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State of Utah v. Grant Allen Adamson : Brief of Appellant

Utah Supreme Court

Moyle, Richards & McKay; For Defendant and Appellant;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

GRANT ALLEN ADAMSON,
Defendant and Appellant.

CASE
No. 1132

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court,
Salt Lake County, Utah,
Hon. M. J. Bronson, Judge, *Presiding*

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STATEMENT OF FACTS

109 In spite of the lack of evidence presented by the State, the lower court refused to dismiss this case of involuntary manslaughter, and the defendant, Grant

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Allen Adamson, was convicted, as the result of a collision between the gasoline truck which he was driving and the bicycle ridden by a boy, Sylvester Kanon, who was killed by the impact. The collision occurred at the intersection
85 of 9th South Street and 2nd West Street in Salt Lake City, as the defendant was making a left turn from 2nd West Street into 9th South Street. Although it was
114 dark, the bicycle had no light and was in the middle of the road.

The State failed so completely in presenting evidence of any negligence of the defendant that the defendant himself was not put on the stand to testify. The only testimony of the defendant's speed at the intersection of
115 the accident was that he was driving slowly. The State's sole witness of the defendant's speed, C. E. Moulton, did not testify what the defendant's speed was at the time of the accident nor immediately before it. It was somewhere between 3rd South and 9th South Streets that Moulton looked at his speedometer and found that the de-
74 fendant was going between 38 and 40 miles per hour. He did not say where it was on 2nd West Street that the defendant was going at this speed. It may have been five blocks away from the scene of the accident. This witness claims he was sure of this speed; yet he had testified at the preliminary hearing that this speed was
80 between 35 and 38 miles per hour. There was also some equivocation on his own rate of speed as compared with that of the defendant. On the night in question (August 5, 1940) Grant Adamson, the defendant, was driving a

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gasoline truck southward on 2nd West Street in Salt Lake City. The witness Moulton was stopped in the driveway of an ice cream parlor on the west side of 2nd
73 West Street between 3rd and 4th South Streets, as the defendant rode past him. He started up and caught up with the defendant. On cross examination he admitted that in doing so he increased his rate of speed above that of the defendant's, and on redirect examination he corrected himself to agree with the prosecution's leading
82 statement that his car was going at "about" the same rate of speed as that of the truck at the time he made the check. This sole witness of speed, however, himself
81 testified that the truck slowed down at the intersection
120 of the accident. Other testimony showed that the truck
115 was going slowly at the intersection.

The semaphore light was green toward the north and south when the defendant made his left turn. There
83, 84 were lights on at two service stations on the east side of 2nd West Street at the northeast and southeast corners
87 of the intersection. Except for these lights it was dark.

A Model "A" Ford automobile traveling north on 2nd West Street crossed the intersection before the de-
114 fendant made his turn. The deceased Sylvester Kanon was riding an unlighted bicycle north on 2nd West Street, somewhere behind the Ford automobile, carrying something in a paper sack in one hand. The collision occurred approximately 44 feet north of the south curb of 9th
99 South Street. The body was found 18 feet from the

supposed point of impact, and the bicycle 35 feet from this supposed point, toward the side of the road. The bicycle was scraped along the road by the truck. The truck continued southeast and stopped at the side of 9th South Street 157 feet from the supposed point of impact.

107 There were no skid marks or tire marks of any kind.

There was a scratch mark in the center of the truck's bumper and milk spilt over the windshield and left fender. A fruit jar bottle top was on the fender.

Second West Street north of 9th South Street is a
101 highway wide enough for four-lane traffic — 83 feet wide—but it narrows south of 9th South Street to a two-lane highway, 45 feet wide. Vehicles traveling north from a point south of 9th South Street, unless they turn to the right, drive into the center lane of the two north bound
100 lanes of traffic after they cross 9th South Street. If a line were projected due north from the east curb of 2nd
98 West Street, south of 9th South Street, it would fall 22 feet west of the east curb of 2nd West Street north of 9th South. Traffic following the curb would necessarily turn in a northeast direction at 9th South Street. The pedestrian lane runs in a northeast-southwest direction so that a north bound pedestrian crossing 9th South Street would, to stay in the pedestrian lane, travel not due north, but northeast, even in a more
106 easterly direction than a line running across Ninth South Street from corner to corner of the curbs. The

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bicycle did not follow either the curb direction or the pedestrian lane. It passed directly in front of witnesses
87 William and Thomas Fowler, two or three feet away from them as they were standing on the east curb
89, 115 of 2nd West Street south of 9th South and continued straight north. The indicated point of impact is on a line almost directly north of the east curb of Second West Street as that curb continues south of Ninth South Street (Exhibit B).

SPECIFICATION OF ERRORS

I. The court erred in refusing to recognize that the State failed to prove the commission of the crime of involuntary manslaughter.

(1). The court erred in denying defendant's motion for dismissal at the close of the State's evidence.

(2). The court erred in denying defendant's motion for a directed verdict in favor of the defendant.

(3). The court erred in refusing defendant's requested instruction No. 1: "You are instructed to find the defendant not guilty."

(4). The court erred in denying the defendant's motion in arrest of judgment.

(5). The court erred in denying defendant's motion for a new trial.

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II. The court erred in refusing to give defendant's requested instructions and in directing the jury.

(6). The court erred in giving the fifth subdivision of its instruction No. 5 as follows:

> "Fifth: That it shall be unlawful for the driver of a vehicle within an intersection who intends to turn left to fail to yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard."

(7). The court erred in failing to include in the fifth subdivision of its Instruction No. 5 all of the statute pertinent to the right of way, to-wit:

> "But such driver having so yielded and having given a signal when and as required by law may make such left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn."

(8). The court erred in refusing to give defendant's requested instruction No. 20:

> "You are instructed that the Salt Lake City ordinances provide that riders of bicycles upon the city streets shall drive as closely as practicable to the right hand edge or curb of the street except when overtaking or passing another vehicle or bicycle or when placing a vehicle or bicycle in a position to make a left turn."

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(9). The court erred in refusing to give defendant's requested Instruction No. 21:

> "You are instructed that if you find the deceased bicyclist was not following as closely to the right hand curb of the street as practicable, then you must find that he did not have the right of way over the defendant."

(10). The court erred in refusing to give defendant's requested Instruction No. 12:

> "You are instructed that the law requires that, 'Every bicycle upon a highway during the period from a half hour after sunset to a half hour before sunrise shall be equipped with a lighted lamp on the front thereof visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle'."

