

1939

## George Saltas v. David A. Affleck and Kenneth Butte : Abstract of Defendants

Utah Supreme Court

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Ralph T. Stewart, Gerald Irvine; attorneys for defendant and appellant, Kenneth Butte.

Harry G. Metos, Joe P. Bosone, Samuel Bernstein; attorneys for plaintiff and respondent, George Saltas.

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### Recommended Citation

Abstract of Record, *Saltas v. Affleck*, No. 6190 (Utah Supreme Court, 1939).  
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6190

Case No. 6173

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# In the Supreme Court of the State of Utah

GEORGE SALTAS,

*Plaintiff and Respondent,*

vs.

DAVID A. AFFLECK, doing business  
under the name and style of D. A.  
AFFLECK GROCERY,

*Defendant*

KENNETH BUTTE,

*Defendant and Appellant.*

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Appeal from the Third Judicial District Court, in  
and for Salt Lake County, State of Utah  
Honorable Clarence E. Baker, Judge

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## Defendant's Abstract of Record

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RALPH T. STEWART,  
GERALD IRVINE,

*Attorneys for Defendant and  
Appellant, Kenneth Butte.*

HARRY G. METOS,  
JOE P. BOSONE,  
SAMUEL BERNSTEIN,

*Attorneys for Plaintiff and  
Respondent, George Saltas*

**FILED**

DEC 14 1939

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*Plaintiff and Respondent,*

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DAVID A. AFFLECK, doing business  
under the name and style of D. A.  
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*Defendant*

No. 6173

KENNETH BUTTE,  
*Defendant and Appellant.*

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## Defendant's Abstract of Record

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(Title of Court and Cause)

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### COMPLAINT

Comes now the plaintiff above named and  
for cause of action against the above named de-  
fendant complains, and alleges:

1. That there does now exist and extend, and  
at all times hereinafter mentioned existed and  
extended, northerly and southerly through Salt  
Lake City, Utah, a paved highway known and  
designated as "K" Street, and there does also ex-  
ist and extend, and at all times hereinafter men-

tioned existed and extended, westerly and easterly through Salt Lake City, Utah, a paved and public highway known and designated as Third Avenue, and that said "K" Street and said Third Avenue intersect and did so intersect one and another at all times hereinafter mentioned.

2. That the plaintiff is the father of Spero George Saltas, deceased; that said Spero George Saltas, at the time of his death, was 30 years of age, and left no wife or issue surviving him; that the plaintiff herein is the sole heir at law of said deceased and the person entitled to bring this cause of action.

3. That at all times hereinafter mentioned the defendant, David A. Affleck, was engaged in the general grocery business in Salt Lake City, Utah, doing business under the name and style of D. A. Affleck Grocery; and at all times hereinafter mentioned the defendant, Kenneth Butte, was an employee of the said defendant, David A. Affleck, and was the driver and operator of the automobile hereinafter mentioned, owned by the defendant, David A. Affleck, and which was being driven by said defendant, Kenneth Butte, for and in behalf of said defendant, D. A. Affleck, in the scope of and in furtherance of the employment aforesaid.

4. That on or about the 27th day of January, 1938, at Salt Lake City, Utah, at about the hour of 1:30 o'clock P. M. of said day, the said Spero George Saltas was riding as a guest in an automobile driven and operated by one Gerald Franz, who was then and there driving said automobile in a northerly direction along and upon said "K" Street and approaching and entering the intersection of said "K" Street and Third Avenue, in Salt Lake City, Utah, and said defendants were driving and operating an automobile in a westerly direction along and upon said Third Avenue and approaching and entering the intersection of said Third Avenue and said "K" Street, in Salt Lake City, Utah; that after the automobile in which said Spero George Saltas was riding had entered said intersection and had proceeded over the middle line of said intersection and while proceeding in a northerly direction, the said defendants negligently, careless and recklessly, as hereinafter more particularly set forth, did drive their said automobile into said intersection and upon and against the automobile being driven by said Gerald Franz, in which said Spero George Saltas was riding as a guest, and did strike said automobile on the right side and at approximately the rear half portion of the same with great force and violence, and did strike the said Spero George Saltas with great force and violence, and, thereby

the said Spero George Saltas did suffer serious injuries to his head and body and thereafter, by reason of said injuries, the said Spero George Saltas died the same day.

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5. That at all times hereinafter mentioned there were, and now are, in full force and effect in Salt Lake City, Utah, certain Ordinances of Salt Lake City, Utah, known as "Revised Ordinances of Salt Lake City," passed, promulgated and published by the authority of the Board of Commissioners of Salt Lake City, Utah, in 1934, Chapter LIX of which relates to traffic and travel upon the streets of Salt Lake City and, among other provisions, it is provided as follows, to wit: Section 1345 (CC) and (DD) provides and fixes the business districts and the residence districts of and within Salt Lake City, Utah, and said Section 1345 (DD), defining the residence district, defines and describes the same as the territory within Salt Lake City, Utah, other than the business districts of Salt Lake City, Utah; that said Section 1345 (CC), defining the residence districts of Salt Lake City, Utah, defines the same as the territory that does not embrace the street known as Third Avenue, extending from "J" to "L" Streets, and does not embrace "K" Street between Second Avenue and Fourth Avenue, in said city, and the intersection of said Third Avenue and "K" Street is within the residence district of Salt

Lake City, Utah. Section 1382 (B) of said chapter provides that it shall be unlawful for any person to drive a vehicle in Salt Lake City, Utah, in any residence district, in excess of twenty-five miles per hour. Section 1382 (a) of said chapter provides and reads as follows:

“RESTRICTIONS AS TO SPEED.  
Penalty. (a) It shall be unlawful for any person to drive a vehicle upon any street in Salt Lake City at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other conditions existing.

“Nor shall any person drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or to stop, as may be necessary to avoid colliding with any person, vehicle or other conveyance upon or entering the highway in compliance with legal requirements and with the duty of drivers and other persons using the street to exercise due care.”

6. That said defendants were careless and negligent as aforesaid in the following particulars:

(a) In driving their said automobile at a speed greater than was reasonable and safe and at a rate of speed which was dangerous to life, limb and property, to wit: at a rate in excess of



40 miles per hour and in violation of said Sections 1345 (DD), 1382 (B) and 1382 (a);

4 (b) In not having at said time and place the said automobile under immediate control;

(c) In not according to the Franz automobile the right of way over said intersection;

(d) In failing to use due care or caution for the safeguard of others by then and there failing and omitting to keep a careful lookout, or any lookout whatever, for other vehicles or cars along and upon said "K" Street and in approaching said intersection;

(e) In not turning their said automobile to the left when there was ample space to have passed at the rear of the Franz automobile without striking the same;

(f) In failing to apply the brakes to said automobile and slowing down the same while approaching said intersection; in failing to have said brakes in proper working condition and in driving with defective brakes;

(g) In that defendants saw, or by the exercise of reasonable care should have seen the automobile in which deceased was riding and should have avoided striking him with their automobile.

7. That at the time of his death the said Spero George Saltas was 30 years of age; that he lived at the home of the plaintiff; that he was healthy, vigorous, intelligent, and of attractive character and disposition, and of great assistance, aid and comfort to the plaintiff; that he was employed by the Utah Copper Company and earning good wages in the sum of approximately \$175.00 per month. That in consequence of the death of said Spero George Saltas, the plaintiff has been, and will continue to be, deprived of his services, assistance, society and comfort, and plaintiff has thereby sustained damage in the sum of fifteen thousand (\$15,000) dollars.

5 WHEREFORE, plaintiff prays judgment against the defendants, and each of them, in the sum of fifteen thousand (\$15,000.00) dollars, and for costs of this action.

H. G. METOS,  
*Attorney for Plaintiff.*

(Duly verified by George Saltas)

13 (Title of Court and Cause)

ANSWER OF DEFENDANT, KENNETH BUTTE

Comes now Kenneth Butte, one of the defendants herein, and answering plaintiff's complaint admits, denies and alleges as follows:

1. Answering paragraph 1 defendant admits the allegations therein contained.

2. Answering paragraph 2 defendant alleges that he has not sufficient information or knowledge to enable him to form a belief as to the truth or falsity of the allegations therein contained and upon such grounds and for such reason denies said allegations.

3. Answering paragraph 3 defendant admits that he was engaged by the defendant, David A. Affleck, to operate a grocery delivery truck in the business of the said David A. Affleck, but denies that at the time said accident occurred he was acting within the course and scope of his employment and in furtherance of any business of the said David A. Affleck, but on the contrary alleges the fact to be that prior to said accident he had completed deliveries which he then had in his truck and it was then time for him to go to lunch; that he met two girls and consented to take them down town; that after having so completed his deliveries and it being his lunch period he took said girls into his truck and started for the business district of Salt Lake City proceeding west on 3d Avenue; that at said time he had no further deliveries to make for his employer until after lunch, had no packages in his truck for delivery and had no purpose for his employer in

proceeding to the business district of Salt Lake City; that said trip was made solely for the benefit of this defendant and the two girls so being transported by him as aforesaid. That defendant's employer's place of business was located on 2d Avenue and T Street in Salt Lake City and this defendant was proceeding west on 3d Avenue and was about to cross the intersection of 3d Avenue and K Street when the accident occurred.

4. Answering paragraph 4 this defendant denies the allegations of negligence therein set forth and denies that the accident at said intersection was proximately caused by any negligence on the part of this defendant and alleges the fact to be that he was proceeding in a westerly direction on 3d Avenue in a careful and prudent manner and with due regard to the condition of the highway and the traffic thereon and as he approached K Street he looked and saw no automobiles proceeding in either a northerly or southerly direction upon said street, but as he was about to enter said intersection he saw a north-bound automobile entering said intersection from the south which said automobile was traveling at an excessive, dangerous and unlawful rate of speed, to wit: at a rate of speed in excess of thirty miles an hour; that the driver of said automobile failed and neglected to observe the automobile truck which this defendant was operating, and

carelessly and negligently failed to yield the right of way to the automobile of this defendant which first entered said intersection or which entered said intersection at the same time said northbound automobile entered the same, and the driver of said northbound automobile carelessly and negligently failed to slacken the speed of said automobile or otherwise control or attempt to control the same to avoid running into this defendant and seeing and appreciating that said northbound automobile was not intending to stop or yield the right of way this defendant applied the brakes upon the automobile which he was then and there operating and endeavored to stop or control the same and avoid being run into by said northbound automobile and did slacken the speed thereof and  
15      did endeavor to avoid being so hit, but was unable in the exercise of reasonable and ordinary care to avoid striking said automobile. That the accident described in plaintiff's complaint was solely caused by the carelessness and negligence of the driver of the automobile in which the deceased, Spero George Saltas, was riding.

