

1952

Norma D. Cox v. Cyril P. Thompson : Brief of the Defendant

Utah Supreme Court

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7-96

IN THE SUPREME COURT

of the

FILE

STATE OF UTAH

DEC 27 1952

Clerk, Supreme Court,

NORMA D. COX, ADMINISTRATRIX,
OF THE ESTATE OF JACKSON
BLAINE COX, DECEASED,

Plaintiff and Appellant,

— vs. —

CYRIL P. THOMPSON,

Defendant and Respondent.

} Case No.
7796

BRIEF OF THE DEFENDANT

STEWART, CANNON & HANSON

By: EDWIN B. CANNON

REX J. HANSON

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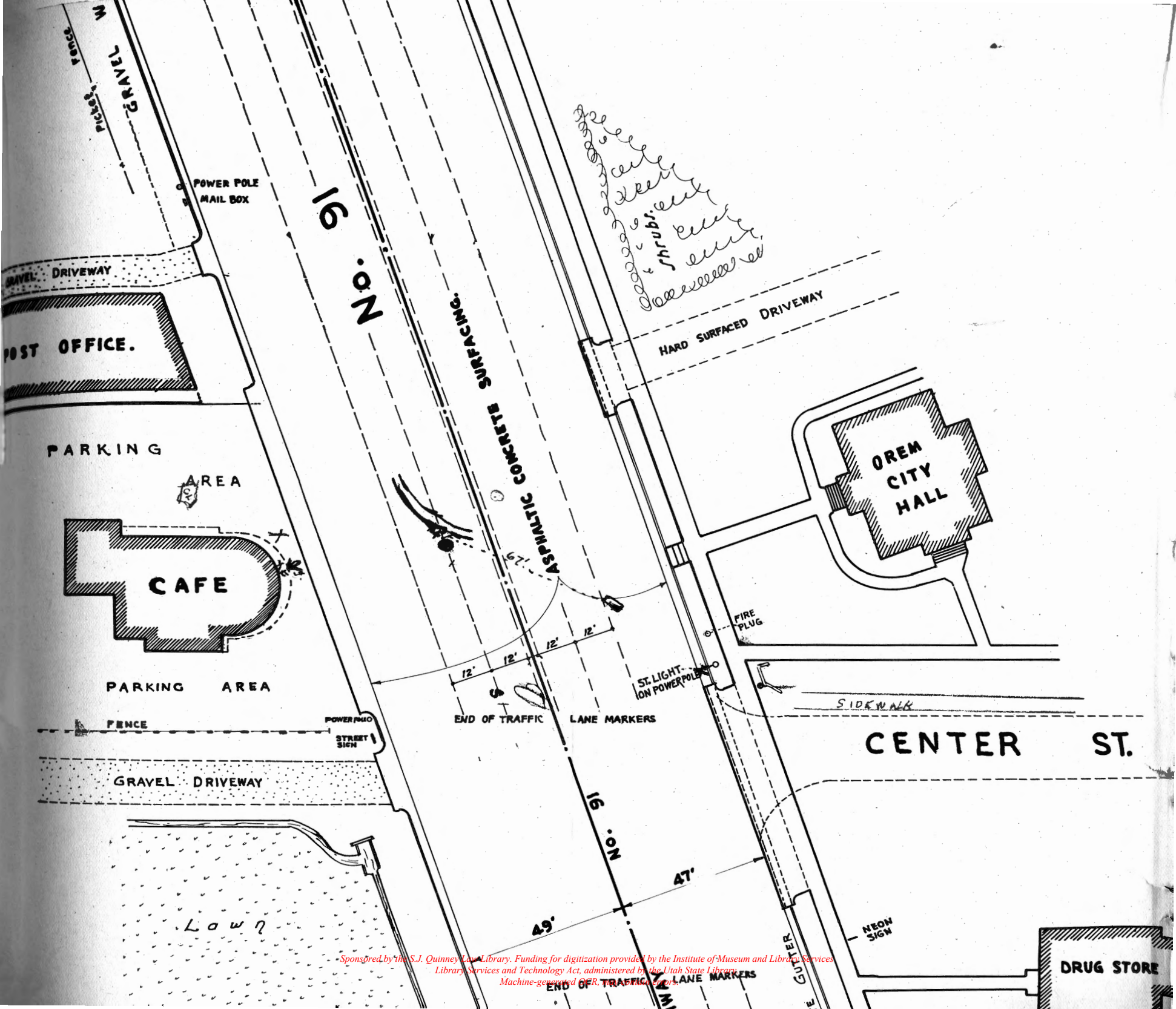
NATURE OF THE CASE

This action was instituted to recover the damages for the death of Jackson Blaine Cox, who was killed in an auto-pedestrian accident within the city limits of Orem, Utah, on U. S. Highway 91. This appeal is from the ruling of the lower court by the Honorable William Stanley Dunford directing a verdict in favor of the defendant because of the carelessness and negligence of the deceased in crossing the highway in the face of approaching traffic at night and outside of a marked crosswalk.

FACTS

As stated in Appellant's Brief, the accident occurred on U. S. Highway 91 from 50 to 100 feet north of the corner of U. S. Highway 91 and Center Street. Ralph A. Peters, Chief of Police of Orem City, one of the investigating officers, measured the distance from where Mr. Cox's body was lying after the accident to the north line of the sidewalk on the north side of Center Street as 50 feet (R. 162-165, Tr. 147-150). Considering the fact that the sidewalk on the north side of Center Street is some distance north of the corner of Center Street and Highway 91 and the fact that the body obviously was not lying at the exact point where Mr. Cox was struck, the actual distance would be somewhere around 75 or 80 feet.

To better illustrate the general scene of the accident, we are inserting a photostatic copy of Exhibit A referred to and marked by the various witnesses. This map was drawn to scale and stipulated to be correct by both parties with the exception that the center lines dividing the street are incorrectly shown. It was agreed by the parties that the center lines were composed of two sets of double lines with a neutral zone of three or four feet between the double lines (R. 25, 26 - Tr. 9, 10). There was no marked crosswalk at the place of the collision, nor at the corner of U. S. Highway 91 and Center Street. Nor was there any traffic control device for north-south bound traffic at that corner. Center Street extends in an easterly direction from U. S. Highway 91. Center Street stops at Highway 91 and does not continue on on the west side. There is a private gravel driveway opposite Center



Street on the west side of Highway 91. There are two lanes, each 12 feet wide, for traffic on each side of the highway plus a "parking lane" approximately 24 feet wide on each side. The total width of the street is 96 feet (Exhibit A).

