language from the opinion of Judge Baker is pertinent and we therefore take the liberty of quoting rather copiously:

“One of the fundamental duties which defendant Butcher owed to his passenger, the plaintiff, was to keep a vigilant lookout for other vehicles along the highway upon which he was traveling. *As he approached the intersection where the accident occurred, he was bound to anticipate the presence of other vehicles that might be crossing his line of travel, and to govern his conduct accordingly.* 42 C.J. 91, *Dembicer v. Pawtucket Cabinet & Builders Finish Co.*, R.I., 193 A. 622; Rich-

ards v. Palace Laundry Co., 55 Utah 409, 186 P. 439. Among other things *it was his duty as he approached the intersection to look in both directions along the intersecting street, and not merely in the direction from which vehicles having the right of way over him might be approaching.* 42 C.J. 963. The supreme rule of the road as to motorists at street intersections in cities is the rule of mutual forbearance. Ward v. Clark, 232 N.Y. 195, 133 N.E. 443. The foregoing rules were particularly applicable to Butcher because he was the driver of a cab for hire. *Butcher could not moreover, insist with impunity upon his right of way in the face of an apparent danger arising from the negligence of another approaching from the unfavored direction. If in such case he saw, or in the exercise of due care should have seen, the Hall car approaching at an excessive rate of speed or otherwise indicating that the right of way was probably not going to be yielded to him, he should have slowed down, or stopped or otherwise have taken appropriate measures to avert a collision.* Blashfield's Cyclopedia of Automobile Law and Practice, Perm. Ed. vol. I, p. 494, § 682; Hogan v. Miller, 156 Va. 166, 157 S.E. 540; Shelton Taxi Co. v. Bowling, 244 Ky. 817, 51 S.W. 2d 468; Petri v. Pittsburg Rys. Co., 328 Pa. 396, 195 A. 107.

“Actual possession of the right of way, as opposed to a physical position of two vehicles with reference to the intersection which might under the statute confer it, presupposes that motorists entering the intersection have exercised due care, including that of keeping a proper lookout. In the case of a taxi driver that means that he must keep such a lookout as will conduce to the safety of his passenger. The operator of a

taxicab may not place his passenger in a place of imminent peril through his own failure to keep the lookout which the law requires of him, and then after a collision has occurred absolve himself of negligence by asserting that, after all, he had the right of way. Neither may he absolve himself by asserting that the collision was due solely to the fault of the other driver, if that fault might have been discovered, and its consequence avoided by the exercise of due care on his part. *Hogan v. Miller*, 156 Va. 166, 157 S.E. 540.

“As we have already indicated, Butcher was required not only to look for cars approaching or entering the intersection, but *to look effectively*, and was charged with knowledge of all that a prudent and vigilant operator would have seen had he looked. 42 C.J. 911; *Dembicer v. Pawtucket Cabinet & Builders Finish Co.* supra; *Huddy Cyc. of Automobile Law*, 9th Ed., Vol. 3-4, Sec. 48.

“* * * The facts as we view them have been recounted above. So far as the lookout kept by Butcher is concerned, they reveal that *he did not look at all until he had entered the intersection and this despite the fact that his view south on Third West Street was clear and unobstructed for a distance of 200 feet from a point 50 feet east of the intersection of Sixth South Street, within which limits Hall was at all times visible to Butcher had he looked.* * * * Certainly, in light of the fact that Butcher's view was unobstructed, it cannot reasonably be said that his observation of the Hall car was at the first opportunity, nor at a point which conduced to the protection of his passenger. *Bullock v. Luke*, supra. *At the time he first saw the Hall car approaching he had by his negligence placed himself and his passenger in a*

position of peril from which he did not, and probably could not, extricate himself by the exercise of any degree of care. Therein Butcher was guilty of negligence.