5. Answering paragraph 5 of plaintiff's complaint defendant admits that at the time and place described in said complaint there was in full force and effect certain ordinances of Salt Lake City relating to traffic and travel upon the streets of Salt Lake City, including the ordinances limit-

ing the speed of automobiles in the residential district in Salt Lake City to 25 miles an hour, an ordinance prohibiting the operation of an automobile at a speed greater than will permit the driver to exercise proper control of said vehicle, and defendant further alleges that at all times mentioned in said complaint there was in full force and effect a city ordinance described as Section 1372 of the Revised Ordinances of Salt Lake City, which ordinance, among other things, provides as follows:

“When two vehicles enter an intersection at the same time the driver of the vehicle on the left shall yield to the driver on the right.”

That this defendant entered said intersection of Third Avenue and K Street prior to or at the same time that the automobile in which the deceased was riding entered said intersection from the left and this defendant was entitled to and did have the right of way at said intersection, but the driver of the automobile in which said deceased was riding carelessly and negligently failed to comply with said ordinances and the accident described in plaintiff's complaint was solely caused by such failure and by the carelessness and negligence of such driver in driving and operating his said automobile at a dangerous, excessive and unlawful rate of speed, in driving and operating his said automobile without keeping a careful, or any,

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lookout for other vehicles upon said highway, in driving and operating his said automobile without keeping the same under safe, immediate, or any, control, in driving and operating said automobile in such a manner and at such a rate of speed that he could not and did not observe the automobile operated by this defendant and avoid an accident and in failing to also operate it with due regard to the condition of the highway, the traffic thereon and the visibility at the intersection where said accident occurred, and in failing to use reasonable, or any, care or caution for the safety of persons upon said highway.

6. Answering paragraph 6 defendant denies each and every allegation of negligence therein contained and with respect to said allegations alleges that the accident described in plaintiff's complaint was solely caused by the carelessness and negligence of the driver of the other automobile, all as herein set forth.

7. Answering paragraph 7 defendant denies that plaintiff was damaged in the manner or to the extent therein alleged.

8. Defendant denies generally and specifically each and every material allegation in said com-

plaint contained not heretofore or hereafter admitted, denied or qualified.

GERALD IRVINE,  
*Attorney for Defendant,*  
*Kenneth Butte.*

(Duly verified by Kenneth Butte)

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(Title of Court and Cause)

# BILL OF EXCEPTIONS—FIRST TRIAL

BE IT REMEMBERED, that on the 19th day of May, 1938, at the hour of 10 o'clock A. M., the above entitled matter came on for *first* trial before the Honorable Allen G. Thurman, one of the judges of the above entitled court, sitting with a jury. H. G. Metos appeared as attorney for plaintiff and Gerald Irvine appeared as attorney for the defendant, Kenneth Butte, and Ralph T. Stewart appeared as attorney for the defendant, David A. Affleck.

A jury was called, sworn, examined and chosen to try the case.

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DAVID A. AFFLECK, one of the defendants, was sworn and testified as to the relationship of principal and agent existing between himself and the defendant, Kenneth Butte.



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G. M. HOPKINS, police officer, testified as follows:

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I arrived at Third Avenue and K Street approximately 1:35 P. M. and saw the automobiles. I found a truck turned over on its left side facing east on the northwest corner of the intersection. K Street is 45 feet wide. Third Avenue is 45 feet wide. At point X there was considerable debris in the street. Leading from that point eastward was a heavy drag mark. A burned tire mark was leading to this debris 36 feet long, caused by a tire moving sideways. Said tire burn led to the truck on the northwest corner. We found the Ford Coupe sitting in this position headed in a northwest direction. At the northwest corner is a utility pole with a small tree four inches in diameter. There is a large tree about sixteen inches in diameter. Between the tree and the curb is grass. Leading across that grass were two tire marks. The grass was torn up leading right up nearly to the tree. There were dirt marks leading back to the position of the Ford. Along the sidewalk was a considerable amount of blood. The distance from point X where the debris was to the tree was 45 feet.

ERNEST H. CHRISTENSEN, police officer, testified as follows:

I received a call about 1:40 P. M. and proceeded to the scene of the accident. I helped make the measurements testified to by Officer Hopkins and took photographs.

280 GERALD A. FRANZ, driver of the car in  
281 which deceased was riding, testified as follows:

I am a Union Pacific stage driver and was acquainted with S. G. Saltas. I had a 1936 Ford Coupe. I was driving north on K Street and Mr.  
282 Saltas was sitting next to me. As we approached Third Avenue I lost sufficient speed so I shifted into second gear and started on across the intersection. As we got into the intersection I noticed a truck approaching from the east. I was practically in the center of the intersection at the time I saw the truck. When I saw it I should judge it was 100 feet east and I believed I could beat it across the intersection. I tried to go across the intersection and when I was practically across he struck me on the rear part of my car on the right side. When I saw the other car I was practically in  
285 the center of Third Avenue. I was probably 25 feet north of the south curb of Third Avenue. Before I approached the intersection I suppose I  
286 looked to the right. After I got into the intersection where I indicated here I see this truck coming possibly 100 or 110 feet up the east side of the  
288 intersection. We were going no particular place,

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289 just riding around. I had no intention of turning  
at Third Avenue and had proceeded three blocks  
up K Street before the accident occurred. I first  
290 saw this Ford truck coming west when I was  
approximately 20 or 25 feet north of the south  
curb line on Third Avenue. I had reached a  
291 point nearly in the center of Third Avenue when  
I first saw the Ford truck coming and at no time  
prior to reaching a point approximately in the cen-  
ter of Third Avenue did I see the Ford truck. I  
would say I was 10 or 15 feet south of the south  
curb line of Third Avenue when I looked east. I  
didn't notice anything or I would have slowed  
292 down or stopped. When I was about 10 or 15  
feet south of the south curb line I looked east and  
saw no car coming. When I was 10 or 15 feet  
south of the south curb line I don't know how far  
east I could see. I had a clear vision east. I never  
293 at any time applied my brakes. My car traveled  
from a point 25 feet north of the south curb line  
to the point of the accident while the truck travel-  
294 ed 100 feet. My car traveled 10 or 12 feet while  
the other car traveled 100 feet. My car was going  
between 15 and 20 miles an hour.

322 GEORGE SALTAS, plaintiff, testified as  
follows:

323 I live in Bingham. Spero Saltas was my son, 30  
years old. My wife died in 1934. I have six child-

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326 ren living with me and one girl is married. He  
327 was working for the Utah Copper as a machinist.  
Spero Saltas lived with me in my house. Spero  
328 helped me out. He helped me at all times. That is  
the only boy I had to help me. I was besides an  
old man, be sick, not do anything, he do for me,  
except to keep a little money for his expenses  
and otherwise he worked for me. He was the only  
329 one that helped. I had four boys going to school,  
nobody else worked, two girls, same thing, and he  
only worked to keep the family, Spero did. The  
332 only time he go out was last year. He go to Yellow-  
stone Park and to California because he make  
333 some money. Spero purchased a car. Gave \$300  
for the car and have worked and paid payments.  
I have worked in Bingham thirty years for the  
334 Utah Copper and United States Mine. I have  
worked regularly for that time except in 1936 when  
I laid off for a while. I am working regularly now  
and worked regularly in 1937. I have worked regu-  
larly for thirty years except in 1936. I have been  
336 working regularly since 1924 except in 1936 when  
I was sick. My married girl doesn't live at home.  
She is 34 years old. Her husband is working. She  
337 worked before she got married. My next girl is 23.  
She stays home and does all things for us, keeps  
house. If she finds work she goes to work. My next  
girl is 22. My next boy is Paul. He is 21. He works  
338 for the Utah Copper. He has worked for the Utah

Copper about two years. He lives at home and helps me sometimes. My next boy is Pete. He works for the B. & G. Railroad and is 20. He has been working about eighteen months and lives at home. Paul earns \$5.00 a day. Pete earns \$3.65. The one next to Pete is Tom. He is 17 and goes to school. The next one is Alex and he goes to school. Paul lives at home and earns \$5.00 a day. He is now working 22 days a month. Pete earns \$3.65. I make \$4.25 a day for 22 days a month. The total income for myself and the two boys is about \$13.00 a day except when we are only working 22 days a month. Spero told me and my wife that he would not get married until the other boys were old enough to step in and help. Maybe some time he would get married. I have a considerable sum of money in the bank.

Plaintiff rested and defendant, KENNETH BUTTE, introduced evidence as follows:

KENNETH BUTTE testified as follows:

My name is Kenneth Butte and I am 25 years old. I live at 173 Q Street and was employed by D. A. Affleck Grocery. I traveled west on Third Avenue and stopped at N Street for the stop sign. I then proceeded west on Third Avenue to K Street. As I approached K Street I slowed down. I looked to the left and saw this car coming just as I entered the intersection. He was maybe 15

feet south of the intersection. I saw he was not going to stop or slow down so I put on my brakes and swerved to the right then we collided. As I entered the intersection I was going about 20 or 25 miles an hour. I turned north. I saw he wasn't going to stop. he was coming at a pretty good rate of speed and I tried to go parallel with him. He did not slaken his speed or put on his brakes. I figured he was going between 35 and 45 miles an hour. When I first saw him he was 15 or 20 feet south of the south intersection on Third Avenue. I was about at the figure 6 when I first saw him coming. I swerved and he just kept on coming and my car was in a northwest position when the cars hit and that whipped the rear end of my truck around, threw my truck on its side and the coupe kept going in a northwesterly direction, hit into a tree and then rolled back down.