(11). The court erred in refusing to give defendant's requested Instruction No. 13:

> "You are instructed that if you find that at the time of the accident Sylvester Kanon was riding a bicycle which was not equipped with a lighted lamp that such riding was unlawful, and if you find that his so riding was the proximate cause of his death you must find the defendant not guilty."

(12). The court erred in refusing to give defendant's requested Instruction No. 14:

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"You are instructed that if you find that Sylvester Kanon drove a bicycle at the time of the accident which was not equipped with a lighted lamp on the front thereof, his riding the bicycle in that manner was negligence and should be considered by you in connection with all other matters pertaining to the said accident."

(13). The court erred in refusing to give defendant's requested Instruction No. 15:

"You are instructed that a driver may presume that others in the road will conduct themselves in a lawful manner. If you find that though Sylvester Kanon was within the intersection or so close thereto as to constitute an immediate hazard he was riding his bicycle in an unlawful manner and that it was because of his so riding in an unlawful manner that the defendant Grant Adamson failed to see him, then you must find that the defendant Adamson did not act unlawfully in failing to yield to Sylvester Kanon."

(14). The court erred in refusing to give defendant's requested Instruction No. 16:

"You are instructed that the law does not require a person to anticipate or guard against events which are not reasonably to be expected, nor does the law require a person to regulate his conduct with reference to the conduct of another person which is not reasonably to be expected."

(15). The court erred in refusing to give defendant's requested Instruction No. 17:

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"You are instructed that when a person is placed without negligence on his part suddenly in a position of peril without sufficient time to consider all of the circumstances, the law does not require of him the same degree of care and caution that it requires of a person who has ample opportunity for the full exercise of his judgment and reasoning facilities."

(16). The court erred in refusing to give defendant's requested Instruction No. 10:

"You are instructed that even if you were to be convinced that the defendant omitted to perform a duty, nevertheless if an unlawful act or negligent act of another person intervened between the omission of the defendant and the death and was the direct cause of the death, then you must find the defendant not guilty."

(17). The court erred in refusing to give defendant's requested Instruction No. 18:

"You are instructed that the Salt Lake City ordinances provide that riders of bicycles upon the city streets shall drive as closely as practicable to the right hand edge or curb of the street except when overtaking or passing another vehicle or bicycle, or when placing a vehicle or bicycle in a position to make a left turn. You are instructed that if you find that the deceased bicyclist violated the ordinance mentioned in Instruction No..... you shall find him negligent, and if his negligence was the proximate cause of his death, you shall find the defendant not guilty."

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(18). The court erred in refusing to give defendant's requested Instruction No. 19:

> "You are instructed that if you find that the deceased bicyclist violated the ordinance mentioned in Instruction No..... you shall find him negligent, and if his negligence was the proximate cause of his death, you shall find the defendant not guilty."

(19). The court erred in refusing to give defendant's requested instruction No. 9:

> "You are instructed that in determining whether or not the defendant was guilty of criminal negligence as that term is defined to you in other instructions you should consider the conduct of Sylvester Kanon immediately prior to the accident and at the time of the accident, together with all other facts and circumstances surrounding the accident,"

and in modifying it as follows in its instruction No. 7A:

> "You are instructed that in determining whether or not the defendant is guilty of the crime charged in the information you should consider the conduct, insofar as there is evidence thereof, of Sylvester Kanon immediately prior to the accident and at the time of the accident together with all the other facts and circumstances surrounding the accident which have been given in evidence. If you believe from all the evidence in the case that the sole proximate cause of the injuries to and the death of the said Sylvester Kanon was a result of

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the acts and conduct of the said Sylvester Kanon then you should return a verdict of not guilty."

(20). The court erred in refusing to give defendant's requested Instruction No. 3:

"You are instructed that the words, 'Without due caution and circumspection' as used in the Statute of the State of Utah defining the offense of involuntary manslaughter must be construed as meaning 'criminal negligence'."

ARGUMENT

I. THE COURT ERRED IN REFUSING TO RECOGNIZE THAT THE STATE FAILED TO PROVE THE COMMISSION OF THE CRIME OF INVOLUNTARY MANSLAUGHTER (Specifications of Error Nos. 1-5).

There were four grounds alleged in the bill of particulars as a basis for the charge of manslaughter:

1. That defendant was driving too fast—

(a). That defendant was driving at a speed greater than was reasonable or prudent, having regard to the traffic, surface, condition and width of the highway and the hazard existing at the intersection.

(b). That defendant was driving at a speed which was greater than would permit him to exercise proper control of the vehicle and to decrease speed or to stop as

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might be necessary to avoid colliding with any person or vehicle then and there upon the highway, to-wit: that the defendant was driving at a speed of between 25 and 30 miles per hour.

2. That the defendant did not keep a proper or any lookout.

3. That defendant failed to yield to Sylvester Kanon.

4. That the defendant was driving without due caution and circumspection and at such a speed and in such a manner as to endanger the person and property of Sylvester Kanon.

The evidence does not sustain the charge of involuntary manslaughter on any of these grounds.

1. The Defendant's Speed.

In this ground we are not even involved with the problem of whether there was evidence of speed sufficient to sustain the charge beyond a reasonable doubt. There is no evidence, at all, of speed of the vehicle at the time of the collision or immediately before it, except that
115 Grant Adamson, the defendant, was driving slowly. The only testimony during the whole trial of Grant Adamson's speed except that he was driving slowly was the evidence of C. E. Moulton, who stated that Adamson was
74 going between 38 and 40 miles per hour along 2nd West

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Street. There is no testimony of where on 2nd West Street defendant was going at this speed except that it was somewhere between 3rd South and 9th South Streets. The accident occurred at the corner of 9th South and 2nd West Streets while Adamson was making a left turn from 2nd West Street into 9th South Street. Assuming that this witness' testimony was reliable, still, in order to establish that the defendant was driving at that speed in the intersection where the accident occurred, the jury must have arbitrarily located this speed at 9th South Street, in direct contradiction to testimony that the de-
115 fendant was driving slowly at that point. And Moulton's testimony was not reliable: it was questionable at its best. He started up from the driveway going out of an ice cream parlor on the west side of 2nd West Street
79 between 3rd and 4th South Streets. He drove at a speed
78 greater than Adamson's speed and caught up with the defendant Adamson. Somewhere along 2nd West Street he clocked defendant's speed and found the defendant was going between 38 and 40 miles per hour. He was positive of that, yet he had previously testified that the
80 defendant was going between 35 and 38 miles per hour. No one knows where it was between 3rd South and 9th South Streets that the defendant was going at this rate
115 of speed. In addition to the positive testimony of Thomas Fowler that Adamson was driving slowly at 9th South
81 Street, Moulton himself said he thought the defendant "did slow down some." At the preliminary hearing held at about a week after the accident Moulton testified
80 that Adamson slowed down appreciably.