The chain of events leading up to this accident is as follows:

Mr. and Mrs. Cox and three other couples, Alma and Ruth Ferre, Roy and Thelma Clark and Mayland and Betty Russell had planned to attend an Eagles' Dance at Provo, Utah (R. 22 - Tr. 6). Prior to going to the dance they gathered at the Clark home at Orem, Utah, at about 9:00 or 9:30 P.M. on January 20, 1951. According to Mrs. Clark, who served the liquor, each member of the party had at least two drinks prior to leaving (R. 128 - Tr. 112). The couples left the Clark home at about 10:00 P.M. and went to the dance at the Federation Room in Provo (R. 128 - Tr. 112). Mr. Cox, deceased, took two pints of whiskey to the dance with him (R. 45, 46, 47 - Tr. 29, 30, 31) which were consumed during the course of the evening, each party having at least two more drinks (R. 47, 64 - Tr. 31, 48). After the dance, the group returned to the Clark residence where they remained about half an hour when they decided to go to the Crown Cafe, which is located in the immediate vicinity of the accident on the west side of Highway 91 in Orem, Utah, (R. 65 - Tr. 49) (Exhibit A).

Mr. and Mrs. Cox left the Clark home in the Ferre automobile with Mr. and Mrs. Ferre. The other couples were to follow (R. 22 - Tr. 6). The Coxes and the Ferres

arrived at the Crown Cafe at about 1:00 A.M. (R. 23 - Tr. 7). They went down into the basement where the lounge of the cafe is located. Eight setups for mixed drinks were ordered (R. 23 - Tr. 7). When the two other couples did not arrive, Mr. Cox grew impatient and decided to go home. The Ferres and Coxes had left the lounge and were outside the cafe when the other two couples drove up in the Clark automobile (R. 23, Tr. 7).

Apparently all of the group, except Mr. Cox decided to return to the cafe. Just as Mrs. Cox was entering the cafe, Mrs. Ferre remarked to her, "Are you leaving? Are you going? Jack is leaving." (R. 40 - Tr. 24). Mrs. Cox turned and observed that Mr. Cox was proceeding across Highway 91 toward the east and was six or seven feet beyond or to the east of the double line in the center of the street (R. 28 - Tr. 12). His position on the highway at that time is shown by the black circle east of the center lines on Exhibit A. Mr. Cox was apparently on the way to his home, which is located five or six blocks away (R. 40 - Tr. 24). At the time he was dressed in dark clothing, a navy blue suit and a bluish gray top coat (R. 40, 41 - Tr. 24, 25). Mrs. Cox called to him and ordered, "Come on back. If you are going home, we will go in the car." (R. 41 - Tr. 25). Mrs. Cox saw Mr. Cox turn and start back across the street. She had turned to open the car door when she heard the screech of brakes. She did not see the actual impact nor the car which struck her husband prior to the time he was struck (R. 241 - Tr. 25).

Mr. Ferre was the only member of the group with Mrs. Cox, who claimed to see the accident. He had enter-

ed the cafe for a second time after the Clarks and Russells arrived but had again stepped outside when he noticed his wife and the Coxes were not with him (R. 68 - Tr. 52). He was standing at the point marked "XF" on Exhibit A and claims to have observed Cox over the top of an automobile, which was five feet high (R. 80, 81 - Tr. 64, 65). When the witness first saw Mr. Cox, Mr. Cox was on his way from the other side of the road in about the same position as when Mrs. Cox saw him, six or seven feet east of the center lines down the middle of the road (R. 69 - Tr. 53). The witness' attention was diverted for a second or two (R. 69 - Tr. 53). The next thing he saw was Mr. Cox flying through the air. He places the point of impact near the dividing line between the two south-bound lanes of traffic at the point marked "XF" on Exhibit A. He did not see the automobile which struck Mr. Cox prior to the impact (R. 74 - Tr. 58).

Defendant, Cyril Thompson, and his two companions, Leon Wimber and Karl Smith, were traveling to their home in Springville, Utah from a basketball game and movie in Salt Lake City (R. 243, 244 - Tr. 228, 229). All three were sitting in the front seat of the automobile, the defendant on the left, Leon Wimber on the right and Karl Smith in the middle (R. 244 - Tr. 229). Leon Wimber testified that they were travelling about 35 miles per hour and then continued (R. 246 - Tr. 231):

"Q. And what did you see?

A. I was watching the road ahead, and the lane of traffic in which we were traveling. The lights were on dim, because of the oncoming traffic. I saw a dark shadow step from the left hand

side of the automobile, which was in the east of us, directly into our lights, from the side. He stepped from the side into our lights. I saw a person move, from the east to the west, into our lane of traffic.

Q. How would you describe what you saw?

A. I saw a dark shadow, a dark object.

Q. Dark object, and what form did it have, if any?

A. My impression was that it was a man.

Q. Was it moving in either direction?

A. Yes.

Q. Which direction was he headed?

A. From east to west.

Q. Did you observe what direction he was looking?

A. West.

Q. And did you say he was moving from east to west?

A. Yes, he was moving in a westerly direction.

Q. Did he get — was he in your lane of traffic?

A. He moved into our lane of traffic.

Q. And how far did he get into your lane of traffic, the last you saw him there?

A. Half way across, approximately.

Q. Do you have any judgment as to how far ahead he appeared to be, how far ahead of the car?

A. I thought at the time it was probably 15 feet ahead of the car."

Continuing on page 248 (Tr. 233) :

"Q. Now what if anything did the car do that you were in, or that you observed that Cyril Thompson do, with respect to the car?

A. The car swerved sharply to the east.

Q. Did you see or hear an impact of any kind?

A. I saw an impact.

Q. And will you describe that to the best of your ability? State where it was and —

A. When I first saw the man, he was to the left of the front of the car, and as we swerved, it brought the right fender over to where he was at, and he hit right about where the light and the hood came in contact there, and rolled up over the right fender, partly on the hood, off of the fender and down to the side, immediately in front of myself.

Q. And was the point of impact within your lane of traffic?

A. It was.

Q. I believe you said that he had got to about the middle of your lane, or somewhere in there?

A. That's right.

Q. When this occurred, were you observing the two lines on either side of your lane of traffic?

A. Ahead of us, I was.

Q. Could you see those?

A. Yes."

Karl Smith testified that he looked up just as the car in which he was riding started to swerve and that there was a pedestrian about 15 feet in front of them. "He appeared to be in the middle of the southbound lane, and at the time of the impact, it just seemed to pick him up and just drop him off to the side of the center." (R. 270 - Tr. 255). He testified that the automobile was traveling south in the lane marked "2" on Exhibit A and that the area around the cafe at the place of the accident was "pretty dark." (R. 274 - Tr. 259).

Cyril Thompson, the defendant, testified he was driving his stepfather's Hudson automobile on the trip from Salt Lake to Springville. He and his companions left Salt Lake at approximately 12:30 A.M. (R. 281 - Tr. 266). He observed the single line on his left separating traffic lanes and estimates that this left line was two to three feet from the automobile (R. 285, 288, 304 - Tr. 270, 273, 289). His testimony concerning what he saw and did is as follows (R. 286 - Tr. 271):

"Q. Well, what was the first thing you did see that caused you any — caused you concern, if anything?

A. Well, I was just driving down the road, weren't saying anything, just driving, and I seen this — well, I seen Mr. Cox now. I seen him when he stepped into the lights. And that is the first time I seen him.