My car was in good mechanical condition and the brakes were good. I was observing as I drove down Third Avenue. The car coming north on K Street did not make any turn either to the left or the right to avoid an accident. It did not increase or decrease speed. I estimate it was traveling between 35 and 40 miles an hour. It continued straight on through the intersection. My truck entered the intersection first.

346 In making my deliveries a route was prepared by the manager for me to follow. Mr. Af-

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fleck would set out the deliveries I was to make in the way in which I was to make them, and I was to take those orders in the order set out and follow from one customer to another in the order Mr. Affleck set out the list of orders on the route. On the completion of each route my duty was then to come back to the the store and unload the truck and get ready to take the next trip, and this process is continued all day long. There was only one seat in the car, just behind the steering wheel, for the driver. Mr. Affleck had prepared a route for me to follow on this particular delivery on this day as he had done on previous occasions. The orders were to the east end of the avenues, Federal Heights, and Military Drive. The last place I was to visit was 1326 Third Avenue. The store is located on T Street and Second Avenue, and east of that you go up to Virginia Street and up to Federal Heights and Military Drive, Arlington Drive and up there. The store where I work is located east and south from K Street and Third Avenue. Beginning with K Street going in an easterly direction, each street running parallel with K Street is given an alphabetical letter in succession. There are nine letters between "K" and "T." The avenues are numbered First Avenue, Second Avenue, Third Avenue, and so on, running from south to north. K Street and Third Avenue, in my judgment is about a half mile from the store. The store knew practically where I

would be all the time. In other words, my employer was conserving my time as much as possible, taking the deliveries in the order that would make the shortest run and they could keep track of where I was at all times. On the one o'clock route on January 27th I had five deliveries to make. I made them in the order that Bird Affleck had given them to me. The fourth delivery was made at 1579 Third Avenue. After I made the fourth delivery I saw two young ladies on Military Drive and Third Avenue. Military Drive is one block east of Alta Street and is east of the

355 Affleck store, that is about four blocks east and one block north of the store. The last delivery was also east of the store. They asked me if I was going down town, and I said, "No, but it is my noon hour, I guess I can take you down." Then I proceeded to the Travers home, 1326 Third Avenue, and made my last delivery. After I had completed that delivery I had no more groceries

355 or deliveries to make. That was the last delivery. From the place where I picked up the young ladies to the place of the last delivery was about two-thirds of one of the smaller blocks. Then I proceeded west on Third Avenue, passed the store where I was employed, except the store is on Second Avenue. The five deliveries I mentioned were all east of the store. I did not have any deliveries to make for any place west of T Street.

362 When I left the store to make those deliveries,



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there was no other place than to those five customers that I was to go for Affleck, and I had not been instructed to go any place except to make those five deliveries. I had no business for the store or for Mr. Affleck west of T Street and had no business to go west as far as K Street, or in that vicinity. I had no business for the Affleck store or for Mr. D. A. Affleck or his son that called upon me to go down to the business section of Salt Lake City. I was driving west on Third Avenue and K Street just to take the two girls down town. I did not have any other business whatsoever in proceeding west of T Street on Third Avenue except to take the two girls down town. When I was employed on January 18, 1937, Bird Affleck gave me my instructions, and told me how I was to make the deliveries. He told me to take the deliveries out and then come back to the store with the empty truck; that there would not be any monkey business on the job. He told me I wasn't supposed to ride anyone in the truck. He said to not even ride members of his family in the truck without specific permission. He told me the truck was not to be used for anything but the purpose of the store, and not to be used for my own purpose. He explained to me the matter of routing and lining up my deliveries on the particular routes and that he would line up the order in which the deliveries were to be made and told me that I was to follow such routes. He

366 told me that upon completing a delivery route, I  
367 was to come directly back to the store. While I  
was working at the store, I ate at the store all  
the time and did not go home for lunch. He told  
me I should never carry passengers in the truck  
or to take anyone into the truck but myself, and  
that was the purpose of having only one seat in  
the truck for the driver alone. After making my  
last delivery I had no other merchandise in the  
truck, and it was my duty to go directly back to  
the store on Second Avenue and T Street, but  
368 instead I proceeded west on Third Avenue. That  
was the first time that I had ever taken any pass-  
engers in the truck.

374 Q. In other words, when you had three or  
four deliveries to make they would give you the  
names and addresses and you would go ahead and  
make the deliveries?

A. They would give them to me enrounted, in  
routed order.

Q. But you had your choice on which street  
you would take?

A. I wasn't supposed to go out of the way  
to get to a house.

384 At the time I was driving down Third Ave-  
nue toward K Street, I was not going to get any  
gas.

D. B. AFFLECK testified as follows:

389           My name is D. B. Affleck and I am the man-  
ager of Affleck's Grocery Store, and have charge  
of the employment of people working for the  
store. It is part of my duty to supervise, direct,  
390           and instruct the employees. I explained to Mr.  
Butte that the orders would be boxed and routed,  
and he was to take these orders and deliver them  
without changing the route whatsoever, and that  
under no circumstances was he ever to take any  
391           riders without specific instruction from the store.  
I did not even allow my son to ride with him. He  
was to take the orders as routed and where they  
were routed, and immediately upon the last order  
being delivered he was to come back to the store.  
He was not to use the truck for any purpose ex-  
cept for the business of the store, unless I gave  
him specific instructions to do so. I routed the  
393           particular trip Mr. Butte took prior to the acci-  
dent. Butte was to make five deliveries, all to the  
east and south of the store. I did not authorize  
him to go any place in the vicinity of K Street  
and Third Avenue and Mr. Butte had no purpose  
whatsoever at that time and while he was out on  
that delivery in going any place west of T Street  
in the business of the D. A. Affleck Grocery. I  
did not authorize or instruct him to go to any  
place in the vicinity of K Street and Third Ave-

nue, nor did I authorize him to go any place west of T Street.

384 RAY VAN NOY testified as follows:

I live at 765 Third Avenue just east of L Street. The blocks are small. I am City License Inspector. I am a city police officer. I had gone home for lunch that day. When I completed lunch I went out to my automobile parked at the curb. It was facing west on the north side of L Street. I observed Mr. Affleck's truck going west as it proceeded to K Street. I saw the crash. I got in my car and went down to the collision. It was a little over a block to the scene of the accident. I saw the truck as it passed me until it got to L Street. It continued to L Street at about the same speed as when it passed me. It was traveling between 20 and 25 miles an hour. I have no connection with Mr. Affleck.

25-26 The court directed a verdict in favor of the defendant, David A. Affleck, and against the plaintiff and thereafter the jury was instructed and the case against the defendant Kenneth Butte, was argued to the jury, which returned a unanimous verdict in favor of the plaintiff and against the defendant, Kenneth Butte, for the sum of \$800.00.

92 Thereafter and on the 26th day of May, 1938, plaintiff served and filed his notice of intention

430 to move for a new trial, setting forth, among other grounds, the following: "5. Inadequate damages appearing to have been given under the influence of passion or prejudice." On the 18th day of July, 1938, plaintiff's motion for a new trial was argued. Defendant produced jurors John Haddow and Werner Kiepe, who testified as to the manner of reaching the verdict, and the court made the following statement:

"THE COURT: So far as the quotient verdict is concerned I am inclined to hold against Mr. Metos. As to his motion for a new trial, that there is evidence to go to the jury, I am inclined to rule against him on that. I am inclined to think at this time that the verdict is too low. I do not mean to say by that that I will find it too low, but the matter will be taken under advisement."

119 Thereafter and on the 2nd day of March, 1939, plaintiff's motion for a new trial as to the defendant, David A. Affleck, was denied and the court made an order that the motion for a new trial as to the defendant, Kenneth Butte, be granted unless said defendant, within twenty days after notice, consent that the verdict of the jury rendered against the defendant, Kenneth Butte, and in favor of the plaintiff, be increased to \$2400.00 and that judgment for such amount be entered against said defendant, Kenneth Butte, and in favor of the plaintiff, and that should the said

Kenneth Butte so consent that the motion for a new trial as to said defendant be denied, but otherwise granted. That notice of such order was served upon the defendant, Kenneth Butte, on the 3rd day of March, 1939, but said Kenneth Butte failed to consent to the increase of such verdict.

124 That on the 3rd day of April, 1939, defendant, Kenneth Butte, served and filed his notice and motion as follows:

(Title of Court and Cause)

NOTICE AND MOTION  
TO THE PLAINTIFF ABOVE NAMED AND TO  
H. G. METOS, HIS ATTORNEY:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the defendant, Kenneth Butte, will on the 11th day of April, 1939, at the hour of 2 o'clock P. M., or as soon thereafter as counsel can be heard, move the court to vacate and set aside its conditional order heretofore entered herein providing that the defendant, Butte, shall consent that the judgment against him be increased to \$2400.00 within twenty days after notice of such order or in the alternative that the judgment against said defendant be set aside and a new trial granted.

This motion is and will be based upon the files, records, evidence and minutes in the above entitled cause and the following grounds:

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1. That the court had no authority to make such alternative order.

2. That the verdict against the defendant, Kenneth Butte, was not insufficient.

3. That the jury having fairly upon the evidence presented returned a verdict for the sum of \$800.00, the court could not set up its judgment, opinion or feeling as against the verdict and judgment of the jury.

4. That said order was made contrary to law.

GERALD IRVINE,  
*Attorney for Kenneth Butte.*

127 That said motion was duly argued to the court and denied on the 17th day of April, 1939.

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(Title of Court and Cause)

8 BILL OF EXCEPTIONS ON SECOND TRIAL  
BE IT REMEMBERED that on the 8th day of May, 1939, the above entitled matter came on for hearing before the Honorable Clarence E. Baker, one of the judges of the above entitled court, sitting with a jury. H. G. Metos and Samuel Bernstein appeared as attorneys for plaintiff and Gerald Irvine and Ralph T. Stewart appeared as at-

torneys for the defendant, whereupon the following proceedings were had:

- 11 MR. STEWART: I have another matter I might call Your Honor's attention to at this time, and that is the order made by Judge Thurman with respect to the new trial.