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No evidence was introduced of what speed limits there were, if any, nor of any violation of any speed limit. Of course, the jury can not assume that Adamson exceeded a speed limit; neither has the court any right to permit the jury to assume, because Adamson was driving 35 or 40 miles per hour somewhere south of 3rd South on 2nd West Street that on the corner of 9th South Street he was driving at a speed greater than was reasonable and prudent or greater than would permit him to exercise proper control of his vehicle. Yet this is what the court did.

Even though we should assume 35 or 40 miles per hour exceeds a speed limit, which we have no right to do, particularly in a criminal case—and assume further—which we still have no right to do, there being no evidence of the type of district or the traffic—that such a speed along Second West Street was reckless, still we cannot overcome the hurdle of the State's failure to show that this speed somewhere along Second West Street was the proximate cause of the accident. There was no showing of defective brakes or of the weight of the truck. Automobiles are now so constructed for quick acceleration and slowing down that testimony of speed at some unlocated point away from the intersection where the accident occurred is valueless as proof of speed at the intersection as the proximate cause of the injury. This is particularly true in this case when the maximum speed testified to at any point along the route was only

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forty miles per hour. This was mentioned by only one
81 witness, and was contradicted by his own testimony.

In *Dunville v. State* (*Ind.*), 123 N. E. 689, the defendant was convicted of involuntary manslaughter for violation of the speed statute. The deceased, a little girl, ran into the street in front of his motorcycle. When he unsuccessfully tried to avoid her, he threw his companion against the curb, rendering him unconscious, and his motorcycle skidded on its pedal across the street. The Supreme Court, reversing the conviction, said:

> "The testimony as to his speed at the south corner of this block and for two blocks farther south is rather remote, considering the fact that nothing appears to show how far these points were from the scene of the accident. It is a matter of common knowledge that motor vehicles may be accelerated and retarded very rapidly. But whatever may be said as to the inferences that the lower court drew from the testimony about appellant's speed, and whether the lower court was warranted in drawing the inference that he was exceeding the speed limit of 15 miles per hour at the time the child was struck becomes material only when it is shown that the accident would not have occurred just as it did had appellant been going at a lawful rate. . .
>
> "The most the evidence discloses is negligence on the part of appellant. For aught that appears in this case the proximate cause of Frances Held's death was the fact that she ran in front of appellant's motorcycle and suddenly stopped. For aught that is shown by the evidence, the acci-

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> dent would have occurred had appellant been proceeding in the most careful manner. . .
>
> "The finding of the court is not sustained by sufficient evidence, and is therefore contrary to law."

Not only was there no testimony of undue speed at the place of the accident; there was no physical evidence
107 of speed. There were no skid or tire marks of any kind. No assumptions can or should be drawn from the location of the truck driven to the side of the road, nor from the location of the bicycle scraped along the road, nor from the location of the body.

To paraphrase this Court's words in *State vs. Gutheil*, (98 Utah 205, 98 P. (2d) 943): What was it that Adamson did or did not do that shows he acted recklessly and in marked disregard of the rights of others?

> "A criminal case requires proof of each element of the crime by evidence that convinces one beyond all reasonable doubt of the existence of each such element. Criminal negligence evidenced by a dereliction of some kind conforming to at least one of the definitions we have set out, is a necessary element of the crime charged here."—*State vs. Gutheil, supra.*

In short, there is a complete absence in the record of any evidence of speed, and *a fortiori* of any evidence of speed to show recklessness or conduct evincing marked disregard of the rights of others.

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2. *Proper Lookout.*

It is clear that the mere fact that there was an accident does not show that the driver failed to keep a proper lookout (*State vs. Gutheil,* supra). There is not one word of testimony of Adamson's alleged failure to keep a proper lookout. He hit a boy on a bicycle. The jury must not be allowed to speculate from this in a criminal case in which the facts denoting criminal negligence must be proved beyond a reasonable doubt, that Adamson was not keeping a proper lookout at the time of the collision. The circumstances, if we make assumptions, would
87 lead to the contrary conclusion. It was dark at that time. There was an arc light at the southwest corner and lights were on at the service stations, but we do not know that these lights illuminated the road where the bicycle was proceeding. It may have been that the lights at the service stations served to confuse the outline of the boy on the bicycle rather than to illuminate it. It is common knowledge that a well-illuminated object alongside a dark one frequently serves to obscure the latter. Obviously the service station was lighted to attract attention to it, not to illuminate the highway.

A car passed through the intersection going north in front of the bicycle. The witness Moulton, who was immediately behind the defendant's truck, and who was
81 watching the intersection, did not see the bicycle. Should we not conclude then that the bicycle was behind the car in such a position in the darkness that it could not be

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seen? This is an especially reasonable assumption because the bicyclist was negligent in at least two particulars, more fully discussed further on in this brief. He
114 failed to have a lamp on his bicycle, although it was dark,
101 and he was driving in the center lane rather than near the curb. Second West Street is a two lane highway south of 9th South Street and a four lane highway north of 9th South Street. Except for the center line, the lanes were unmarked on the highway (Exhibit D). The east curb line of 2nd West Street north of Ninth South Street is 22 feet east of where it would be if it followed the extension of the east curb line of 2nd West Street south of 9th South. A bicyclist then, to continue along the curb, as he is required by statute and ordinance to do, would necessarily turn in a northeasterly direction across 9th South Street in order to reach the curb line continuing north on 2nd West Street. The location of the probable point of impact shows that the deceased boy was driving due north in the inside lane of traffic and was not proceeding parallel to the pedestrian lane as he would normally be expected to do. Adamson or any other driver would normally see the car coming thru the intersection and see no light behind it and would drive watching for pedestrians in the pedestrian lane or bicyclists near it. The impact occurred at a location in the middle of the road where Adamson as a reasonable driver would not expect a bicyclist to be. An impact with a bicycle without lights in a location where it is not supposed to be certainly does not denote failure to keep a lookout.