“It is to be observed that we are here confronted with a situation where there was an entire failure of the operator of the cab to keep the look-out that was required of him. *By his utter failure to look until a time when the accident had become unavoidable, Butcher deprived himself of the opportunity to do anything which might have avoided the collision.* Had he looked sooner and in response to what such observation revealed attempted in some manner to have avoided a collision then, perhaps, a question of fact would arise as to whether or not he had exercised that degree of care demanded by the circumstances and his relationship to the plaintiff. *As the facts present themselves, however, viewed in a light favorable to the defendants, Butcher failed to look when he should.* He kept no look-out such as would be effective for the due protection of his passenger. In so doing he failed to perform one of the essential duties he owed to his passenger, and therein was guilty of negligence as a matter of law. *Bullock v. Luke, supra; Block v. Peterson, 284 Mich. 88, 278 N.W. 774; Jacobsen v. O’Dette, 42 R.I. 447, 108 A. 653; Thibodeaux v. Star Checker Cab Co., La. App., 143 So. 101.*” (Italics ours).

Chief Justice Wolfe wrote a concurring opinion agreeing both with Judge Baker and with the remarks of Mr. Justice McDonough. We quote below from the concurring opinion of Chief Justice Wolfe:

“We must not maneuver the law into such a position that we put on a driver using due care the duty to avoid the effect of another’s negligence. That would make each driver an insurer against the effect of the other’s actions. In this case the distinction is well preserved. Butcher did not exercise due care in relation to his fare. *He failed to look when looking would have been effective.* Had he looked at a point 50 feet back of the intersection or at least so far back of it as to permit him to conduct his driving in relation to the exigencies which might arise out of the conduct of Hall, he might have slowed to a speed below 20 miles an hour. * * * *We can say as a matter of law as we did in the Bullock case that entering an intersection without timely observation is negligence.* But can we say as a matter of law that such negligence proximately caused the accident? In order to do that we must be able to say that had Butcher looked sooner the degree of care toward his fare with which he was charged, be it ordinary or extraordinary, would in law demand that he act differently than he did in this case. While I am not without doubt in the matter *I think we can say as a matter of law that had he sized things up at a moment or two earlier he would, in view of his speed and the speed of Hall, have had to make different accommodations in order to discharge the duty he owed his fare.* The failure to make such accommodations contributed to the accident and the failure to sooner look resulted in the failure to make the accommodations. Thus the chain between failure to look and the accident is established as one of proximate cause.” (Italics ours).

Judge Larson also wrote a concurring opinion from which we quote as follows:

"It is the duty of every driver approaching an intersection to anticipate that other persons may be in, or about to enter the intersection, and to govern his conduct accordingly. State v. Adamson, 101 Utah 534, 125 P. 2d 429; Richards v. Palace Laundry Co., 55 Utah 409, 186 P. 439. And since he must anticipate that others may be approaching or entering the intersection it becomes his duty to look to both sides and ascertain that it is reasonably safe for him to enter and pass through the intersection, and he cannot be heard to say that he did not see that which he should have seen had he looked. * * * I conceive the rule of the Bullock case to be this: A driver approaching an intersection must anticipate that there may be other cars approaching the intersection and before entering the intersection must look both ways and note any vehicles near or approaching the intersection. If the position and speed of the other user of the highway is such that a reasonably prudent man would think he could cross in safety he may proceed through the intersection and will not be guilty of negligence. But, if the conditions are such that a reasonably prudent driver would be apprehensive of danger in crossing through the intersection, then to do so would be negligence. This without regard to who has the right-of-way unless the intersection is one controlled by semaphore lights or other definite means of control of traffic, at the intersection. And one may not rely upon the right-of-way or assume the other driver will stop unless the circumstances and behavior of the other driver are such that a reasonably prudent man would conclude that the other driver was going to stop and yield him the right-of-way.

"* * * Butcher, driving west, approached the

intersection—where there was no traffic director, semaphore, or stop sign—at 20 miles per hour. Hall, driving the other car was coming north toward the intersection, at 40 miles per hour. When Butcher was 50 feet from the intersection, he had an unobstructed view of the intersecting road to the south of him for 200 feet, had he looked in that direction. At that time, Hall would have been approximately 100 feet from the intersection—well within the field of vision—and traveling about 60 feet per second, or less than two seconds time from the intersection. Butcher was going about 30 feet per second, or less than two seconds time from the intersection. Had Butcher looked, as it was his duty to do, he would have seen this very apparent danger. Since the record is silent as to Hall's behavior as he approached the intersection but he did not stop or slow down, we must assume that there would have been nothing in Hall's conduct to justify Butcher in concluding that Hall would stop and yield him the right of way * * * .”