Judge Thurman, on March 2, 1939, made an order, which I am taking the substance of from the notice served on me, not having the original order before me, and which order read substantially as follows:

(Alternative order to increase the verdict to \$2400.00 or grant a new trial was read).

- 12 Now, it not appearing from the record in this case that any order has been made since the expiration of twenty days, determining that consent was not given and the granting of the motion because of the fact that such consent was not given, we object to the case proceeding to trial, on the ground that there is already a verdict in this case for \$800.00, and that a motion for a new trial was not legally granted, and that therefore there is no issue to be tried. We further object to the case proceeding to trial as against the defendant, Kenneth Butte, only, and not as against both defendants.



We take the position on behalf of Kenneth Butte that his rights would be seriously prejudiced by having this case as against him alone, tried separately. He is put in a position where a verdict or judgment might be rendered against him in one amount, whereas on a possible retrial as against the defendant, Affleck, would change the verdict—or a verdict in a different amount might be rendered, and if, upon a subsequent trial as against the defendant, Affleck, a verdict in excess of the amount rendered against the defendant, Kenneth Butte, was entered, the said Affleck would have a cause of action against Butte for an amount in excess of any judgment or verdict which might be rendered in this case.

13           MR. METOS: Now, if the court please, all those matters Mr. Stewart talked about were ruled upon last week by Judge Thurman.

THE COURT: I will go over this between now and 2 P. M. and reserve the ruling upon it until that time.

17           MR. METOS: I don't know whether an entry has been made, but the judge, in open court, overruled those objections.

18           THE COURT: I assume that the order indicates the objection has been ruled upon. It is the opinion of this court that the order, without

any further order, is binding and absolute. The motion is, therefore, at this time denied.

You may draw the jury.

MR. STEWART: There is one matter I want to take up before commencing the examination of the jury, either now, or after the names have been drawn, it is immaterial to me at which time but before the commencement of any examination.

THE COURT: Can you state to me what it is, Mr. Stewart?

19 MR. STEWART: If Your Honor please, at this time I wish to offer in evidence Policy No. AU-206787, issued by the Northwest Casualty Company, on the 28th day of September, 1937, and covering the period when this accident occurred, being a policy issued to D. A. Affleck, doing business as Affleck Grocery Company. The purpose of the introduction is to show to the court the fact that the coverage under the policy is not extended in this action to the defendant, Kenneth Butte, but is limited to persons driving the car for purposes of Mr. Affleck; so as to advise the court, in advance, that there is no insurance in this case, and that it would be prejudicial to the defendant, Kenneth Butte, if any matter relating to insurance should be brought out in this action. It is purely

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for this purpose, and no other purpose.

20 MR. BERNSTEIN: If we get a judgment against Kenneth Butte and an execution issues that is not satisfied, and we make demand on the insurance company, then we would have to file suit against this insurance company, and we are entitled to ask Your Honor, and we are going to ask Your Honor, to ask this jury whether or not they carry liability insurance, and we can ask the jury if they own stock in this company. The Supreme Court has ruled we have a right to ask this question.

MR. METOS: The court may tell the jury, and ask them whether or not they carry liability insurance.

MR. STEWART: I want the paragraph to appear in the record, and if the court rules it is not properly there, I cannot help that,—with respect to this paragraph which I offer to read.

21 MR. STEWART: I will be glad to have the reporter copy it, as though it had been read in the record, this provision of paragraph 5, and particularly the last portion of it, which reads as follows: “provided, further, that the actual use is with the permission of the named insured.”

THE COURT: Well, it may be received solely for the purpose offered, but at this time

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the ruling on any number of possible questions that might be asked in regard to the question will be ruled on hereafter. It is not an exhibit for the jury.

MR. BERNSTEIN: I don't understand the court has a right to admit anything in evidence unless it is shown to the jury.

22 MR. METOS: In other words, is Your Honor going to rule that in the event the plaintiff asks these jurors whether they are connected with the Northwest Casualty Company, Your Honor will sustain an objection to those questions?

THE COURT: That is not the court's ruling at this time.

23 Thereupon the jurors returned to the courtroom and after examination by the court were examined by Mr. Metos as follows:

Q: Mr. Langton, are you a stockholder or officer or employee of the Northwest Casualty Company of Seattle, Washington?

A. No.

Q. Mr. James L. Wilson, are you a stockholder or officer or employee of any casualty company?

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A. No. The company I am with writes casualty insurance; that is the First Security Trust. I have no stock in the corporation.

24 Q. Mr. Self, are you a stockholder—by the way, what did you say your employment was?

A. A salesman.

Q. For whom?

A. For myself.

Q. Are you a stockholder, officer or employee of the Northwest Casualty Company?

25 A. No.

Q. Or any casualty company?

A. No.

Q. Mr. Groo, where are you employed?

A. Roe's Department Store, Third South and State.

Q. Are you a stockholder or officer or employee of the Northwest Casualty Company of Seattle, Washington?

A. No.

Q. Or any other casualty company?

A. No sir.

Q. Mrs. Andrus,—are you married?

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A. Yes sir.

Q. What is your husband's business?

A. He is a salesman at the Producers Market.

26 Q. Are you a stockholder, officer or employee of the Northwest Casualty Company of Seattle, Washington?

A. My husband just bought a car, and he would have insurance, but I don't think it is that company.

Q. Mr. McCowan, what is your occupation?

A. I am the district manager of the Libby, McNeil & Company—food products.

Q. Are you a stockholder or officer or employee of the Northwest Casualty Company of Seattle, Washington.

A. No sir.

Q. Or any other casualty company?

A. No.

Q. Mr. Lalliss, are you, yourself, employed?

A. Yes.

27 Q. Are you a stockholder or officer or employee of the Northwest Casualty Company of Seattle, Washington?

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A. No sir.

Q. Or any other company?

A. No.

Q. Mr. Booth, do you drive an automobile?

A. I have driven one, but I haven't a car now.

Q. You say you work for the U. S. Smelter?

A. I am a tailor, I make the bags.

Q. Are you a stockholder or officer or employee of the Northwest Casualty Company of Seattle, Washington?

A. No sir.

Q. Or any other casualty company?

A. No sir.

Q. Mr. Timothy, do you own an automobile, and drive it?

A. I do.

Q. You are a musician?

A. Yes.

Q. For whom do you work?

A. I work for myself.

28

Q. Are you an officer or employee or stockholder of the Northwest Casualty Company of Seattle, Washington?

A. No sir.

Q. Or any other casualty company?

A. No sir.

Q. Ever been involved in any kind of a case where suit was brought against you, or you brought suit against somebody else?

A. No sir.

Q. Are you an officer, stockholder or employee of the Northwest Casualty Company of Seattle, Washington?

A. No sir.

Q. Or any other casualty company?

A. No sir.

Q. Mrs. Westwood, you say you work as a bookkeeper for John Holley?

A. Yes sir.

Q. What business is that company engaged in?

29 A. Wholesaling of poultry, butter, eggs and cheese.

Q. Are you married.

A. Yes.

Q. What does your husband do?



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A. He is a mechanic down at the County Shops.

Q. Are you an officer, stockholder or employee of the Northwest Casualty Company?

A. No sir.

Q. Or any other kind of casualty company which insures automobiles?

A. No sir.

Q. Mr. Ray, you say you are working for a printing company?

A. I am a part owner.

30 Q. That is with what company?

A. The Acorn Printing Company.

Q. Are you an officer, stockholder or an employee of the Northwest Casualty Company?

A. No sir.

Q. Or any other kind of a casualty company which insures automobiles?

A. No sir.

Q. Mrs. Williams, I understand you are a housewife?

A. Yes sir.

Q. What does your husband do?

A. I am a widow.

Q. What did your husband do?

A. He was running the elevator here in the County Building.

Q. Was that Thomas Williams?

A. Yes sir.

Q. Are you an officer, employee, or a stockholder of any casualty company that carries insurance on automobiles.

A. No sir.

31 Q. Mr. Nalder, do I understand right now you are not employed?

A. No.

Q. What was your business when you were employed, what did you do?

A. I was a groceryman.

Q. Was that for yourself?

A. Yes.

Q. Are you a stockholder in any insurance—casualty insurance company, that carries insurance on automobiles?

A. No.

33 At the conclusion of the examination of the jury by plaintiff's counsel and before questioning

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of the jurors by defendant's counsel, the jury was excused from the courtroom and the following proceedings were had:

MR. STEWART: At this time, if Your Honor please, in view of the interrogation of the jury, the defendant, at this time, moves that this jury be discharged, and that a new jury be called to try this case, because of the prejudicial misconduct of plaintiff's counsel in specifically asking each and every one of the jurors as to whether or not they were officers, agents, employees or stockholders of the Northwest Casualty Company, or any other insurance company, particularly by reason of asking such questions of John Self, who is a salesman, working for himself, and who does not drive an automobile, and particularly by asking the question of Virgil Groo, likewise a salesman, who indicated by his prior answer that he would be unlikely to have such a position; of asking such similar questions—identical questions of Charity Andrus, a housewife, whose husband works at the Producers Market, and who testified that she was a housewife, living at 138 East 7th South Street, and by asking the same question of Mr. McCowan, and asking the same question of Charles J. Lallis, and of asking the same question of Merines M. Otten, 963 West 2nd South Street, formerly a shoe repairer, and not now working at any occupation, and, therefore, could

not be employed by such a concern; of asking the same question of Laura Williams, widow of Thomas Williams, who, for years, was an elevator operator in this building, and herself is a housewife and unemployed; of asking the same question of Richard W. Ray, co-owner of the Acorn Printing Company; asking the same question of Mrs. Edith Westwood, a housewife, who had previously stated that she worked for John Holley, and that her husband was employed in the Salt Lake County Shops, and who could, therefore, have no connection with an insurance company; of asking the same question of Dan H. Nalder, who had previously testified that he was unemployed, and, therefore, could not have been an employee of such a concern. Of asking the same question of Evan Timothy, of 812 East 5th South, who had previously testified that he was a music teacher—I think he said the violin and accordion—and he could not, therefore, have been such an employee of such company; and of asking the same question of John T. Booth.