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3. Failure to Yield.

The charge that the defendant Adamson failed to yield to Sylvester Kanon must include two elements: (1) that Sylvester Kanon had the right of way and (2) that Adamson actually failed to yield to Kanon, and in so doing acted recklessly with a marked disregard of the safety of Kanon. The statute pertaining to the right of way provides (Rev. Stat. Utah, 1933, Sec. 57-7-31):

> "The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, *but such driver having so yielded and having given a signal when and as required by law may make such left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn.*" (Italics added.)

The court gave part of this law in the Fifth subsection of its Instruction No. 5, but failed to give the italicized balance of it. So far as determining the right of way is concerned the record is blank as to the respective location of the truck and the bicycle immediately prior to the truck's entering of the intersection. The jury is left to conjecture as to how fast the bicycle was going;
115 we know that the truck was going slowly; we also know
114 that a Model "A" Ford car preceded the bicycle through
81 the intersection going north. Moulton says that the defendant's truck in front of him slowed on entering the

intersection. Thomas Fowler said it slowed down for
120 the red light, which was green when Adamson went into the intersection. Whether it slowed in order to yield to the automobile, we do not know. Neither do we know, however, that it did not so yield. If it did, and the bicycle was then approaching the intersection, then the rider of the bicycle had a duty to yield to the truck when the latter
120 was making the left turn. The Model "A" Ford going north was stopped for the red light at the intersection. Starting up from a dead stop it could not have gone very fast through the intersection. Could not the Adamson truck in slowing down for the red light to turn green, have been yielding to the Ford automobile? In such a case where almost everything is left to conjecture the rule of the *Gutheil* case, *supra,* should be applied:

> "A criminal case requires proof of each element of the crime by evidence that convinces one beyond all reasonable doubt of the existence of each such element."

4. The fourth charge that the defendant was driving without due caution and circumspection and at such a speed and in such a manner as to endanger the person and property of Sylvester Kanon does not allege any factual infraction of law and is in a way a summary of the three preceding definite charges. In the light of *State v. Lingman* (97 Utah 180, 91 P. (2d) 457), the fourth charge becomes an allegation of recklessness, like the first three, to mean that Adamson acted with criminal

negligence, that his actions were "reckless, or in marked disregard for the safety of others."

It should be noted that the whole prosecution of this case was done under the theory that the defendant committed an unlawful act not amounting to a felony. This theory is described in the *Lingman* case as arm (a) of the manslaughter statute:

> "Involuntary manslaughter is the unlawful killing of a human being without malice, in the commission of (a) an unlawful act not amounting to a felony, or (b) in the commission of a lawful act which might produce death, (1) in an unlawful manner or (2) without due caution and circumspection."

The distinct characteristic of arm (a) under this case is that the conduct must be reckless and must evince a marked disregard for the safety of others, whereas that of arm (b) is that the act must be one that has knowable and apparent potentialities for resulting in death.

The entire prosecution of this case was under the theory of arm (a) of the statute. Nowhere in the bill of particulars is there an allegation that the defendant was committing a lawful act which might produce death or an act fraught with potentialities for producing death. This Court in the *Lingman case, supra,* pointed the way to a proper allegation under the arm (b) of the statute, an act fraught with potentialities for producing death:

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> "If forty miles an hour had been a lawful speed, *then the allegation that it was dangerous to human life*, plus the allegation in the second paragraph of the bill that 'defendant failed to keep a proper and sufficient lookout ahead and failed to observe the course of his automobile to see if it was obstructed,' would allege the necessary lack of 'due care and circumspection' which, added to the lawful speed *with potentiality for producing death,* would present a situation for an instruction under arm (b)." (Italics added.)

Neither did the court in its instructions include a standard under arm (b) of the statute, and it refused defendant's requested Instruction No. 8:

> "You are instructed that the words 'act which might produce death' which are used in the statute defining involuntary manslaughter, do not mean every act which theoretically might produce death. These words must be considered by you to mean an act which has knowable and apparent potentialities for resulting in death."

And in its Instruction No. 4 the court expressly limited the charge to the (a) arm of the statute:

> "You are instructed that involuntary manslaughter, insofar as material to this case, is defined by the laws of the State of Utah as the unlawful killing of a human being, without malice, in the commission of an unlawful act not amounting to a felony, when such unlawful act is committed by the defendant in such manner as to evince on his part marked disregard for the safety of others, or recklessness."

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The fourth charge of the bill of particulars, that the defendant was driving without due caution and circumspection and at such a speed and in such a manner as to endanger the person and property of Sylvester Kanon, must also come under the (a) arm of the manslaughter statute, and the State had the burden of proving that such driving was reckless, or in marked disregard for the safety of others. Nothing was proved to show such driving.

The State's charge rests, therefore, upon these three alleged infractions of the law as set forth in the bill of particulars:

1. Excessive speed.

2. Failure to keep a lookout.

3. Failure to yield to the deceased.

In none of these particulars does the record show any evidence of a reckless conduct or conduct evincing a marked disregard for the safety of others.

When we summarize the evidence the only facts we have are that some time before the accident somewhere between 3rd South and 9th South Streets, Adamson was driving at a maximum of 35 to 40 miles per hour and that there was a collision between his truck and a bicyclist. How can such evidence justify a court's refusal

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to grant defendant's motion to dismiss the charge? There is clearly no reckless conduct shown at all; certainly not beyond a reasonable doubt.

The district court erred then in denying defendant's
109, 14 motion to dismiss, and in denying defendant's motion for
123, 17 a directed verdict. It further erred in denying defend-
55, 61 ant's motion in arrest of judgment on the ground that the facts proved at the trial failed to prove the defendant guilty of the crime charged, and finally it erred in deny-
59, 61 ing defendant's motion for a new trial on the ground that the verdict was contrary to the evidence.

II. THE COURT ERRED IN DIRECTING THE JURY.

1. The court erred in giving the Fifth subsection of its Instruction No. 5, relating to the right of way, and in failing to submit to the jury all of the law pertaining to right of way. (Specifications of Error Nos. 6, 7.)

The subsection as it was given to the jury is as follows:

44 "Fifth: That it shall be unlawful for the driver of a vehicle within an intersection who intends to turn left to fail to yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard."