We quote also from the opinion of Mr. Justice McDonough as follows:

“I concur. The defendant's own testimony reveals that he did not look to the south along the intersecting highway before reaching a point where observation was ineffectual. The situation therefore, is the same as though he had driven heedlessly through the intersection without looking at all. He drove his fare into a position of danger without having placed himself in a position to determine whether he, under the statute defining the right of way, had the right to proceed; he negligently failed to inform himself of

the hazard presently encountered so as to exercise that care toward his passenger which the law enjoins.

“Such situation differs from one where a driver, having performed the duty of observing, exercises a reasonable judgment as to the right of precedence and, absent evidence that his right was not going to be respected by the driver of another car, proceeds. Under such a state of facts, it is usually for the trier of fact to evaluate such driver’s conduct; although, in some circumstances such driver would in my opinion be free from negligence as a matter of law.”

* * * * *

“* * * That he might have avoided the accident by a slight acceleration of speed or by slowing down, after becoming cognizant of the approach of the other car, is demonstrated by the physical facts. Had he made such choice under the exigency confronting him, his choice of other than the most safe of the courses open to him, would not be negligence in law. But here *his failure to observe, evaluate and act should in my opinion be held to be the cause of his vehicle being placed in the path of the other car.*” (Italics ours).

Notwithstanding the fact that none of the members of the court concurred outright in the opinion of Judge Baker, all of them appear to agree quite fully with his views and we find no dissent therefrom.

We believe that the decisions in the *Bullock* case and *Sine vs. Salt Lake Transportation Company* are controlling of the case at bar and it is on these decisions which we rely for affirmance of the trial court. The facts

of this case distinguish it from the cases of *Martin vs. Sheffield*, *Hess vs. Robinson* and *Lowder vs. Holley*.

In *Hess vs. Robinson*, the case was held to be for the jury because the plaintiff was entitled to assume that the defendant would obey the stop sign and yield to the plaintiff. There was no stop sign at the intersection involved in the case at bar and hence the rule of *Hess vs. Robinson* would have no application here.

In *Martin vs. Sheffield*, the case was held to be for the jury because there was a substantial dispute in the facts as to the speeds at which both of the cars were traveling and as to whether or not the defendant stopped before the collision. We are not confronted with any such difficulties in this case. The facts are substantially without dispute, and taking the facts in the light most favorable to the plaintiff, the conclusion is irresistible that the plaintiff's failure timely to observe the defendant's approaching automobile and to take steps to avert the collision was in fact a substantial contributing cause of the accident.

In *Lowder vs. Holley*, the case was held to be for the jury because there was evidence which would warrant a finding that the defendant was at least 250 feet from the intersection at the time the plaintiff entered the intersection. No such finding is permissible under the evidence adduced in the case at bar. Assuming the defendant to have been traveling at the rate of 50 miles per hour, he would have been at a distance of less than 200 feet from the intersection at a time when the plaintiff was 20 feet north of the intersection; and at the time

the plaintiff entered the intersection the defendant could not have been much more than 100 feet east of the intersection. At the time the plaintiff entered the intersection he still had adequate time and space in which to halt his vehicle and to avoid the accident, and if the defendant were traveling at 50 miles per hour that would have been fair notice to the plaintiff that the defendant had no intention of yielding the right of way.

We have carefully examined the cases of *Hunter v. Michaelis*, 198 Pac. (2d) 245, *Mingus v. Olsson*, 201 Pac. (2d) 495, *Nielson v. Mauchley*, 202 Pac. (2d) 547, *Spackman v. Carson*, 216 Pac. (2d) 640 and *Compton v. Ogden Union Ry. & Depot Co.*, 235 Pac. (2d) 515, all of which are cited in plaintiff's brief, and we do not see that any of them are sufficiently close in point of fact to be of any assistance to the court in determining the case at bar.

Hunter v. Michaelis was a case involving a pedestrian being struck by an automobile. It was decided under the laws of the State of California and the court specifically observed that it expressed no opinion as to whether the case would be ruled the same under the law of Utah. Moreover, in that case the plaintiff not only looked before attempting to cross the street, but looked and reappraised the situation twice during the course of her traverse of the street.

Mingus v. Olsson is likewise a pedestrian case. In that case a pedestrian was held guilty of contributory negligence as a matter of law in failing to observe and take heed of the defendant's approaching vehicle. In

so far as the principles of that case have any relationship to the case at bar, it is favorable to the defendant and not to the plaintiff.