Q. What lights do you have reference to?

A. The headlights on the car. He stepped into the lane, where the lights go the strongest, down the center of the lane.

Q. Which direction was he going?

A. He was heading across the street west.

Q. Did you see him at any time face the car?

A. No, I couldn't see him. All I could see after I did see him was a silhouette. There was no form there at all, just a dark silhouette.

Q. When you first saw this silhouette in front of you, I will ask you how far ahead of you it was, appeared to be, as far as your vision was concerned?

A. Well, I could see the full length of him, and possibly — probably two or three feet of highway. I couldn't specify as to how much highway, but I could see the full height of the man.

Q. Was he on the move, or was he standing still, or do you know?

A. Well, his legs were apart, I could see — and I never seen him until he came into view into the lights from the side.

Q. Now prior to the time you saw him, where were you looking?

A. I was looking straight ahead, down the road.

Q. Could you see your lane of traffic?

A. Yes.

Q. Could you see the entire lane of traffic?

A. Yes.

Q. Was there anything there prior to the time he entered your lane?

A. Nothing. I couldn't see anything in the lane at all.

Q. Was he on the move when you saw him?

A. Yes, he had entered in from the side of the lights, and that is the first time I seen him was when he stepped into the light there.

Q. Could you tell which direction he was headed?

A. He was headed west.

Q. And what did you do if anything when you saw him?

A. Well, I could see him stepping to the west, so I immediately swerved the car to the east, which would have been my left.

Q. Were your hands on the wheel during this time?

A. Yes.

Q. Had they been on the wheel prior to the time you swerved?

A. Yes.

Q. And did you do anything else, other than swerve your car?

A. Well, at the same time I swerved, I probably depressed the clutch at the same time. It all happened at the same time. I swerved, depressed the clutch, and applied the brakes a small amount. I don't think I applied them all, completely, because of the force of stopping and turning too, it didn't seem reasonable.

Q. You did apply your brakes, you put your foot on the brakes?

A. Yes.

Q. As soon as you could?

A. Yes."

The physical facts of the accident are illustrated by Exhibit A and the testimony of Ralph H. Peters, Orem City Chief of Police, who testified that he was inside the Orem Fire Station of the Orem City Hall (Exhibit A, R. 159 163 - Tr. 144, 148). He was facing west and looking toward U. S. Highway 91. His attention was directed to the defendant's automobile as it swerved, (R. 172 - Tr. 157). He stated that he could see both headlights as the car swerved but was unable, at that time, to tell what had occurred (R. 160 - Tr. 145). He, together with Officer Cook got into the police car and drove out on the highway. As he left the entrance of the fire station and turned toward the highway, he saw Mr. Cox lying on the highway with Mrs. Cox bending over him (R. 172 - Tr. 157).

He stated that Mr. Cox was lying approximately on the line separating the first two southbound lanes of traffic (R. 161 - Tr. 146) 50 feet north of a perpendicular line drawn across U. S. Highway 91 from the north side of the sidewalk on the north of Center Street, (R. 162, 199 Tr. 147, 184) at the point where the red circle appears on Exhibit A. (R.166 - Tr. 151).

Small pieces of chrome from the headlights of defendant's car were found three to five feet north of Mr. Cox's body, shown by the two blue "X's" in the second lane west of the center highway on Exhibit A. Defendant's car stopped on the east side of the highway in front of the City Hall where the red rectangle appears on Exhibit A (R. 169 - Tr. 154). The distance from the pieces of chrome to the front of defendant's car at the point where it stopped is 67 feet (R. 176 - Tr. 161). The center

of damage to the car driven by the defendant was on the right front between the headlight and radiator (R. 188 Tr. 173).

Officer Peters noted that Mr. Cox's breath smelled of intoxicating liquor and that he was wearing dark clothing (R. 171 - Tr. 156). The witness testified that there was a dark spot encompassing that general area of the highway where the accident occurred (R. 171 - Tr. 156). The tire marks of defendant's automobile commenced in lane two on Exhibit A and extended across the highway to the east (Exhibit A, R. 174 - Tr. 159). In the officer's opinion, based upon the physical evidence, the defendant's automobile could not have been traveling over 35 miles per hour (R. 178 - Tr. 163).

Police Officer Cook, who assisted Officer Peters testified that he had observed the general area of the highway where the accident occurred on several occasions and that when the large neon sign of the Crown Cafe is out, there is a dark area in the highway where this accident occurred (R. 213, 216 - Tr. 198, 201).

Howard R. Jacobsen, Fire Chief at Orem, testified that Mr. Cox, after the accident, was lying across the line dividing the two southbound lanes of traffic with his feet in the second lane (R. 222 - Tr. 207).

At the conclusion of the evidence, the court directed a verdict for the defendant. The court's action was not error, as contended by appellant, for the foregoing reasons.

STATEMENT OF POINTS

Point No. 1. The presumption that deceased exercised due care disappeared when the positive evidence showed the deceased was guilty of contributory negligence.

Point No. 2. Under the evidence, the decedent was guilty of negligence as a matter of law.

Point No. 3. The causal connection between the negligence of the deceased and the accident was so patent as to preclude the submission of that issue to a jury.

Point No. 4. The evidence clearly shows that the doctrine of last clear chance could not be invoked and could not, therefore, be submitted to the jury.

POINT NO. 1

The presumption that deceased exercised due care disappeared when the positive evidence showed the deceased was guilty of contributory negligence.

In *Mingus v. Olsen*, 114 Utah 505, 201 Pac. (2d) 495, the evidence was that the deceased and his wife were crossing 13th East Street in the vicinity of Westminster Avenue in Salt Lake City, Utah. His wife testified that as "they stepped off the curb and started easterly across Thirteenth East Street, decedent was to her left or north; that he looked neither to his left nor right, but looked straight ahead as they proceeded across the street; that he said nothing to her about approaching traffic; that she did not hear or see defendant's automobile until it struck; and that they had proceeded about a quarter of the way (about 10 feet) across the street when they were

struck." A verdict was directed against the deceased's heirs and the verdict was attacked, as here, on the ground, among others, that the decedent was entitled to a presumption that the deceased exercised due care for his own safety. The court held:

"Plaintiff relies on an asserted presumption that deceased was, at the time of his injury, in the exercise of due care for his own safety. It is true that in certain death cases, there is a presumption that decedent was in the exercise of due care for his own safety. But there is no room for such a presumption where, as here, there was positive evidence not only as to the fatal accident itself, but to the conduct of decedent leading up to the fatal accident. Such a presumption must give way to the positive evidence adduced."

None of the cases cited in Appellant's Brief contradict this proposition of law. In *Compton, et al v. Ogden Union Ry & Depot Co.*, (Utah) 235 Pac. (2d) 515, a Mrs. Laws was with the deceased at the time she was killed and testified of her actions up to the time of her death. The deceased was killed by a train while crossing a railroad track and the evidence showed that prior to crossing, she had an unimpaired view of the railroad tracks for 300 feet. The court dismissed plaintiff's case and the presumption of due care was argued on appeal. The court held as set out in plaintiff's brief:

"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."

The court then continued, which is not set out in Appellant's Brief:

"It has no application where, as here, the deceased is observed during the period prior to and at the time she is fatally injured and the witness is available and testified."