This charge, which purported to set out the applicable statute, omitted part of the vital provision of this statute (Rev. Stat. of Utah 1933, Sec. 57-7-31), which reads as follows:

> "The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, *but such driver having so yielded and having given a signal when and as required by law, may make such left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn.*"

The part we have italicized was omitted from the court's instructions.

(a) Here is a manifest error of giving an instruction unsupported by evidence. There is nothing in the case to indicate the location of the bicyclist immediately before Adamson's turn to the left, or to show whether he was within the intersection or so close thereto as to constitute an immediate hazard. There is nothing to indicate how fast the bicyclist was peddling at this time or how slowly the truck was going except that it was proceeding slowly. To conclude from the fact that there was a collision that the bicyclist was so close to the intersection as to constitute an immediate hazard is to beg the issue. If that conclusion followed, every driver making a left turn who had a collision would be found guilty of violat-

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ing this section of the statute. It was improper to include this charge at all in the instructions.

To what extent did the bicyclist have the right of way? He was violating the law in at least two particulars in failing to have a light on his bicycle and in failing to keep on the right side of the road. The law requires (Rev. Stat. of Utah, 1933, Sec. 57-7-22):

> "In driving upon the right half of a highway, the driver shall drive as closely as practicable to the right hand edge or curb of the highway, except when overtaking or passing another vehicle in position to make a left turn."

The Salt Lake City ordinances in force at that time provided:

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> "Persons riding bicycles upon any of the public streets of this city must observe the same rules for the use of said streets that apply to drivers of vehicles, except when by their very nature they are inapplicable, *and riders of bicycles upon said streets,* and every person driving a vehicle or electric trolley coach, except electric coaches in the business districts, *shall drive as closely as practicable to the right-hand edge or curb of the street,* except when overtaking or passing another vehicle or bicycle, or when placing a vehicle or bicycle in a position to make a left turn." (Italics ours.)

In *Dixon v. Bergin,* 64 Utah 195, 228 Pac. 744, this court approved in a civil case the giving in an instruction

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of a Salt Lake City ordinance requiring bicycles to keep close to the right hand gutter. It said:

> "As pointed out in a recent decision of this court, ordinances regulating travel upon our streets may become absolutely necessary . . . Where, therefore, vehicles can be classified and different portions of the street can be set apart for different classes of vehicles, and the city authorities, in the interest of public safety, deem it proper to do so, the courts are bound to enforce all such reasonable regulations."

99 We have already indicated that the supposed point of impact located the bicyclist on a line practically due north of the point where he passed the Fowlers near the east curb of Second West south of 9th South. The 89, Fowlers testified that the bicyclist was going north. His 115 duty under the statute and the Salt Lake City ordinance was to turn sharply to the right upon reaching 9th South Street. In failing to do so, did he still retain his right of way, if he had it originally? Does a driver always retain a right of way, no matter what his position? Would he have retained his right of way if he had been entirely on the left side of the road in the lane for south bound traffic? If not, then at what point would he lose his right of way? Did Kanon have a right of way over an oncoming vehicle even though he was riding in the dark without a light to warn Adamson of his presence? In such circumstances discussion of "right of way" becomes incongruous. Yet the court gave an instruction on part of the law of right of way.

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> "A driver can not be required to yield the right of way when his inability to know and act is chargeable to the lawless conduct of him who claims it." *Andrus v. Hall,* 27 Pac. (2d) 495, 93 Colo. 526.

The giving of an instruction on the right of way when there was no evidence of failure to yield the right of way was error.

In *State vs. Johnson,* 76 Utah 84, 287 P. 909, there was insufficient evidence to found a charge of operating an automobile under the influence of intoxicating liquor, but the court included that charge with other charges in its instructions to the jury. This Court held that to be error, saying:

> "The question presented is as to whether error was committed in submitting to the jury a material issue upon which it is claimed there was insufficient evidence to support it, and if so, whether the error was prejudicial. If in a civil case where several acts of negligence are charged, each constituting actionable negligence, and the evidence is insufficient as to one of such acts, but against objections nevertheless is submitted to the jury and a general verdict rendered in favor of the plaintiff, hardly any one would contend that no prejudice resulted on the ground that the evidence was sufficient to sustain the verdict on the other alleged acts. In principle, the matter in hand is not different. The jury here rendered a general verdict of guilty 'as charged in the information.' It thereby found the defendant guilty of an unlawful act not supported or justified by the evi-

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dence. Because the unlawful act related to or concerned intoxicating liquors does not call for an abridgment of the general rule that to justify a submission of a material issue to a jury there must be sufficient evidence to support it, nor as to the prejudicial effect against whom it is submitted and a general verdict rendered in favor of his adversary having the burden of proof. The general verdict here is not severable. Letting all the issues as to all of the alleged unlawful acts to the jury gave them to understand that they could render a verdict of guilty on any one or all of them, which was required to be expressed only by a general verdict. Some of the jurors may have been induced to join in the verdict on one or more of the alleged acts, some on other alleged acts, but on which or on all it is impossible to tell. That none of the jury was induced to join in the verdict because of the submission of the issue as to intoxication is also impossible to tell. We cannot review a criminal action like an equity case—try it de novo on the record—and ourselves determine the guilt or innocence of the defendant, the weight to be given conflicting evidence, the credibility of the witnesses, or the weight or credit to be given the claim or testimony of the defendant. Though the evidence may amply or satisfactorily sustain the conviction, yet it is not within our province to determine the guilt of the defendant and in such case justify erroneous and adverse rulings against him nonprejudicial. That is to say, if on the record we think a defendant guilty or ought to have been convicted, we may not regard any kind of a trial good enough for him. We thus think the ruling not only erroneous, but also prejudicial. Its very nature had the tendency and was calculated to do harm, and on the record we cannot

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say it did no harm or did not influence the verdict.''

(b). It was even more improper, however, having included this charge, to leave out a part which was as pertinent to the evidence as that left in. Certainly there was as much evidence that Adamson yielded in compliance with the last half of the statute as there was that
114 the bicycle constituted an immediate hazard. A Model
120 ''A'' Ford automobile preceded the bicycle through the intersection. When Thomas Fowler was asked by the district attorney, speaking of the defendant Adamson, ''He didn't stop at all for the red light?'' the witness repeated that Adamson turned on the green light, and answered, ''He slowed down.'' In other words, Adamson was so close to the intersection while the light was still red that he had to slow down for it to turn green. Yet the Model ''A'' Ford which was stopped dead on the other side of 9th South Street for the light to turn green, passed the middle of the intersection before Adamson's truck turned through it. The two cars were so close together that the court could not arbitrarily say that the defendant did not yield to this Model ''A'' Ford. Yet that is what the court did in excluding part of the statute. Certainly the jury had the right to all of this law.