And it clearly and definitely appearing, from the nature of the examination, and the method followed in pursuing it, as well as from the statements made by counsel in the court's presence, before the jury was sworn and examined, that these questions, in view of the nature of the jurors, their businesses and connections—three of them,

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at least, being housewives, would make it impossible to conceive that such questions were asked in good faith for the purpose of determining either that the jury would be subject to challenge for cause or on peremptory challenges, and in view of the examination, and in view of the record that I previously made to Your Honor, it is my opinion that the defendant, Kenneth Butte, could not have a fair and impartial trial before this jury; that the questions were asked in such a manner as to directly suggest the existence of insurance in this case, when, as a matter of fact, there is no insurance protection, and we feel that it is imperative that this jury be discharged.

THE COURT: The motion last made is denied.

Thereupon the jurors were recalled to the courtroom and eight jurors sworn to try the case.

36 G. M. HOPKINS, a witness called on behalf of the plaintiff, testified as follows:

#### DIRECT EXAMINATION:

My name is G. M. Hopkins and I am a traffic investigator for the Salt Lake Police Department and was such an officer on the 27th day of January, 1938. I was called to Third Avenue and K Street on that day at about 1:30 P. M.

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37 to investigate an accident. I drove directly to Third Avenue and K Street, arriving within about four minutes after the call. I seen two cars that apparently had been in an accident and proceeded to make my usual investigation, examining both cars with reference to their positions on the street, also the surrounding conditions. I took measurements and made a rough sketch of what  
38 I saw. With reference to my sketch I can place on the blackboard the measurements and markings that I saw.

40 Figure number 1 represents a truck, the grocery delivery truck, which was lying on its left side on the northeast corner of the intersection. It was facing east on the left side in the center of the intersection, that is, in the center of K Street and right on the crosswalk was a Ford Coupe. I will mark that 2. We also found on the east part of the intersection one long tire mark which had been burned by a tire skidding, with a length of 36 feet, and at the termination of that mark was debris and glass on the street. Starting from the west side of the spot where the debris was, were two tire burns leading right over to the truck which was lying on its side. The width of these tire burns was 37 feet. From a point which started to the point which stopped at the truck further up on the corner of the intersection is a tree about 16 or 18 inches in diameter, which

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sets 15 feet north of the crosswalk. There was grass in the parking between the sidewalk—these lines represent the sidewalk—there was grass in here. And across that grass there up to that tree  
41 was two tire marks, tearing the grass out, showing the car went up there. Then there was tire marks leading right back to the Ford coupe. We found the truck damaged on the front end more on the left front side, and the Ford coupe was damaged on the right side slightly to the rear of the center. The visibility was good, it was a clear day. The width of Third Avenue was 45 feet and K Street is 40 feet wide at the south and 45 feet wide at the north. The truck mark commenced  
43 23 feet east of the east curb line.

Q. Now, officer, did you go down on K Street and look over towards Third Avenue?

MR. STEWART: I make the further objection there is no proper foundation laid. No showing that the condition and visibility was the same, or there were no obstructions at the time the accident occurred which were not present when the witness made the observation, which would affect the distance or the position or the visibility that he might undertake to testify to.

44 Q. Well, officer, did you make the observation that I asked you, about how far you could see over on Third Avenue from K Street?

MR. STEWART: Just answer that yes or no.

A. Yes.

Q. All right now, assuming that there were no obstructions at the scene of the accident, about how far could you see from K Street over on Third Avenue.

MR. STEWART: We object to that as containing an improper assumption. This witness cannot assume there were no cars there.

THE COURT: The objection is overruled.

MR. STEWART: I make the further objection it is incompetent, irrelevant and immaterial, there is no proper foundation laid. Calling upon a witness to give evidence based upon an assumption, which neither he nor counsel has any right to include in such a question.

THE COURT: The objection is overruled.

MR. STEWART: I make the further objection that the question, if answered, would have no probative value, there being no position fixed, and no basis to make it of any materiality.

THE COURT: The objection is overruled.



A. From a point 8 feet south of the south curb line of Third Avenue.

Q. Will you put a point to designate that?

MR. STEWART: Now, may my objection go to all this line of examination, or to all of the questions, that it is incompetent, irrelevant, immaterial, and no foundation laid, and these answers are all based upon an assumption not appearing in the record?

THE COURT: You may have your objection.

Q. To each question and each answer?

THE COURT: Yes.

46

Q. Go ahead, Mr. Hopkins.

MR. STEWART: Now I object to the witness making any marks upon the map showing any imaginary position or positions taken by him in making any observation or placing any distances or markings upon the map, relating to such positions, and I base my objection upon the same ground that I have heretofore indicated with respect to this line of examination.

THE COURT: The objection is overruled.

A. From a point 80 feet south of the imaginary curb line of Third Avenue to the center of K Street, a point being 80 feet down, taking 80 feet east of the east curb line of the center of Third Avenue—

MR. STEWART: Now may the record show that over my objection the witness is proceeding to draw an imaginary line from a point in the center of K Street south of Third Avenue to a point in the center of L Street east of K Street?

THE COURT: It may so show.

MR. STEWART: And that the line is being drawn over my objection.

THE COURT: I think it shows that, Mr. Stewart.

47 A. From a point 80 feet south of the Third Avenue curb line to the south side of Third Avenue, you could see to a point 80 feet east of the east curb line of K Street. I stood at that point to see how far east I could see on Third Avenue and I could see from there to there. The skid mark on Third Avenue curved slightly to the north near the end of it.

## CROSS-EXAMINATION

The sketch, Exhibit "C," is not a sketch that I made at the scene of the accident. I made it down at the police station. The marks on the black-board are copied substantially from Exhibit "C." Independently of my record I don't purport to remember what I see in each particular accident. The only thing that I can do is refer to my record. These skid marks identified by A, B were tire burns by a tire skidding sideways. The tire marks to the wheels of the truck are the way that the marks led as I saw them and put them on my report. I don't know how they were made at the time, by the front or the rear wheels. There was quite a little bit of debris and I made my measurements as nearly as I could from the center of it. It was about 45 feet from the debris to the tree identified with the letter T. An automobile traveling at a speed of 25 miles an hour travels about 36 feet per second and at 20 miles an hour travels about 29 feet a second. The 36 foot line XY curved slightly to the north near the west end. I would say that the west end extended three or four feet farther north than the east end. I would say between two and three feet. Third Avenue is slightly down hill and a car going westerly would be going down a slight grade. A car going up K Street would be going up grade. There were no tire marks or skid marks on K Street south of point

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55

X where the debris was. There were no marks showing any gripping of tires on K Street. When I arrived at the scene of the accident the Ford coupe was at point 2. Mr. Franz was there and I asked him if that was where the car stopped after the accident and he said yes. He told me that his car stopped at the point marked point 2 and that is where his car came to a stop. And I saw marks from point X to point C and tire marks from point C, which is a 16 inch tree, back to the center of K Street. There were tire marks from point X from the curb and there were these heavy marks where the grass was dug up and there were tire marks that led back from the curb to the car at point 2 and I could see marks from point X to point C.

Q. Did you ask Mr. Franz how his car got from point X to point C and back to point 2?

MR. BERNSTEIN: We object to this as immaterial.

THE COURT: The objection is sustained.

MR. STEWART: Exception.

56 A car will stop more quickly going up hill than going down. K Street is asphalt, black top pavement and gives a 60 to 70 per cent coefficient

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57 breaking surface. Photograph, defendant's Ex-  
58 hibit 2, resembles the intersection. It appears to  
be the same street. It appears to be the same as  
it was prior to the accident. There is no debris  
shown in the picture. Defendant's Exhibit 3 fair-  
ly represents the intersection looking south on  
K Street from a point north of Third Avenue. On  
Exhibit 3 there appear to be several marks shaped  
similar to the marks on the road but I wouldn't  
say they are tire marks because I don't know.  
59 I see marks on Exhibit 3 in the general locality of  
where I saw the marks on the road. I should judge  
it is a photograph of it. I see a line on the left  
side of Exhibit 3 commencing at a point east of  
the curb line and proceeding to the center of K  
Street. It would seem to be in approximately the  
same position as the 36 feet line between point X  
and Y on the map. Exhibit 2 is a fair representation  
of the appearance of K Street looking north from  
Third Avenue. I went down K Street 80 feet  
south of the south curb line of Third Avenue and  
at no place between there and point X was there  
any indication of application of brakes or the  
pressure of tires gripping upon the highway.

62

## RE-CROSS EXAMINATION

What I mean by that was that as a result  
of the collision the truck was damaged on the  
left front, showing that the collision happened on  
the left front of the truck. It was more on the left

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front of the car at the corner. It appeared that the force of the impact came toward the left front corner.

63 ERNEST H. CHRISTENSEN, called on behalf of the plaintiff, testified as follows:

My name is Ernest H. Christensen and I am a police officer and I am the police officer who assisted Mr. Hopkins at the intersection of Third Avenue and K. Street January 27, 1938. I took  
64 some photographs at the scene of the accident. I  
66 held the tape and officer Hopkins put down the measurements.