In *Tuttle v. Pacific Intermountain Express*, (Utah 1952), 242 Pac. (2d) 764, the Judge did instruct the jury that, in the absence of evidence to the contrary, the deceased was presumed to use due care for his own protection. Two of the three concurring justices were of the opinion that the presumption had been destroyed by evidence of the deceased's conduct, and that giving the instruction could only confuse the jury, but decided the error was not prejudicial. Justice Crockett, the third concurring justice, thought the presumption applicable but only because there was no evidence of deceased's conduct. Quoting Justice Crockett:

"The jury's verdict for the plaintiff plainly shows that they did not believe the deceased was going southward, but on the contrary their finding was that he was coming north. Under these circumstances, there is no evidence whatsoever regarding his conduct just preceding his death."

It is elementary that presumptions are of evidentiary value only and must give way to positive evidence to the contrary, as this court held in the Mingus case, *supra*. They control only where there is no evidence to the contrary.

In the case at bar, the uncontradicted testimony of all the witnesses, which will be covered in greater detail

in the next section, was that the deceased had crossed over on the east side of Highway 91 at a point where there was no cross walk, marked or otherwise, and that he then turned, started back across the road and walked directly into the path of defendant's automobile. Only one conclusion can be drawn from this testimony, and that is that decedent was completely oblivious of defendant's approaching car, having either failed to look for defendant's car or to see what was to be seen.

This is corroborated by the undisputed physical facts testified to by the investigating officer, which established that the deceased had completed crossing the southbound lane of traffic nearest the center and was crossing the second or defendant's lane of travel when struck. Damage to the right front of the car, the skid marks and the testimony of the eye witnesses show that Mr. Cox was struck as the car swerved southeasterly to miss him, his body being carried up over the hood and coming to rest on the marked line between the two southbound lanes of travel next west of the center zone. Chrome from the grille was found after the impact just north and a little west of the body in the second southbound lane from the center. The skid marks for 67 feet showed defendant was not exceeding the 40 mile speed limit and probably not exceeding a maximum of 30-35 miles per hour.

In *Heath v. Klosterman*, 23 A. (2d) 209 (Penn.), the decedent was struck and killed by a truck as he alighted from his parked car. Judgment for the plaintiff was reversed on appeal, the court holding decedent guilty of

negligence as a matter of law. Discussing the presumption of due care, the court said:

“Even though Doctor Heath is dead and ordinarily a presumption might arise that he exercised due care, this presumption is destroyed in the instant case by the testimony adduced by plaintiff. As held in *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, a presumption such as this is not evidence, and it cannot be weighed as evidence, since, it gives way the moment proof to the contrary is presented. This conclusively appeared in the presentation of plaintiff’s own case, for the evidence established that Doctor Heath did not look. Moreover, the accident having happened in broad daylight, he must have seen the trucks had he looked before stepping out. There can be no presumption as against facts which are proven.”

In *Heintz v. Southern Pacific Company*, (Cal.) 147 Pac. (2d) 621, the decedent drove his automobile into a freight car which was parked on a siding. The lower court granted a motion for a non-suit which was affirmed on appeal. In discussing the presumption of care which was raised by the appellant, the court said:

“The appellants, however, rely on the presumption that the deceased exercised due care for his own safety and argue that this presumption is sufficient to raise a question of fact for the jury. They go so far as to argue that this presumption ‘declares that whatever the decedent may or may not have done he was not negligent.’ This argument overlooks the well established rule that this presumption of due care is dispelled and disappears from the case when a fact which is wholly irreconcilable with it is proved by the uncontra-

dicted testimony produced by the party relying on the presumption.

“* * * Where the appellant’s own evidence clearly establishes that the deceased was familiar with this crossing, that the fruit car was visible and should have been seen by any driver who was exercising any care at all, and where there was ample room to pass on either side of the fruit car, even if reasonable care was belatedly used. Under the circumstances here appearing, we think any presumption of due care was dispelled by the facts clearly proved by the appellants, that under those facts the deceased was guilty of contributory negligence as a matter of law, and that the trial court correctly so held.”

This defendant earnestly contends that the presumption of due care in the instant case was dispelled by the evidence of all the witnesses that decedent did nothing other than walk directly into the path of defendant’s automobile, completely unaware that there was any automobile. It cannot be said that he exercised due care when the positive facts show so clearly that he did not.

POINT NO. 2

Under the evidence the decedent was guilty of negligence as a matter of law.

Title 57-7-143 (a) Utah Code Annotated 1943, as amended, provides:

“(a) Every person crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.”

It is clear that as soon as decedent left the center

of the highway and proceeded directly into the path of southbound traffic, he failed in his duty to yield the right of way as provided by law. His failure to act in this regard was negligence of a most apparent kind, and it is readily seen that had he not continued his course the accident would not have occurred.

In *Fearn v. City of Philadelphia*, (Pa.) 182 Atl. 534, the court said:

“When a pedestrian traverses a street between intersections, since he is not crossing at a place where he is expected to be, he must exercise a higher degree of care for his safety; motorists are correspondingly held to a less degree of care.”

See also *Sheldon v. James*, (Cal.) 166 Pac. 8, where the court said:

“A greater degree of care is necessary upon the part of the pedestrian who undertakes to cross a congested highway other than at the established crosswalk and especially so if in the act he does not essay a direct crossing, but pursues a long diagonal route.

“The observation of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. The observance of that care is imperative upon him during all of the time that he is crossing.”

The Supreme Court of Michigan in *Malone v. Vining*, 313 Mich. 315, 21 N. E. (2d) 144, aptly defined the duty of pedestrians as follows:

“Under present-day traffic conditions a pedestrian, before crossing a street or highway, must (1) make proper observation as to approach-

ing traffic, (2) observe approaching traffic and form a judgment as to its distance away and its speed, (3) continue his observations while crossing the street or highway, and (4) exercise that degree of care and caution which an ordinarily prudent person would exercise under like circumstances.”

The evidence conclusively shows that the decedent did not exercise the degree of care of a reasonably prudent person. It naturally and logically follows that such heedless and inattentive conduct was negligence as a matter of law. Numerous courts, including the Utah Supreme Court, in similar situations, have so held.

In *Mingus v. Olsen*, 114 Utah 505, 201 Pac. (2d) 495, a directed verdict was sustained on the grounds of plaintiff's contributory negligence. In concluding that the plaintiff either did not look or did not make sufficient or adequate observation, this court said:

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

In *Sant v. Miller*, 115 Utah 559, 206 Pac. (2d) 719, plaintiff and his wife were crossing the main street of Logan, Utah, from east to west at a point between inter-

sections. They stopped somewhere over the center of the highway on the west side of the street to allow south-bound traffic to pass. Plaintiff was gazing in a south-westerly direction when defendant's automobile, approaching from the north struck the plaintiff and injured him. Plaintiff's wife had seen the impending danger and had stepped out of the way. Verdict was directed in favor of defendant by the lower court and affirmed on appeal, the court saying:

"Appellant was aware of the fact that he was taking a chance in crossing the street at a place contrary to law. He should also have known that a driver of a vehicle would not ordinarily anticipate the presence of pedestrians on the street at the time and place of the accident. Knowing that his presence might not be anticipated and knowing that traffic on the west side of the road was approaching from the north and with nothing of importance to distract his attention, it was appellant's duty to watch the traffic he knew was approaching his location.