2. *The court erred in refusing to instruct the jury in the facts pertaining to the conduct of the deceased as the proximate cause of the accident.* (Specifications of error Nos. 8-18.)

(a). Closely related to the problem just discussed is

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the failure of the court properly to instruct the jury on the fact of the deceased's violations of these statutes and ordinances and the relationship of these violations to the accident. The court refused to give the following instructions requested by the defendant:

31 "*Defendant's Requested Instruction No. 15.*

"You are instructed that a driver may presume that others in the road will conduct themselves in a lawful manner. If you find that though Sylvester Kanon was within the intersection or so close thereto as to constitute an immediate hazard he was riding his bicycle in an unlawful manner and that it was because of his so riding in an unlawful manner that the defendant Grant Adamson failed to see him, then you must find that the defendant Adamson did not act unlawfully in failing to yield to Sylvester Kanon."

36 "*Defendant's Requested Instruction No. 20.*

"You are instructed that the Salt Lake City ordinances provide that riders of bicycles upon the city streets shall drive as closely as practicable to the right hand edge or curb of the street except when overtaking or passing another vehicle or bicycle, or when placing a vehicle or bicycle in a position to make a left turn."

37 "*Defendant's Requested Instruction No. 21.*

"You are instructed that if you find the deceased bicyclist was not following as closely to the right hand curb of the street as practicable, then you must find that he did not have the right of way over the defendant."

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These three instructions clearly presented to the court the propositon that a bicyclist does not always have the right of way regardless of what his position might be within the intersection. We submit that the court erred in not giving these instructions to the jury.

On the law that a bicyclist riding in the dark without a lighted lamp did not have the right of way over an oncoming vehicle, the court had the opportunity to give the jury defendant's requested instruction No. 15, already quoted, as well as requested instructions 12, 13, 14, and 16. These instructions were particularly necessary, however, not only to present fully the question of the right of way, but also to determine whether Kanon's negligence, rather than the defendant's, was the cause of the accident. The requested instructions follow:

28 "*Defendant's Requested Instruction No. 12.*

"You are instructed that the law requires that, 'Every bicycle upon a highway during the period from a half hour after sunset to a half hour before sunrise shall be equipped with a lighted lamp on the front thereof visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle'."

29 "*Defendant's Requested Instruction No. 13.*

"You are instructed that if you find that at the time of the accident Sylvester Kanon was riding a bicycle which was not equipped with a

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lighted lamp, that such riding was unlawful, and if you find that his so riding was the proximate cause of his death you must find the defendant not guilty."

30 "*Defendant's Requested Instruction No. 14.*

"You are instructed that if you find that Sylvester Kanon drove a bicycle at the time of the accident which was not equipped with a lighted lamp on the front thereof, his riding the bicycle in that manner was negligence and should be considered by you in connection with all other matters pertaining to the said accident."

32 "*Defendant's Requested Instruction No. 16.*

"You are instructed that the law does not require a person to anticipate or guard against events which are not reasonably to be expected, nor does the law require a person to regulate his conduct with reference to the conduct of another person which is not reasonably to be expected."

111 The sun that evening set at 7:40. Witness Moulton
73 had left the ice cream parlor between 3rd and 4th South Streets shortly after eight o'clock. Particularly with the evidence of darkness, the court should have instructed the jury as to the bicyclist's negligence in violating the statute requiring a lighted lamp on the bicycle. Certainly there was enough evidence to require the court at least to submit to the jury the question of the violation and of the bicyclist's negligence.

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Laws of Utah 1935, Chapter 48, Page 121, Sec. 57-7-55 provides as follows:

> "(1). Every vehicle upon a highway during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 200 feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles, subject to exemption with reference to lights on parked vehicles as declared in subsection (11). . .
>
> "(10). Every bicycle upon a highway during the period from a half hour after sunset to a half hour before sunrise shall be equipped with a lighted lamp on the front thereof visible under normal atmospheric conditions from a distance of at least 300 feet in front of such bicycle and shall also be equipped with a reflector or lamp on the rear exhibiting a red light visible under like conditions from a distance of at least 200 feet to the rear of such bicycle."

These instructions were not requested for the purpose of showing contributory negligence on the part of the bicyclist. They were pertinent because they would permit the jury to determine whether or not under the circumstances the defendant Adamson was negligent. There is all the difference in the world between riding down a bicyclist in broad daylight and in striking a bi-

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cyclist in the dark when he is not where he lawfully should be.

In *People vs. Campbell,* 212 N. W. 97, 237 Mich. 244, the Supreme Court reversed a conviction of involuntary manslaughter because the lower court had taken from the jury the facts showing the deceased's negligence, saying:

> "The defendant was driving 6 feet from the curb. The night was dark and misty. He testified that he was keeping a lookout, but that he assumed that no person would be walking out in that part of the highway where he was driving. The deceased were not crossing the highway. They were walking 6 feet from the curb, with their backs to approaching cars. We think it was for the jury to say whether, under all of the circumstances, they were using ordinary care for their own safety in walking 6 feet out from the curb, in a dark and misty atmosphere, on an extensively traveled highway, with their backs to approaching automobiles. Considering the darkness, the misty atmosphere, the slippery condition of the pavement, their position in the highway, the fact that there was a safer place to walk, and their knowledge of the fact that automobiles would be constantly overtaking them from the rear, were the deceased, at the time of accident, using ordinary care for their own safety? If they were not, that fact would not be a defense, but it would be an important factor in the case, which the defendant would be entitled to have the jury consider."