69 GERALD A. FRANZ, called on behalf of the plaintiff, testified as follows:

#### DIRECT EXAMINATION:

My name is Gerald A. Franz and I live at 50 North Fifth West, Salt Lake City. I am a stage driver for the Union Pacific Stages, and was very well acquainted with S. G. Saltas, having known him several years. He was with me  
70 on January 27th in a Ford V8. I was driving the car and he was sitting on my right. As we approached Third Avenue on K Street I shifted into second gear and drove in the center. As I entered the intersection I looked in both directions and did not notice anything coming. Drove towards the center of the street approximately two feet

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71 from the center line and the truck hit me on the  
right side towards the rear of the car. We were  
both thrown out. I was driving possibly between  
15 and 20 miles an hour. When I approached the  
intersection I looked both ways, both east and  
west. When we got about just over the imaginary  
72 line of the intersection this truck hit me on the  
right side. I shifted into second gear to prevent  
lugging the motor. It would run better in second  
73 gear than third and I was going up hill. I no-  
ticed the truck about the moment it hit me, just  
75 about — it was possibly within 20 feet of me,  
or 15,— before it hit me. I was approximately 60  
or 80 feet south of the south line of the intersec-  
tion when I put my car in second gear. As I en-  
tered the intersection I made an observation in  
both directions, east and west, and couldn't see  
76 anything coming. I was about 15 or 20 feet south  
of the north side of Third Avenue when the truck  
hit me. Mark X represents my automobile. It is  
77 marked 2. Mark 1 represents the truck.

After the noon recess Mr. Franz further testified as follows:

As I neared the intersection just over the the imaginary line I first saw the car, which was probably 100 or 110 feet up the road east of the intersection, east of the south imaginary line of the intersection. I continued on across the inter-

section and at a point near the center of the intersection I saw this truck over here about 20 or 25 feet. It was then I thought I would be hit and I started in this direction towards the left.

78 MR. METOS: Now, Mr. Franz, how far north were you of the south line—imaginary line—when you first observed the truck, when you were going up north?

MR. STEWART: I object to that as repetitious. The witness just a moment ago pointed to the south imaginary line on the south side of Third Avenue.

MR. METOS: What I want to do is to just indicate with a dot approximately where he was.

79 MR. METOS: Now can you state how many feet you were south or north of this line—imaginary line, when you saw that truck?

MR. STEWART: I object to that; it appearing that he put the mark of his automobile right on the imaginary line. Counsel is trying to get him to put it one way or the other. He put it directly on the south curb line of Third Avenue.

MR. METOS: So far as I am concerned, Your Honor, if he wants to leave that car at that point there is no objection to that.



MR. STEWART: I want to leave it to the witness.

THE COURT: I think he may state the number of feet, if he wants to.

81 I had met Mr. Saltas in the Union Pacific Garage. We drove around on the east side of town, went down to Thirteenth South and back on Ninth East.

82 Q. You haven't any claim against the defendant in this case, of any kind?

A. No sir, that was taken care of—

MR. STEWART: Just a moment. I take an exception to counsel asking the question of the witness, and answering before I can make an objection, and assign it as misconduct on the part of counsel and ask the court to discharge the jury. The witness started to answer and then answered the question before I had a chance to object.

MR. METOS: He didn't answer it, I think.

MR. STEWART: He answered enough of it.

MR. METOS: I don't want any error in this record. It may go out.

MR. STEWART: After you brought it out, it is then too late.

THE COURT: Read the question.

MR. STEWART: Just a moment. I don't want the answer read right in the presence of the jury.

83 THE COURT: Mr. Reporter, will you please read the answer and the question.

(Question and answer read to the court)

MR. STEWART: I take an exception to the question and answer being read.

THE COURT: The motion is denied.

MR. BERNSTEIN: May the record show the question and answer was read to the court and not within the hearing of the jury?

MR. STEWART: The question and answer was read so that I could hear the question read by the reporter.

THE COURT: The record may show the reporter read it so the court could only hear it. The court isn't advised as to whether the jury heard it.

MR. STEWART: I take an exception to the ruling of the court.

84

## CROSS-EXAMINATION:

During the recess Mr. Metos talked with me for a few minutes. Mr. Metos took the transcript of the testimony in the former case and called my attention to the fact that on the previous trial I had testified that I saw the truck when it was 100 to 110 feet east. He called my attention to that distance and when I got on the stand this afternoon I corrected my testimony. The automobile which I was driving was in good condition and had good brakes. It was a Ford V8 and had good power, as good as the average Ford. There was no particular reason for our going for the ride. We drove around town possibly an hour.

86 As I remember we came up Ninth East to South Temple and then turned up K Street. In driving up K Street I don't believe we had any point picked

87 out. We were just driving. We just turned up K Street on a pleasure drive. I have had a lot of experience driving heavy equipment. The grade

88 on K Street was about four per cent. A four per cent grade isn't very steep. I don't know whether any modern car will gain speed on a six to eight

89 per cent grade. The rear end of my car was approximately on the extended line of the south curb of Third Avenue when I first saw the truck

91 coming. When the rear end of my car was about

92 at the south curb of Third Avenue this truck was approximately 100 to 110 feet east of the east curb line of K Street. That is my judgment. I don't know whether Third Avenue is about 45 feet wide. As near as I can guess my car traveled a distance of between 20 and 25 feet, not to exceed 30 feet, while the other car went a distance of between 100 and 110.

93 Q. Now, did you make the following answer this morning: "We proceeded into the intersection, and when we got about just over the imaginary center line of the intersection this truck hit me at the rear of the door, on the right side of the coupe"? Q. Now, did you—I want to read you this question and answer—tell me if this is what you testified to this morning: "Q. (By Mr. Metos) Now while you were crossing the intersection did you see the truck? A. I noticed it about the moment it hit me, just about—it was possibly within 20 feet of me or 15 feet before it hit me." Is that what you answered this morning?

A. That was the answer I was confused on. That is when, at least, I thought I would be hit. Before, when I saw it, I didn't have any idea that I would be hit. I felt safe in going across the street.

Q. So that you first testified that when you first saw the truck it was within 15 or 20 feet of you, and then later voluntarily changed that to read 15 or 20 feet east of the east curb line of K Street, didn't you?

A. That is right. That is what I was trying to correct, and I couldn't get it straightened. You wouldn't give me a chance.

Q. Now you want to correct it a third time, after Mr. Metos called your attention to the transcript, and want to say it was about 100 or 120 feet when you first saw it. Is that right?

A. That is right.

Q. You remember testifying at the other trial, don't you?

A. Yes.

Q. Do you remember being asked, in the other trial, where your car was when you first saw the truck, do you remember that? Do you remember that question being asked?

A. No I don't.

Q. Do you remember in the other trial testi-

fyng that the first time you saw the other truck was when you were about in the center of Third Avenue?

A. I don't remember it.

Q. Let me ask you if you recall these questions—page 42. Do you remember making this answer: "As I got into the intersection I noticed a truck approaching from the east going west. It seemed I was far enough across the intersection. I was practically in the center of the intersection at the time I saw the truck." Do you remember making that statement?

A. Something to that effect

Q. Now do you remember this: "Q. And when you saw it approximately how far was it east? A. I should judge about 100 feet." Is that what you testified to in the other trial?

A. Something like that, yes.

Q. Did you testify at the other trial that you tried to beat it across the intersection?

A. I think I used the word "beat," but that wasn't the right word.

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Q. Did you testify, at the other trial: "and I believed I could beat it across the intersection." Did you so testify at the other trial?

A. I think so.

Q. And you didn't ever put on your brakes, did you?

A. No.

Q. And you didn't even try to stop?

A. No I didn't.

Q. Going in a Ford coupe up the grade that you were going on K Street, at between 15 and 20 miles an hour, you could have stopped it in 15 feet, couldn't you?

A. I think so.

97        Q. Now did you testify as follows at the other trial: 45. In answer to this question "Will you point out on this map here where you were when you saw the other car on the east. A. I was about here. This portion here." You were pointing at the map. "It was about there, practically in the center." Did you so testify?

A. Possibly so, I don't remember.

99

Q. Now, did you make this further statement at the other trial: "After I got into the intersection where I indicated there I saw this truck coming possibly 100 or 110 feet up on the east side of the intersection." Did you say that?

A. I believe so.

100

Q. And the place that you indicated there was the point that you fixed, substantially in the center of the intersection. That is true, isn't it?

A. I believe so, but then, if I could draw it in proportion to the street it would be a little larger than that.

MR. METOS: I object to that, Your Honor, because the answer read from the transcript there doesn't show that he referred to another map, that is not in evidence. It only tends to confuse the witness here and the jury and the court. The witness has testified, two or three times, where he was when he first saw it. I think it is repetitious in addition to being confusing.

MR. STEWART: Let's see if it is confusing. Let's go to page 51 of the transcript, Mr. Metos.



MR. METOS: All right.

101 Q. Answer this question: "Q. And never, at any time prior to reaching a point approximately in the center of Third Avenue, did you see the truck coming west. A. No I did not." Did you so answer that question at the other trial?

A. I believe I did, but, Mr. Stewart, I would only be 10 feet from the center if I was on the imaginary line.

Q. At the other trial here—at the other trial did you say that never at any time prior to reaching a point approximately in the center of the intersection did you see the other car, and why, today, did you say you saw it when you were at the south side of the intersection? This place?

A. I think I said, in the other trial, when it was nearly at the center. This would be within 10 feet of the center.

Q. Do you remember coming into my office and talking to me?

A. Yes.

Q. Did you at that time, in my office, tell

me that you never saw the truck until the instant of the impact.

A. I was in your office, but I didn't tell you that.

102 Q. Did you testify at the other trial, and did you make answer to this question: "Q. How far did your car travel while the other car was going 100 feet? A. Probably 10 or 12 feet." Did you make that answer at the other trial?

A. I answered a question like that.

103 The view east on Third Avenue wasn't obstructed by the store. There was nothing north of the store to obstruct my view. The accident occurred in January and there were no leaves on the trees. When I reached the point on K Street just above the figure 40 I looked east. At that time I couldn't see a block and a half east.

104 Q. All right, you knew, as you approached Third Avenue that it was your duty to yield the right of way to a driver approaching from the right if the car was approaching as close to the intersection as you were?

MR. METOS: I object to that on the ground that that is calling for a legal conclusion.

THE COURT: The objection is sustained.

107 As far as I know my car stopped where the  
map is marked with the figure 2 and I told that  
to officer Christensen. I never did see the other  
108 car until I was within 10 feet of the center of the  
intersection. The front end of my car was at  
109 least 15 feet into the intersection. That was the  
first time I saw the westbound truck.