"* * * Having omitted to continue to watch, he failed to exercise the degree of care required of a pedestrian who leaves a place of safety and places himself in a position of peril. A greater degree of care is necessary upon the part of a pedestrian who undertakes to cross a city street at a prohibited place than is placed on one who uses a marked crosswalk."

Tysinger v. Cobble Dairy Products, (N.C.) 36 S. E. (2d) 267:

"Now, then, as to the alleged contributory negligence of plaintiff's testate, it is sufficient to say that in crossing the highway at a point other

than a marked crosswalk at an intersection it was his duty to yield the right of way to all vehicles upon the highway. G.S. Sec. 20-174 (a). The highway was visible according to all the evidence, for at least 300 yards in the direction from which the truck of the defendant was approaching. And in leaving the point where he was talking to the witness Everhardt to go toward his home, he necessarily faced in the direction of the oncoming truck. He must have seen the truck and taken the chance of crossing or, have been inattentive to the duty imposed upon him by law, and started across without looking for vehicles on the highway. In either event, a reading the evidence leads to the conclusion as a matter of law, that his own conduct contributed to his injury and death, unfortunate and regrettable as it may be."

In *Horton, et al v. Stoll*, (Cal.) 40 Pac. (2d) 603, plaintiff, a twenty-year old girl, was crossing between intersections not in a pedestrian lane. As she came to the further west car track, first rail, she hesitated and looked or glanced to the north, but failed to remember what, if anything, she saw. She was under the impression, however, that she had plenty of time to cross the street. After taking a step or so, and while she was still on the car track, she was hit by the left front fender of defendant's car coming from the north. In sustaining a non-suit, the court said:

"We are of the opinion that the facts of this case show affirmatively that plaintiff failed to use due care and that she failed in this respect was the proximate cause of the injury.

"Had she looked she must have seen defendant's car approaching a few feet away, for she had

taken only a step or two from her position of safety when she was struck.

“It was plaintiff’s duty from the position she was in upon the highway to yield to defendant the right of way.

“The only conclusion that can be reached from the evidence is that plaintiff failed to take the trouble to properly look for automobiles on the side of the street as she crossed, or that she saw the automobile and for some unexplained reason stepped directly in its path. Under either theory she failed to use due care, which precludes her rights of recovery.”

In *Reid v. Owens*, 98 Utah 50, 93 Pac. (2d) 680, this court in holding plaintiff guilty of contributory negligence as a matter of law said:

“A case very similar to the instant case is *Andrus v. S. J. Boudreaux & Son*, La. App. 158 So. 679. There the plaintiff was foreman of about twelve men engaged in roadwork, about half of them being on each side of the road, but not on the paved portion, as defendant’s truck approached. The paymaster had just pulled up his car across the road from the plaintiff who proceeded to cross the road diagonally to the paymaster’s car. The plaintiff testified he did not see defendant’s truck, but the court noted a probable inference that he saw it from the fact that he had ‘walked unusually fast, rushed or run.’ But this was immaterial as the court found: ‘The on-coming truck was in full open view of the road and was bound to have been seen by the plaintiff had he looked down the road at the time of starting across.’ The court then held the plaintiff to the knowledge he would have had if he had looked and held: ‘It was his duty to look

for his safety before starting across. He must be regarded as having seen the truck whether he looked or not'; and the court approved the holding of the lower court that plaintiff was guilty of contributory negligence as a matter of law. 'He should not have thus voluntarily, heedlessly, and thoughtlessly left a safe place and exposed himself to an obvious danger by trying to cross the road under the circumstances which attended such a movement.'

"As the court said in *Andrus v. S. J. Boudreaux & Son*, *supra*, he was chargeable with what he would have seen had he looked. He either proceeded without looking or, having seen the approaching car, he chanced crossing in face of the hazard. The latter would clearly, under the circumstances, have been negligence on his part. The approaching vehicle was at the instant of deceased's entry onto the pavement so near that no prudent person would attempt crossing in front of it. The more reasonable inference is he did not see the car. But had he looked he would have seen it, and he is charged with knowledge of what he would have seen had he the duty to look. We think that he clearly had such duty.

* * *

"The presence of the barriers on the untraveled portion of the highway and of piles of dirt on the side of the pavement, and the presence of workmen, would not justify deceased in assuming that the driver of a vehicle will, because of the presence of these elements, so drive as to avoid striking one who, without looking, darts out into the path of the vehicle. We conclude that under the evidence viewed most favorably to the plaintiffs the deceased was guilty of contributory negligence as a matter of law."

Appellant in analyzing the deceased's conduct asks the court to indulge in conjecture and speculation and to assume a set of facts not supported by, but contrary to the evidence, that is, that defendant stopped before crossing in front of defendant and that the defendant deliberately turned and ran deceased down.

Appellant cites the testimony of Mr. Ferre as evidence that the impact occurred in the first and not the second lane for traffic southbound on the highway. Such a conclusion is not warranted by his testimony. Mr. Ferre was observing the scene from the side of the road over the top of a five foot automobile (R. 81 - Tr. 65). He did not see defendant's car prior to the impact. Nor did he keep his eyes constantly on deceased (R. 69 - Tr. 53). He saw the flash of the impact (R. 75 - Tr. 59), heard the glass or the headlight break and saw Mr. Cox go through the air and land on the cement (R. 71 - Tr. 55). He places the point of impact in the vicinity of the line dividing the two lanes for southbound traffic (R. 70 - Tr. 54). Considering the limited observation of the witness and that he was observing from a point off to the side of the road over the top of another automobile, such a point can only be an approximation. That point is approximately in the same place as testified to by other witnesses and as illustrated by the physical evidence.

Nor should we, in our considerations, lose sight of the real negligence of the deceased, which is that decedant walked directly into the path of defendant's automobile completely unaware of the approach of that automobile which was there to be seen. There is nothing in

Mr. Ferre's testimony contrary to this. In fact, that is his testimony. On page 69 of the record, he testified as follows (Tr. 53):

“Q. Now did you watch Mr. Cox at that time?

A. Yes.

Q. And what did you see?

A. He was on his way back, and I seen the point of impact.

Q. Did you watch him all the way back?

A. Well, there might have been a second or two there I never paid much attention to it.

Q. Now could you see Mr. Cox from where you were, when he was out in the road there?

A. Yes, very good.”

On page 75 of the record (Tr. 59), Mr. Ferre testified:

“Q. Then I assume you didn't watch during the interval you saw Mr. Cox over here, until the time of impact, that you just saw the impact?

A. Oh, I seen Jack as he was on his way back to the point of impact.

Q. Then you didn't see anything, and the next thing you saw was the flash of the impact as it occurred?

A. That's right.

Q. During that interval, you didn't see him, during that short interval, between the time you last saw him and the impact?