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In *People v. Barnes,* 182 Mich. 179, 148 N. W. 400, the court held it reversible error to withhold from the jury the conduct of the deceased, saying:

> "While the claimed contributory negligence of Mary Robb is no defense in this case, yet it does not follow that her conduct should be eliminated from the case; it should be considered as bearing upon the claimed culpable negligence of the respondent, and the question should all the time be:
>
> " 'Was respondent responsible under the law, whether Mary Robb's failure to use due care contributed to her injury or not?' "

A California Court of Appeals (*People v. Hurley,* 56 Pac. (2d) 978, 13 Cal. App. (2d) 208 pointed out that the convicted appellant was driving on his own right-hand side of the road and the deceased whom he struck was walking on the wrong side of the road, and said:

> "While contributory negligence of the deceased is no defense in a manslaughter prosecution, still it may have an important bearing on the degree of culpability of appellant. The law required Schwitz to walk close to his left hand edge of the roadway. Section 564, Vehicle Code. Had he obeyed the law there would have been no collision as he would not have been in the path of the Cord. Appellant had the right to assume that pedestrians would obey the law and that no one would be walking down the road in the path of his automobile. While this would not excuse him from keeping a vigilant watch of the roadway in front

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of his car, it has an important bearing on the degree of his lack of care.

"Under the facts of this case, and the decisions we have cited, we have reached the conclusion that the evidence shows appellant guilty of only the lack of the exercise of ordinary care, and not of gross indifference to or such a disregard of the safety of others as is necessary to constitute criminal negligence. It follows that the judgment pronounced upon him upon his conviction of involuntary manslaughter, and the order denying his motion for new trial made in that case, must be reversed."

The same question was ruled upon in the case of *State v. Sisneros,* 82 Pac. (2d) 274, 42 N. Mex. 500. The court reversed the conviction, saying:

"While the defendant is not excused by the contributory negligence of Chavez, yet that negligence should have been taken into consideration by the jury in determining the proximate cause of the death of Chavez (citing cases), and the court should have so instructed the jury.

"Chavez was inviting disaster when he parked his car on the highway, without lights. The sudden turning on in the dark of the lights of an unseen car is startling to the driver of a closely approaching automobile and is likely to cause him to swerve from his course . . .

"The action of the jury can be accounted for by the seriousness of the tragedy, and the failure of the court to instruct it under either count, that the unlawful act charged must have been the

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proximate cause of the death of Chavez; and his failure to instruct specifically on defendant's theory of the case, regarding the flashing of the lights and consequent blinding of the defendant, which was his only affirmative defense; and his failure to instruct upon the negligence of Chavez as bearing upon the question of whether any criminal negligent act of defendant was the proximate cause of Chavez' death; neither of which was requested or given. This cannot be considered as error, because not called to the attention of the district court or presented here; but it probably accounts for the verdict."

The Tennessee court in *Copeland v. State,* 285 S. W. 565, 49 A. L. R. 605, likewise held it reversible error not to charge that it must appear that the death was not the result of misadventure, saying:

"The contributory negligence of the boy would not relieve Copeland of the consequence of his unlawful act . . . But the conduct of the boy was entitled to consideration in determining whether under the circumstances, Copeland's negligence was the proximate cause of death or whether death resulted from an unavoidable accident."

In *State v. Bowser,* 124 Kan. 556, 261 Pac. 846, the court said:

"The court correctly instructed that the negligence of Anderson, if any, was no defense to the alleged crime of Bowser, but the instruction was somewhat lame in failing to state that the decedent's negligence, if shown, should be con-

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> sidered with all the other evidence to determine whether some negligent act or omission of defendant's was or was not the proximate cause of Anderson's death, or whether, under the circumstances, defendant's act was negligent at all."

Defendant's requested Instructions numbered 12, 13, 14, 15, 16, 17, 20 and 21 should therefore have been given.

In line with the authorities just cited the lower court should have given defendant's requested Instruction No. 10, and erred in refusing it. This instruction reads as follows:

> "You are instructed that even if you were to be convinced that the defendant omitted to perform a duty, nevertheless if an unlawful act or negligent act of another person intervened between the omission of the defendant and the death and was the direct cause of the death, then you must find the defendant not guilty."

The lower court in refusing this probably had in mind a conception of the contributory negligence doctrine, but it totally failed to see the necessity of the instruction in determining the proximate cause of the decedent's death. The jury were entitled to all of the facts, including the deceased's negligence, to determine what was the cause of the accident. Among these facts were that the deceased was violating an ordinance and statute in riding as he did. This is another reason, too, that the requested instructions No. 15, 20, 21, and 12 (heretofore quoted) should have been given.

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In *Dunville v. State,* 123 N. E. 689, cited in the first section of this brief, the defendant motorcyclist killed a child who ran into the street in front of him. The Indiana Supreme Court said:

> "Counsel for the state say that contributory negligence of the child has nothing to do with the case. This is true in a sense. It is not a question of contributory negligence. Of course we know that a child 2 years and 9 months old is not sui juris, and cannot be guilty of negligence, or contributory negligence, in the ordinary sense of those terms; but the conduct of this child, in the circumstances shown by the evidence, is just as cogent in breaking down the intent which the law imputes to appellant after the event as like conduct on the part of an adult in like circumstances would be in repelling such imputation. It is not a question of contributory negligence, but it is one of proximate cause.
>
> "So the question is, Did appellant conduct himself at the time and place in such a manner as to show a willful and wanton disregard for the rights of others, from which the law infers an intent to cause death, and did his conduct cause the death . . .
>
> "The most the evidence discloses is negligence on the part of appellant. For aught that appears in this case the proximate cause of Frances Held's death was the fact that she ran in front of appellant's motorcycle and suddenly stopped. For aught that is shown by the evidence, the accident would have occurred had appellant been proceeding in the most careful manner."

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Faced suddenly with the appearance of a bicycle before him, in a place where the bicycle was not legally supposed to be, and would not be expected, the defendant Adamson was in an emergency not of his own making. Just as in *State v. Gutheil, supra,* in which case defendant was suddenly faced with an automobile illegally being pushed across the highway, so here Adamson was suddenly faced with an unlighted bicycle out in the middle of the road behind an automobile. In such an emergency Adamson should not have been expected to exercise the degree of care that would be expected had not this emergency arisen. While there is no evidence of lack of care on the part of Grant Adamson, there is evidence of the emergency created by the negligent driving of the bicyclist. Therefore the court should have given to the jury defendant's requested instruction No. 17:

33 "You are instructed that when a person is placed without negligence on his part suddenly in a position of peril without sufficient time to consider all of the circumstances, that law does not require of him the same degree of care and caution that it requires of a person who has ample opportunity for the full exercise of his judgment and reasoning facilities."