110 W. KALE, a witness on behalf of the plain-  
tiff, testified as follows:

DIRECT EXAMINATION:

I live at 752 First Avenue and am a guard at  
the Veterans' Administration. On January 27, 1938,  
111 I lived at 829 Fifth Avenue. The Affleck truck  
passed me at L Street and Third Avenue going  
in the same direction. I was traveling about 15  
112 miles an hour. It is my judgment the truck was  
going between 45 and 50 miles an hour. I could  
113 not say how far I was between L and K Street  
114 when the crash occurred. I don't know how far I  
was from the east curb of K Street when I heard  
the crash. My best idea would be that I was one-  
115 third of the way from K Street. I stopped right  
along—there was a truck along the north side  
and I was back of it.

## CROSS-EXAMINATION

I had a broken spring on my car and was driving slowly to take my car to have it fixed.

117 My little three year old girl was with me. I had been driving very carefully. I couldn't have been much past L Street when the truck passed me. I heard the crash and then glanced up and saw it. I didn't exactly see the collision but saw it after it happened. I was just riding down the street and wasn't following the truck with my eyes as it went past. It just passed like any other

118 car would pass. I didn't follow it as it proceeded all the way to K Street. When I heard the crash I didn't look at the side of the road to see just how far I was down the block. I didn't undertake

119 to measure the distance that my car traveled or exactly where it was when I heard the crash.

121 ALTON BUNNELL, a witness on behalf of the plaintiff, testified as follows.

## DIRECT EXAMINATION:

My name is Alton Bunnell and I live at 735 Major Street. On January 27, 1938, I lived at 740 Third Avenue. I am 17 years of age and have driven an automobile. On January 27th around

122 1 o'clock I saw the Affleck truck going west on Third Avenue. I was sitting in the front room on the sofa looking out the window. Our house was

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located on the southwest corner of Third Avenue and L Street.

123 Q. Have you a judgment as to the speed of the truck?

MR. STEWART: I object to the question as being no proper foundation laid, the witness not being qualified as to speed, to express an opinion.

THE COURT: He may answer the question.

A. Yes.

Q. And in your judgment how fast was the truck going west at the time you saw it?

MR. STEWART: We object to that as being incompetent, irrelevant and immaterial, no proper foundation having been laid. The testimony as to the speed at the place where this witness saw it would not have any relevancy in connection with an accident occurring one block west, and, if the court has any doubt, I would like to argue the law. The theory of my objection is that there was no presumption that a car will continue at the same rate of speed and will not slow down at a subsequent crossing, and, furthermore, that the witness has not testified that he  
124 watched it after it left L Street, and as it proceeded toward K, and under these circumstances

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he would be unable to express an opinion as to the speed which the car might have been going when it reached K Street.

THE COURT: The objection is overruled.

A. I would say it was going at least 45 miles an hour.

126

### CROSS-EXAMINATION

127

I had turned 16 in October before the accident. From the north side of the store to the curb would be nearly 16 feet. I was sitting on the sofa looking out the window. As I glanced out the window I saw the truck coming. I observed the D. A. Affleck sign. At the other trial I testified it was going at least 40 miles an hour. I was sitting on the south side of the sofa kinda facing northeast on the end of the sofa away from the window, about five feet from the window. I didn't see it after it passed beyond the point where my eyes were looking through the window.

129

130

MR. METOS: Are you willing to stipulate that the deceased, S. G. Saltas, was thirty years of age at the time of the accident?

MR. STEWART: I don't know what his age was.

MR. METOS: And had a life expectancy of thirty-five years and three months?

MR. STEWART: I don't know what his age was.

MR. METOS: That is what we allege in our complaint and that is what we will prove.

MR. STEWART: I will be willing to stipulate.

MR. METOS: Assuming he was thirty years of age. That is what he was.

MR. STEWART: The only limitation of such stipulation would be this: That, in this particular case, where a father is suing for the death of an adult child, and where the father's age is such as it is in this case, that the American Mortality Table would not be applicable and the cause of action would be solely for the benefit of the father on the basis of any contemplated damages. If he personally would receive it it would make the mortality table ineffective.

MR. METOS: Are you willing to stipulate that the mortality table is evidence, and let the court rule on it?

MR. STEWART: I will stipulate that the mortality table is as you stated, thirty-five years and three months. It is absolutely incompetent,

irrelevant and immaterial, and we particularly object to it being received in evidence in this case.

131 MR. METOS: The plaintiff's age is 60 years.

THE COURT: Well, it apparently has some probative value in connection with all the evidence in the case, the objection will be overruled.

132 THE COURT: The objection to the admission of the American Experience Table of Mortality showing the expectancy of life of the deceased to be thirty-five years and three months, is overruled.

GEORGE SALTAS, plaintiff, testified as follows:

#### DIRECT EXAMINATION:

133 My name is George Saltas and I live in Bingham. I have lived there thirteen years. Spero Saltas was my son and was 30 years old. I am a widower. Spero Saltas was not married. My wife is dead. I have five children living with me. I had eight children but have got seven now. My  
134 son was working at the time of his death. He was working at the Utah Copper for \$5.85 a day. He worked every day. He had been working for  
135 twelve years. He lived with me all the time, all



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his life. He lived at the same house with me in Copperfield. He helped me out all the time. He helped me raise my family. Anything I ever asked him he give me. I am not in good health.

136 I have been in Bingham since 1907 and after I go to Idaho for seven years about. Every winter came in Bingham and worked again, worked in Bingham. In Idaho I farmed. Spero worked on the farm. He went to school to the eighth grade

137 and then started working. Spero turned over

138 money to me. He gave me about \$100 a month. He paid the rent. He paid the rent because Utah

139 Copper charge it to the check. Spero paid the rent from 1927 when he started to get his check along about '27, eight years. Utah Copper work this way, it was for the days work. I work three days over for Spero and Utah Copper take three days rent. They take it from my check, take three days rent for time Spero started to pay the rent. Utah Copper started to take rent off my son's

140 check in 1934. My son had an automobile. Dur-

141 ing the depression Spero worked ten to thirteen days a month. From '31-'30 to '33 he worked ten to thirteen days: \$3.80 a day.

144 CROSS-EXAMINATION:

I have been working in Bingham approxi-

145 mately thirty years. I am working for the Utah Copper. Except when I operated the farm in Idaho I worked either for the Utah Copper or the

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U. S. Mines. I earn \$4.25 a day. I am working twenty-two days a month. I have been earning \$4.25 a day for a substantial time. Two years ago I worked thirty days a month. In 1937 Spero took a vacation to California. He went to Yellowstone Park. I have a boy Paul and a boy Pete. Paul has been working about three years and makes \$5.00 a day. Pete has been working pretty close to two years and a half.

146

147

Q. And how much does Pete earn?

MR. METOS: Just a minute. I object to that on the ground it is immaterial, irrelevant and incompetent and not within the issues of this case. It doesn't go to any issue.

THE COURT: The objection is sustained.

MR. STEWART: Exception.

148

Paul was living at home and still lives at home and is still working. Pete was living at home a year ago. He left home now about a month ago he go out of the home. He was living at home before and for some time after Spero's death.

Q. Now, between you and Paul and Pete, at the time of Spero's death, you were earning about \$13.00 a day, were you not?

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MR. METOS: I object to that as immaterial and irrelevant and incompetent and entirely prejudicial. I never asked this witness if they made any money or contributed anything to him.

THE COURT: The objection is sustained.

149 About a year ago Paul pay his board and sometimes he give a dollar or two at home and when Pete was working he paid board. Spero did not pay board. When I work at present time the rent deducted out of his check, and if I work three days over for Spero, Utah Copper Company—Utah Copper wants to collect other days, more rent, because I pay some for the days I work, so it makes it twenty days a month, and they pay  
151 twenty days rent. I paid part of the rent. I have a married daughter. My children are pretty well grown up. Pete boards some place in boarding house down in Bingham. The car was for the whole family. It belonged to the whole family.  
153 Paul and Pete lend the money to Spero. Pete works for the Utah Copper. I am past 62 last  
154 November. I now pay rent for the number of days I work. I pay 90c a day. If I work twenty-five days then I pay full rent. If I work twenty-two days I pay \$19.80.

176½ Q. Mr. Saltas, for some months prior to Spero's death, didn't he live at what is known as

Cyprus Hall?

A. Yes sir.

Q. How long did he live at Cyprus Hall?

A. I don't remember.

Q. Well, about how long?

A. Two or three months. I don't remember.

Q. Well, it that your best recollection, two or three months?

A. I can't understand that.

Q. Is that your best recollection, two or three months. Didn't he live there longer than that?

177 A. I can't understand at all what you mean.

Q. Now, didn't your son Paul pay the rent to the Utah Copper Company for several months?

A. May I explain it better?

Q. You can answer my question. Didn't your son pay the rent for several months?

MR. STEWART: During the year 1937?

A. Yes; I asked if I could explain how he did.

Q. Didn't they deduct from his wages several months?

A. Paul pay the rent right now. I been sick. Since 1935 Utah Copper wants to collect the rent, and so I now work, and turn the rent to Paul and Paul figure up the rent.

Q. Now, just a minute. I am not talking about 1935 at all. When you were sick—you were working in 1937, weren't you?

A. Yes.

Q. Didn't Spero live at Cyprus Hall?

A. Not in '37.

Q. Not in '37?

A. No.

178 Didn't Paul pay part of the rent in 1937?

A. Not pay rent at all. He just charge the Utah Copper with his check. He charge it with his board. Not pay any.

Q. But the rent was deducted from Paul's check?

A. But I paid,—charge to him—

Q. Will you please answer my question?

A. But he pay rent—not pay rent. I pay rent. He pay his board, and pay—because rent is \$30.00, and he pay some days for the board, not pay the rent.

Q. Or at least part of it deducted from Paul's pay check. Now, answer that question.

A. Charge to his check. He—

Q. Now, just a minute. It was charged to his check, wasn't it?

A. Yes sir.

179 Q. And while Spero was living at Cyprus Hall wasn't the coal bill deducted from Spero's check, and the rent deducted from Paul's?