A. Well, I was watching Jack coming.”

Leon Wimber testified that Mr. Cox was walking

from the east to the west and was looking to the west (R. 246 - Tr. 231). He testified Mr. Cox was two or three feet into the lane in which defendant was driving when he first noticed him and had continued to walk to approximately the middle of the lane when the accident occurred (R. 262, 264 - Tr. 247, 249).

Cyril Thompson testified that decedent was moving to the west at the time defendant first saw him (Tr. 286 - Tr. 271).

The testimony of all these witnesses is substantiated by the physical evidence.

The evidence is that defendant had consumed a considerable amount of intoxicating liquor. The evidence further shows that Mrs. Cox had previously divorced her husband on the ground of habitual drunkenness and that this was his first spree since December 29, 1950. It is not contended that decedent was drunk or that intoxication alone was a cause of the accident. But the defendant does urge that this evidence should be considered in determining the question of deceased's negligence, and certainly this evidence tends to explain decedent's overall lack of care and inattentiveness.

Appellant is correct in the assertion that the court should direct a verdict only in clear cases, but in view of all the evidence, the only conclusion upon which reasonable minds could agree in this case is that decedent, with a clear and unobstructed view of oncoming traffic for at least 500 yards (R. 66 - Tr. 50), failed to yield the right of way to defendant's automobile, failed to observe the automobile or to heed the same, and walked directly into its path, thereby causing his own death.

POINT NO. 3

The causal connection between the negligence of the decedent and the accident is so patent as to preclude the submission of that issue to a jury.

Appellant contends that even though decedent was negligent, the question of whether such negligence contributed to his injuries was a question for the jury.

In *Sec. 6127 of Blashfield's Cyclopedia of Automobile Law and Practice*, it is stated:

“Although one may be under the duty to look before crossing a city street, if he is injured by an automobile while crossing and would escape the consequences of his negligence, he must show that, even if he had looked, the accident would still have happened.”

If Mr. Cox had paid heed to what was to be seen he would not have placed himself in a position of peril. He would not have left his place of safety on the east side of the highway and walked to the west directly in front of the oncoming vehicle. The fact is, as testified to by the witnesses, the decedent walked into the point of impact apparently oblivious to the imminent peril to which he subjected himself, and certainly under that state of facts it cannot be said that the accident would have happened even if decedent had exercised the requisite degree of care.

In *Burgess v. Salt Lake City Railroad Company*, 17 Utah 406, 53 Pac. 1013, plaintiff in crossing Second South between Main and West Temple Streets looked for west-bound street cars, but failed to look for an eastbound car

and was injured when he stepped in front of the latter. There was some evidence that at the place of the injury, there were flagstones laid flush with the paving blocks indicating a crossing and also evidence that pedestrians crossed the street at any place between Main and West Temple. The court reversed a judgment in favor of plaintiff and remanded the case for a new trial. In holding that plaintiff was contributorily negligent as a matter of law under the evidence, the court said, starting on page 410 of the Utah Report: ,

“On the other hand, the evidence shows that the plaintiff incautiously and heedlessly stepped upon the track, where he received the injury. In the hurry of the moment, he attempted to cross the street and track without exercising that care which a man of ordinary prudence ought to exercise under like circumstances. Had he but used his senses it is clear that he could have avoided the accident. This it was his duty to do; and, having failed so to do, he cannot be heard to complain of any injury that resulted from the failure which was the proximate cause thereof.

“The plaintiff, in crossing the street, was bound to exercise the same degree of care as that which it was incumbent upon the railway company to exercise.

“The car has the right of way in case of meeting a person or vehicle on the track, but each party, in order to avoid accident, is bound to exercise ordinary care, and such reasonable prudence and precaution as the surrounding circumstances may require.”

In *Miller v. Utah Light & Traction Co.*, 96 Utah 369,

86 Pac. (2d) 37, a directed verdict in favor of defendant was affirmed on the grounds that plaintiff was held guilty of contributory negligence as a matter of law in standing in a pedestrian lane, but so close to a passing bus that the overhang of the bus when turning struck her. The court on page 380 of the Utah Report quoted *Kent v. Ogden L. & Tr. Co.*, 50 Utah 328, 167 Pac. 666:

“When, as in this case, there can be no doubt whatever regarding the proximate cause of the accident, nor any doubt that it was wholly within the power of the deceased at any moment before the collision to have averted it by merely moving a foot or two out of the zone of danger, this court cannot shirk its duty in determining the result. * * * The deceased’s inexcusable conduct constituted the proximate cause of the injury.”

In *Trumbley v. Moore*, (Neb.) 39 N.W. (2d) 613, plaintiff was crossing a street between intersections when struck by the defendant’s vehicle. The evidence showed that the wheels of the vehicle were straddling the center line of the road. A verdict for the plaintiff in the lower court was reversed on appeal. The court said:

“It is true that the left wheels of the Hamer car went over the center line, but there is nothing to indicate that this was the proximate cause of plaintiff’s injury. The proximate cause of the injury was the attempt of plaintiff to cross the street between intersections without looking, or if he did look, in not seeing that which was in plain sight. * * * The evidence reveals nothing which would excuse plaintiff’s failure to see the Hamer car and respect the right of way that it had. A right of way means nothing unless persons obliged to respect it are required to see an approaching

avored car that is in plain sight. Plaintiff was negligent in attempting to cross the street between intersections as he did. Negligence on the part of the defendant Hamer is not shown by this record. Under such circumstances plaintiff's own negligence is the proximate cause of the accident and there is nothing for a jury to determine. The trial court should have directed a verdict for the defendants."

In *Milligan v. Weare*, (Maine), 28 Atl. (2d) 463, plaintiff sought to recover for personal injuries sustained when defendant's car driven by his employee knocked him down as he was crossing a highway. The point of the three lane highway at which the accident occurred was an intersection which was marked with stop lights. Since traffic waiting for the lights was blocking the crosswalk, plaintiff walked between cars and into the center lane, which was reserved for left turning, and into the path of defendant's rapidly approaching automobile. The court held:

"By his own admission the plaintiff without warning walked through a line of cars which, until he emerged, obscured his movements and stepped out into the center lane of a main highway in front of a rapidly moving automobile which must have been in plain view but was not seen by him. * * * We are convinced that he either did not look at all to his left or if he did he was so inattentive that he failed to observe the danger which threatened him and take available precautions for his own safety. He gave the driver of the approaching car no time or opportunity to avoid the collision. It was his own negligence which was the proximate cause of his injuries."

In view of the aforementioned authorities, it is plain that when a person attempts to cross a highway and the evidence taken most favorably in his behalf shows that he heedlessly walked into the path of an oncoming vehicle, he has failed to exercise reasonable care, and that failure is at least a contributing factor in his injuries. That principle can have no greater application than to the case at bar.

POINT NO. 4

The evidence clearly shows that the doctrine of last clear chance could not be invoked and could not, therefore, be submitted to the jury.