The court erred also in refusing to give, in connection
36 with defendant's requested instruction No. 20, defendant's requested instructions Nos. 18 and 19:

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34 "*Defendant's Requested Instruction No. 18.*

"You are instructed that the Salt Lake City Ordinances provide that riders of bicycles upon the city streets shall drive as closely as practicable to the right hand edge or curb of the street except when overtaking or passing another vehicle or bicycle, or when placing a vehicle or bicycle in a position to make a left turn. You are instructed that if you find that the deceased bicyclist violated the ordinance mentioned in Instruction No. ..... you shall find him negligent, and if his negligence was the proximate cause of his death, you shall find the defendant not guilty."

35 "*Defendant's Requested Instruction No. 19.*

"You are instructed that if you find that the deceased bicyclist violated the ordinance mentioned in Instruction No. ..... you shall find him negligent, and if his negligence was the proximate cause of his death, you shall find the defendant not guilty."

3. The court, in modifying defendant's requested instruction No. 9, cast the burden of proof upon defendant. (Specification of error No. 19.)

The court erred in refusing defendant's requested

25 instruction No. 9:

"You are instructed that in determining whether or not the defendant was guilty of criminal negligence as that term is defined to you in other instructions you should consider the conduct of Sylvester Kanon immediately prior to the accident and at the time of the accident, to-

gether with all the other facts and circumstances surrounding the accident.''

46 The court modified that in its Instruction No. 7a and added these words:

> ''If you believe from all the evidence in the case that the sole proximate cause of the injuries to and the death of the said Sylvester Kanon was a result of the acts and conduct of the said Sylvester Kanon, then you should return a verdict of not guilty.''

This was prejudicial error. It had the effect of shifting the burden of proof from the plaintiff to the defendant. In *State v. Laris,* 78 Utah 183, 2 Pac. (2d) 243, this court held that it was error to give a certain instruction because it cast upon the defendant the burden of establishing the good faith of a person, saying:

> ''As the burden of proof to establish the commission of a crime necessarily extends to every essential element of the crime, the burden is, of course, with the state to overcome that presumption beyond a reasonable doubt.
>
> ''A very similar question was before the Circuit Court of Appeals, Eighth Circuit, in the case of *Drossos v. U. S.*, 2 F. (2) 538. An instruction that, if the jury was convinced that the accused's relationship with the woman was innocent, and that he had no intention of having immoral relations with her, he should be acquitted. It was held that the instruction was erroneous and prejudicial in shifting the burden of proof

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> on the accused, and that the error was not cured by an instruction that the accused is presumed to be innocent until he is proved guilty beyond a reasonable doubt, and, in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal."

The Instruction No. 7a given by the court in the case at bar eliminated all possibilities of the defendant's being found not guilty other than that the death of Sylvester Kanon was a result of the acts and conduct of Sylvester Kanon. It laid undue emphasis upon the duty of the jury to find that his acts "were the sole proximate cause" of the injury and death.

4. The court, in refusing to give defendant's requested instruction No. 3, denied to the jury a needed clarification of two definitions of care already given them. (Specification of error No. 20.)

The court erred in refusing to give defendant's requested Instruction No. 3:

19

> "You are instructed that the words, 'Without due caution and circumspection' as used in the Statute of the State of Utah defining the offense of involuntary manslaughter must be construed as meaning 'criminal negligence'."

In the first and second subdivisions of its Instruction No. 5, the court set forth provisions of the statutes which, taken together without explanation, led the jury to assume that there are two standards of care, a violation of

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either of which should permit conviction. The first subdivision sets forth the true standard of care in an involuntary manslaughter action:

> "You are instructed that the laws of the State of Utah in force on the 5th day of August, 1940, provide as follows:
>
> "First: That it shall be unlawful for any person to drive any vehicle upon any highway carelessly and heedlessly in wilful or wanton disregard of the rights and safety of others."

The second, however, reads as follows:

> "Second: That it shall be unlawful for any person to drive any vehicle upon any highway without due caution and circumspection and at such a speed or in such a manner as to endanger any person or property."

Instruction No. 6 required for conviction that the jury find that the violation of the statutes was reckless or was an act evincing a marked disregard for the safety of others. This to a lawyer would have the effect of giving to the second subdivision of Instruction No. 5 the same meaning as that of the first subdivision of that instruction. However, the effect on a jury of laymen of these two standards placed next to each other is to emphasize some distinction between the two standards of the first and second subdivisions: the standard of (1) acting with "wilful or wanton disregard" and (2) that of acting "without due caution and circumspection." A definition

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of the words "without due caution and circumspection" was necessary, and the court erred in refusing defendant's requested Instruction No. 3. "Criminal negligence" was defined by the court in its Instruction No. 10, but "due caution and circumspection" was not defined. The giving of defendant's requested Instruction No. 3 was a needed clarification of the law, and its omission was prejudicial error.

CONCLUSION

The prosecution rested its whole case upon four alleged violations of the statute by the defendant, Adamson. In all of these four it failed to prove any violation by the defendant and the court should have granted plaintiff's motion to dismiss, plaintiff's motion for a directed verdict, plaintiff's motion for new trial and plaintiff's motion in arrest of judgment.

In addition to its failure to recognize that the State did not prove a public offense the court erred in the following particulars:

(1). It included in its instructions a charge quoting part of the statute pertaining to the right of way, though there was no evidence of failure to yield the right of way. Not only did it do this but it failed to include all of the law on the right of way and gave only that part which assumed in itself that the defendant did not yield.

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(2). It failed to give to the jury all of the facts pertaining to the accident and in particular:

(a). That the boy's riding a bicycle after dark without a lighted lamp was negligence and was illegal:

(b). That the boy's crossing an intersection in the middle of the road at a place where he was not supposed to be was negligence and was illegal.

(3). It shifted the burden of proof in modifying defendant's requested Instruction No. 9.

(4). In refusing to give defendant's requested instruction No. 3, defining the phrase "without due caution and circumspection," it deprived the jury of necessary clarification of standards of care in a manslaughter action and led the jury to assume that the defendant, Adamson, should be judged by a standard of care used in civil negligence cases.

In short, under the meager facts adduced at the trial and the insufficient instructions which were given to the jury by the court, Adamson should be found as a matter of law not guilty of the "reckless handling, or conduct

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evincing a marked disregard for the safety of others," that this court has required in the *Gutheil* and *Lingman* cases for conviction of involuntary manslaughter.

Respectfully submitted,

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