The case of *Nielson v. Mauchley* is likewise different on its facts. In that case the plaintiff observed the defendant's bus when he was 300 feet away and he continued to observe the bus and watch its movements during the entire course of his travel toward the bus. He also made an appropriate reduction in his speed as he approached the bus. He was entitled to assume under the facts of that case that the bus would yield the right of way to him. When it became apparent that the bus would not yield it was too late for the plaintiff to avoid the accident. The case is entirely different on its facts and involves an entirely different question of law.

The case of *Spackman v. Carson* is somewhat similar to *Nielson v. Mauchley* and bears no resemblance to the facts in the case at bar. There the plaintiff observed the defendant's vehicle parked along side the road as he proceeded toward it and when he was about 200 feet away. There was nothing about the appearance of the vehicle which would indicate that it was about to move onto the road. Plaintiff next observed it when it was about 30 feet away and at that time it was moving on to the road in front of him. That is quite a different situation from a case where a car is observed or is observable approaching an intersection at a fairly rapid rate of speed. In such a case it can only be inferred that the driver of such an automobile intends to traverse the intersection and other drivers approaching the inter-

section must in the exercise of reasonable care pay heed to this fact. By express statement of the court, the holding of the *Spackman* case is limited strictly to its own facts.

The case of *Compton vs. Ogden Union Ry. & Depot Co.* involved a pedestrian being struck by a train. She was held to be guilty of contributory negligence as a matter of law in failing to observe the approach of the train. If that case has any bearing on the case at bar, it supports the position of the defendant.

The following quotation therefrom, has some pertinence to the facts in the case at bar :

“It seems inescapable that the deceased was guilty of contributory negligence. It was her duty to look and listen for trains before going on the tracks. She had a clear view of the tracks to the north, well before she got far enough west to be in the path of a train. Under the evidence the engine was there to be seen. If decedent had looked at any time, either as she started, or as she pursued a course parallel to, but dangerously near the tracks, she must necessarily have seen the train approaching. She was therefore, either negligent in failing to look or in failing to heed the train if she saw it.”

The rule that both drivers involved in an intersection collision are guilty of negligence as a matter of law is a healthy rule and conforms to the realities of modern day driving conditions. In truth and in fact, under ordinary circumstances, it is possible for an intersection collision to occur only where both drivers

are guilty of some laxity. In the ordinary situation an intersection collision will not and cannot occur unless both of the drivers fail to see each other, or, having seen one another, attempt to win a race across an intersection. No prudent driver will attempt to cross an intersection, even though technically entitled to the right of way, unless there is no driver approaching from the intersecting highway so close as to constitute an immediate hazard, or unless such approaching driver has clearly indicated an intention to yield the right of way. In the face of a rapidly mounting accident toll, resulting in the loss of 35,000 lives and physical injuries to one million persons annually, and property damage amounting to untold millions of dollars, a rule requiring both parties approaching an intersection to take the utmost precaution would seem to be a salutary principle. It will be a most unusual factual situation where one driver involved in an intersection collision can say that he was blameless in the matter. Obstructions to vision would not ordinarily be any excuse. Where an intersection is blind the driver approaching should make an appropriate reduction in speed and even come to a complete stop if necessary before essaying to cross.

As was so well said by the court in *Conklin v. Walsh*, 193 Pac. (2d) 437, 439:

“The duty to keep a proper lookout applies as well to the favored as to the disfavored driver. Neither driver can excuse his own failure to observe because the other driver failed in his duty. Neither driver is at any time to be excused

for want of vigilance or failure to see what is to be seen.”

We are fully mindful of the desirability that traffic should flow freely and with a minimum of delay, but we do not believe that a rule requiring careful and reasonable observations on the approach to, and entry of, intersections need necessarily to detract from this end. We are not so much concerned, in cases of this sort, with arterial highways, where traffic is regulated by semaphores and protected by stop signs. In those areas where intersections are not controlled by semaphores, stop signs, or other devices, traffic ordinarily is very light and will not be unduly burdened or delayed by a rule which requires careful observations at all intersections.

CONCLUSION

The judgment of the trial court was correct and is in accordance with the rules and decisions heretofore laid down by this court and should be affirmed.

Respectfully submitted,

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