The doctrine of last clear chance has no application to a case where, as here, the defendant's negligence continues up to the event out of which the damage or injury arises. We quote the example given by Justice Wolfe in *Graham v. Johnson*, 109 Utah 346, 166 P (2) 630, on page 359 of the Utah Report:

"A defendant is exceeding the lawful restricted speed limit; another driver, the plaintiff, fails to keep a proper lookout and crosses the path of the oncoming car and gets stalled on its path. Both up to that point might be guilty of negligence and neither be able to recover against the other. But if the oncoming driver, realizing the situation of the plaintiff, had a clear opportunity to avoid the accident and failed to utilize it, that counts just as if the plaintiff had not been negligent and the defendant had been."

In the *Mangus v. Olsen* case, *supra*, where the evidence would sustain a finding that the deceased had proceeded 19 feet from the curb of a street into the street at a

speed less than three miles per hour, and the defendant approached the point of impact at a speed of twenty miles per hour, and the defendant could have stopped his car had he seen deceased crossing, Judge Wade in a concurring opinion on page 516 of the Utah Report said:

“In the present case, both defendant and decedent were guilty of the same kind of negligence. Each negligently failed to observe the approach of the other. The negligence of each continued to the time of the accident and either of them could have avoided the accident within a very short time prior to the impact had he observed the approach of the other. There does not appear to be any good reason why the last clear chance doctrine should allow a recovery under these circumstances.”

In this case the defendant could have avoided the accident up until almost the very instant of the impact had he been observing the proper care for his own safety. If, as argued by the plaintiff, he was on the point of entering the intersection as defendant approached, he needed only to have stepped back. If he was on the point of leaving, he needed only to have hurried. Therefore, his negligence did continue up to and at least contribute to the impact.

Moreover, the doctrine of last clear chance also requires that the defendant be aware of defendant's position and able to do something about it. As was said in *Compton v .Ogden Union Ry. & Depot Company*, supra, where deceased was killed while crossing a railroad track:

“The rule approved by this court where plain-

tiff is negligently inattentive and has subjected himself to risk of harm as provided in Section 480 is that he can recover from a defendant who knew of his situation *and realized or had reason to realize* that plaintiff is inattentive, and unlikely to discover his peril in time to avoid harm, and thereafter *is negligent* in failing to use ordinary care with the means at his disposal to avoid harming him. For the rule to be otherwise, we would again only have the negligence of the plaintiff and defendant concurring together to proximately cause the injury. * * *

“In the principal case in order for plaintiffs to make out a case of last clear chance, it would have been necessary that the defendant know that decedent was in a position of peril, and in addition have realized or had reason to realize that decedent was inattentive and unlikely to discover her peril in time to avoid the threatened harm, *and defendant must thereafter have failed to exercise reasonable care in connection with its then existing ability to avoid harming decedent.*” (Italics ours.)

Not only must the evidence show that the defendant had an opportunity to avoid the accident after he becomes or has reason to be aware of plaintiff's negligence, but the opportunity must be shown by clear and convincing evidence.

The case of *Graham v. Johnson*, 166 Pac. (2d) 230, 109 Utah 346, involved the opportunity of a defendant to avoid injury to a thirteen year old boy playing ball in the street. The court said:

“* * * But in the last clear chance doctrine the word ‘clear’ has significance. In a case such as

this when both parties are more or less rapidly changing their positions the evidence must be clear and convincing that the party when it is claimed could have avoided the accident had a 'clear' chance to do so.

"Construing any reasonable combination of facts on this theory of the case most favorable to Gary, if Darlene was coming at 10 miles an hour down the extreme west side of the street and Donald shouted at Gary setting him off toward the car when he, as must in such case be inferred, was not then in danger, the jury must be instructed that it should be clearly convinced in such case that she was far enough north of him as to give her a clear chance to avoid the accident. That is to say, she must have had a clear and ample opportunity to sense the danger into which he was coming and clearly have had time after that to apply her brakes and stop the car after she sensed or should reasonably have sensed that he was putting himself into danger. Otherwise there is no room for the application of the last clear chance doctrine. One should not be held liable for failing to avoid the effect of the other's negligence in a situation where it is speculative as to whether he was afforded a clear opportunity to avoid it. In a situation where both parties are on the move the significance of the word 'clear' is most important. Otherwise we may put the onus of avoiding the effect of one's negligence on a party not negligent. That party's negligence only arises when it is definitely established that there was ample time and opportunity to avoid the accident which was not taken advantage of."

The best evidence as to whether defendant had a *clear chance* to avoid injury to the plaintiff after plaintiff

had placed himself in a perilous position and defendant had become aware of or had to be aware of his situation and what defendant did to avoid the accident is the testimony of defendant himself. He testified to the scene which confronted him as follows (R. 286 - Tr. 271):

“Q. Well, what was the first thing you did see that caused you any — caused you concern, if anything?”

A. Well, I was just driving down the road, weren't saying anything, just driving, and I seen this — well, I seen Mr. Cox now. I seen him when he stepped into the lights. And that is the first time I seen him.

Q. What lights do you have reference to?

A. The headlights on the car. He stepped into the lane, where the lights go the strongest, down the center of the lane.

Q. Which direction was he going?

A. He was heading across the street west.

Q. Did you see him at any time face the car?

A. No, I couldn't see him. All I could see after I did see him was a silhouette. There was no form there at all, just a dark silhouette.

Q. When you first saw this silhouette in front of you, I will ask you how far ahead of you it was, appeared to be, as far as your vision was concerned?

A. Well, I could see the full length of him, and possibly — probably two or three feet of highway. I couldn't specify as to how much highway, but I could see the full height of the man.

Q. Was he on the move, or was he standing still, or do you know?

A. Well, his legs were apart, I could see — and I never seen him until he came into view into the lights from the side.”

On page 287 of the record (Tr. 272) defendant testified:

“Q. And what did you do if anything when you saw him?

A. Well, I could see him stepping to the west, so I immediately swerved the car to the east, which would have been my left.

Q. Were your hands on the wheel during this time?

A. Yes.

Q. Had they been on the wheel prior to the time you swerved?

A. Yes.

Q. And did you do anything else, other than swerve your car?

A. Well, at the same time I swerved, I probably depressed the clutch at the same time. It all happened at the same time. I swerved, depressed the clutch, and applied the brakes a small amount. I don't think I applied them at all completely, because of the force of stopping and turning, it didn't seem reasonable.

Q. You did apply your brakes, you put your foot on the brakes?

A. Yes.

Q. As soon as you could?

A. Yes.”

In discussing this aspect of the case, appellant makes a number of assumptions not warranted by the evidence. For example, on page 45 of his brief, appellant asks the court to assume defendant became aware of plaintiff's situation before plaintiff entered the defendant's lane of travel. The record contains no such testimony either expressly or by implication.

Clearly, this evidence portrays a situation where no further act of the defendant could have avoided the accident. The plaintiff was immediately in front of defendant when he first saw him. It was already too late to avoid the collision, even though the defendant attempted to do so by swerving to the left and braking his automobile.

Even assuming defendant became aware or had reason to be aware of plaintiff when he entered the defendant's lane, defendant had no clear opportunity to avoid the collision. Police Officer Mower testified that at a speed of 40 miles per hour, *it would require 126 feet to stop an automobile* (R. 140). Assuming that decedent was walking at an average speed of 4.1 feet per second (R.) and that he had reached the middle of the lane when the impact occurred, it would take roughly one and one-half seconds for him to reach the middle of the 12 foot lane (Ex. A). Officer Mower stated that an automobile moving 40 miles per hour would travel 58 feet per second (R. 141). At the beginning of the one and one-half seconds which elapsed, assuming that decedent had reached the middle of the lane when the accident oc-

curred, the automobile would be 89 feet from the point of impact, too close to stop even had the brakes been applied at that very instant.

The case at bar and the Mingus case are closely similar as regards the doctrine of last clear chance. The difference would seem to be only that the case at bar presents a much clearer factual situation for denying the application of the doctrine. It is readily seen that in this case the decedent was only a few steps (6 feet at the most) into the defendant's lane of travel when the accident occurred, whereas in the Mingus case the decedent was 19 feet from the curb and the defendant's vehicle moving only 20 miles per hour, whereas in this case the defendant's automobile was traveling between 35 and 40 miles per hour. And further, in the Mingus case, the decedent was proceeding between the marked lines of a crosswalk at an intersection. In the case at bar the decedent was walking across a through highway in violation of statute and at a point where the presence of a pedestrian could not be reasonably anticipated or foreseen by an automobile driver. And too, in the Mingus case the intersection was lit by a street light. In the case at bar the evidence is that the area in the vicinity of the accident was darker than surrounding territory.

The negligence of the decedent was continuing in this case as in the Mingus case and it was wholly within the power of decedent at any point to extricate himself from his perilous position had he exercised the requisite degree of care. As in the Mingus case, the doctrine of last clear chance has no application to the facts of this case.

CONCLUSION

In summarizing the evidence and the law of this case we can do no better than the Judge who heard the evidence. The following is taken from his remarks upon directing a verdict, beginning on page 345 (Tr. 330) of the record:

“In the light of the recent decisions of our Court, I feel that these things appear quite certainly: The deceased had gone seven or eight feet beyond the safety center lines. There were approximately three feet between the two double lines. The traffic lanes are 12 feet wide. The Court has indicated before that there could be no question of negligence on the part of the deceased in leaving the curb, crossing the street and stopping and turning back across the safety zone. The evidence establishes beyond any peradventure of a doubt whatsoever that the defendant was traveling in the center lane of southbound traffic, or in lane two. Thus, in order for the deceased to arrive in any position of peril, he had to travel approximately 22 feet.

“There isn’t any indication that he was either hurrying, or that he was walking sluggishly, and taking the rate of four and one tenth foot per second, it would require him approximately five and six tenths seconds to return from the place where he stopped and reversed his direction, to reach the line of lane number two.

“The plaintiff herself, the widow, and Mrs. Ferre, had called to the decedent, and had seen him stop and turn to come back. They didn’t watch him any further. Mrs. Ferre turned to open the door—no, Mrs. Cox turned to open the door of the car to get in, when she heard the emergency occurring. The witness, Mr. Ferre, saw the deceased

stop and turn and walk back, and excepting for his glancing away for maybe a second or two, he said, he watched him all the way, and stated that he saw the point of impact. He didn't even imply any erratic, sudden action on the part of the decedent. That fact, considered in reference to the time required, would make it inconsistent to believe that there was any appreciable stopping of the decedent in number one lane of traffic.

"Now in the Mingus case our Supreme Court not only weighed the testimony of plaintiff, but also weighed the testimony of the defense, and had before it exactly the same problem that faces this Court at this moment.

"From those things that I have now recited, the Court feels, even without any defense evidence, that to submit the question of whether or not the decedent continued oblivious to the approach of the defendant's automobile, would submit it only on a guess and a conjecture, and couldn't be supported by the evidence.

"Then if we weigh into the scales the testimony of the defendant and his witnesses, we find that the defendant testified to seeing a shadow moving into the lane in which he was proceeding. The other two boys with him—you may call them biased witnesses in a certain respect, but you couldn't call them interested in the outcome of the case — they were friends. But allowing for that, they corroborate the defendant's testimony, that the decedent was stepping into the lane of traffic before there was any action taken by the car.

"Now the physical evidence further strengthens in this: That the impact—and considering only the physical evidence—could not have oc-

curred, regardless of which position you may believe the body came to rest in, immediately at the place where the chrome pieces were found.

“The record establishes without any possible question of a doubt that prior to the car making any turns or the driver observing any emergency, it was going in the neighborhood of 35 miles an hour. The only evidence of rubber marks on the dry cement indicates that there was very little, if any at all, braking, in the skid marks. So the car was moving at substantially 30 to 35 miles an hour during the time of the action occurring from the first contact with the decedent's body.

“It is absolutely undisputed that the body, in addition to being struck, was thrown back over the radiator, striking with such force to dent the hood and then sliding marks as it went off to the side. That sort of action does not occur with explosive timing. And in the meantime, the car was progressing at about, roughly, around 30 miles an hour, in its direction toward the double center line and across to where it came to rest.

“In the most generous possible interpretation for the plaintiff, and considering the course of those marks with respect to the lateral lines of the traffic lane, considering that the defendant had been traveling approximately in the center of that lane, from the fact that he was able to see the side line on the driver's side as he came along, and in head, and while he was looking out through the window of his door, and the fact that the car is in excess of five feet in width, three feet is a reasonable estimate of the distance between his car and the side line in order that he might so see. Five feet would be eight feet. The deceased struck not on the extreme right corner of the car, but

struck the grill of the radiator on the right side, and near the right front headlight, from which the chrome was broken. The fact that the deceased went up on top of the car, the hood, indicates that the primary force was practically in the direct line of the travel of the car, rather than in a slanting line. The natural law of the breakage of the chrome under such circumstances would cause the chrome to proceed further along the line of the force that was propelling it at the time.

“That coupled with the fact that it required the time to pass over on top of the hood and fall off, whether it reached the position on the highway described by the officer or the position on the highway described by the plaintiff’s witnesses, required time sufficient that at that rate of speed, definitely shows the occurrence of the impact within, and well within, the number two lane of traffic, far enough so that the deceased, if he had jumped in head, would have had to jump anywhere from seven to eight feet. If he walked straight into it, of course, he was negligent. If he jumped into it, he’d have to stop. The calculation of the times, the positions, in the Court’s judgment, leaves the inescapable conclusion that as a matter of law the deceased was wholly oblivious to anything that was going on around him, so far as traffic was concerned; that he walked directly from the place where he stopped and reversed his course, into the number two lane; that he did not see, or if he did see, that he did not heed the approach of the defendant’s car, and that therefore he was negligent as a matter of law.

“And the last clear chance doctrine, not being available in this case, his negligence proximately contributed to produce his death as a matter of

law, and therefore, as a matter of law, the plaintiff cannot recover.”

Respectfully submitted,

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