A. They, they not—

Q. Now, during 1937, before January of 1938, wasn't the rent deducted from Paul's check?

A. Yes.

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Q. And wasn't the coal deducted from Spero's?

A. At that time coal was charged to Spero.

Q. Do you know Mr. Watson?

180 A. Mr. who?

Q. Mr. A. W. Watson at Bingham?

A. Yes, he is at the Utah Copper.

246 Q. Now, I asked you the other day about  
247 Spero living at Cyprus Hall?

A. Yes sir.

Q. Was he living at home in 1935 and 1936?

A. I don't remember exactly. It was '35 or '36 he lived at Cyprus.

Q. You remember you said something about his living at Cyprus Hall for two or three months?

A. About that time, yes.

Q. Now, isn't it a fact that he lived in Cyprus Hall from the 1st day of April, 1935, to the 10th day of March, 1936, a period of thirteen months and ten days?

A. No, that is not true.

Q. Are you sure?

A. I am sure, because I don't remember so long. Besides, too, he wants to go.

Q. I am asking you for a date.

A. I don't remember exactly how long.

Q. Now, you are sure he didn't live there thirteen months?

A. I am not sure.

Q. What is that?

A. I am not sure how long he lived, I don't remember.

Q. Did Spero pay any rent to December 1, 1934?

A. To December when?

Q. To December 1, 1934?

A. No.

Q. What is that?

248

A. No sir.

Q. Isn't it a fact that you paid all the rent from December 1, 1934, to December 31, 1935?



A. Yes sir.

Q. And isn't it a fact that Paul paid all the rent from December 1, 1935, to the present time?

A. I want to explain this.

Q. Just answer this question. Isn't it a fact?

A. I no answer this question because I got to explain. I refuse to answer.

THE COURT: Yes, you are required, Mr. Saltas, to answer the question.

A. It was this different way with him so that he charge it to his check.

A. Why won't you let me explain?

THE COURT: The explanation will be called for by your own attorney afterwards, if he desires to do so.

249

A. Charge to his check.

Q. It was charged to Paul's check?

A. Yes.

Q. And charged to his check, including January 1, 1936?

A. Yes sir.

Q. So that during all of 1936 and 1937, the rent was taken out of Paul's check?

A. Yes sir; but charged to him.

Q. Let me make this clear, isn't it a fact that there has been no rent deducted by the Utah Copper Company from Spero's check?

A. No sir.

Q. Since November, 1934?

A. Yes, that is to him.

Q. Let me see if you understand the question. Prior to December, that is, before December?

A. Before December, 1934, charged to Spero.

Q. Yes; now since that time none of it has been charged to Spero?

A. No.

Q. Do you mean that?

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A. Charged to Paul, charged to me, with my name, December, 1934, charged to Spero in 1935, I been sick.

250 Q. In 1934, to November, it was charged to Spero, wasn't it?

A. Yes.

Q. And since December 1, 1934, no rent—has been charged to Spero?

A. No.

Q. That is right, isn't it?

A. Yes.

Q. And since December 1, 1934, Spero has worked for the Utah Copper Company?

A. Yes sir.

Q. And from December 1, 1934, to December 31, 1935, the rent was all charged to you?

A. Yes sir.

Q. And since December 31, 1935, it has all been charged to Paul?

A. Yes.

Q. You are sure you have got that clear? Isn't it a fact that Spero didn't live at home, but lived and boarded and roomed at Cyprus Hall?

A. Yes sir.

Q. From April 1, 1935, to March 10, 1936?

251 A. I don't remember exactly how long.

Q. Was it about that long?

A. He lived there—he lived there three or four months and five months. I don't think he lived there six months, that I remember. I don't remember more. I remember he live at Cyprus Hall, but how long I don't remember.

Q. When you first testified in this case, didn't you tell us he lived at home and paid rent all the time?

A. Since he live with Cyprus he pay—live in the home, because he just stay there. No, he work—he was at work, and at time he want to come home—stay home there three or four hours, sometimes sleep home.

Q. When you testified in answer to Mr. Metos' question before I questioned you, did you say anything at all about his living at Cyprus Hall?

A. Say anything, you say?

Q. When Mr. Metos questioned you did you tell him that your son lived at Cyprus Hall for several months?

A. I don't remember of saying that.

252

Q. Did you testify before, in the trial, that Paul paid the rent from January 1st on?

A. Yes, I say he paid it sometimes.

Q. Can you read?

A. Yes sir.

Q. Now, your testimony begins right here. Your testimony begins right there, and goes over to the next page, and several pages. Will you find any place in there where you testified that your son lived in Cyprus Hall? Can you find any place there where you testified that Paul paid any of the rent?

MR. METOS: Now, just a minute, I object to that, Your Honor, as not proper cross-examination. He was not asked those questions either on direct or cross-examination before. If I remem-

ber the record correctly, there wasn't a question asked this witness about these matters.

THE COURT: The objection is sustained.  
BY MR. STEWART:

Q. I will ask you again. In the former trial you said that Spero was the only boy that helped you?

A. Yes.

MR. METOS: What page is that?

MR. STEWART: Page 92.

Q. The only boy to help you. That is what you testified to before?

A. Yes sir.

#### REDIRECT EXAMINATION:

254

The rent in 1934 charged Spero's check. Spero still worked ten days a month and I work fifteen days a month. The rules of the Utah Copper—because I live in Utah Copper house—charge the rent by the day, and so Spero work for ten days and I work for fifteen days. I have run three to five days rent and they transfer from Spero to my check in 1935. In December I get sick, and stay two months, and I not go to work. The rent went

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to Paul's check. Since today charge every month to Paul's check, and Paul charge to me.

RE-CROSS EXAMINATION:

255           The rent was changed from Spero to me in 1934.

256           Q. All right, now; that was on the 1st day of December, wasn't it?

A. I don't remember the date.

155           MARY SALTAS, a witness for the plaintiff, testified as follows:

My name is Mary Saltas and I live at Copperfield, Bingham. I am related to George Saltas.

MR. STEWART: Now, just a moment. If the court please, at this time we assign the calling of this witness in this particular action, assign it as misconduct, and object to the witness testifying, it appearing that this is an action for the benefit of the father only, and the effect of producing in the courtroom and putting upon the witness stand the present witness, is prejudicial to the rights of the defendant, and we ask the court to instruct the jury to disregard anything that this witness may say, and eliminate from their minds the fact that she has been called as a witness in this action. I don't care to argue it.

THE COURT: The motion is denied. You may proceed.

158 MR. STEWART: I neglected to ask Mr. Franz one or two questions. I understand counsel is willing to stipulate he would testify, if he were recalled, that is, in substance, that Spero Saltas, while riding in the automobile with Mr. Franz, made no complaint about the manner of the driving of the automobile by Mr. Franz, and in approaching and entering the intersection made no complaint or comment of any nature.

MR. METOS: We will admit that Mr. Franz would so testify if he were called.

MR. METOS: We rest, Your Honor.

159 T. W. SOUTHWORTH, a witness for the defendant, testified as follows:

DIRECT EXAMINATION:

My name is T. W. Southworth and I am a traffic officer of Salt Lake City, being in that service about two and one-half years as a traffic investigator. During that time I have conducted and participated in the conducting of tests relating to speed of automobiles and distances within which they may be stopped at different speeds and have records of the results of those tests and have learned concerning distances within which vari-



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ous makes of cars with various types of brakes  
160 may be stopped at different speeds. I have served  
as a witness in testifying as to such speeds and  
stopping distances. Last evening I went to the  
intersection of K Street and Third Avenue, and  
161 made a test of a car driven north on K Street  
immediately south of Third Avenue. I also made  
a measurement of the distance between the south  
curb of Third Avenue and the north wall of the  
162 Gem Grocery. It was 18 feet from the south curb  
line of Third Avenue to the north side of the Gem  
Grocery. I drove an automobile north on K Street  
to the right of the center line of the road to a  
point where I was able to see the intersection of  
163 Third Avenue and L Street. The right side of my  
car was 11 feet west of the curb and I measured  
the distance from the left front hub cap of my  
automobile to the south curb line of Third Ave-  
nue and that distance was 17 feet. I have placed  
upon the blackboard the position of my car,  
with the left front hub cap 17 feet south of the  
south curb line of Third Avenue and the right  
side of my car 11 feet west of the east curb  
of K Street.

164 Q. Mr. Southworth, as a result of your  
testing of automobiles, various types of automo-  
biles using four wheel brakes, what have you  
discovered, if anything, as to whether or not  
different makes of cars, assuming that the brakes

are in good condition, stop or do not stop in substantially the same distance?

A. Yes, they stop in the same distance.

Q. Regardless of make?

A. Regardless of make.

Q. And that has been a fact that you have established from tests that you have made?

A. That is true.

165 Q. And you were driving a Chrysler four-wheel brake car?

A. Yes.

Q. And from your experience and tests that you have made, is there any difference between the distance that such a car will stop and the distance that other cars with four-wheel brakes will stop under the same circumstances and road conditions?

A. There is no difference.

Q. Now, I will ask you again at what rate of speed you were driving your Chrysler car when you were on K Street?

MR. METOS: I make the same objection, as incompetent.

THE COURT: The objection is overruled.

A. At 18 miles per hour.

Q. Where, if any place, on K Street did you apply the brakes on your car?

A. At about 33 feet south of the south curb line of Third Avenue when the brakes first took hold on the road surface.

166 Q. Now, will you tell us within what distance, after the brakes took effect, that your car came to a complete stop?

A. 16 feet.

Q. And can you tell us whether or not your car was still south of the south curb line of Third Avenue when your car came to a stop?

A. It was.

Q. Now, when you made the observation to the east on Third Avenue from the point 17 feet south of the curb line—that is, where the left front wheel hub cap was 17 feet south, from your position in the driver's seat, were you then able to

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see automobiles proceeding east and west on Third Avenue crossing L Street?

A. I was.

167

### CROSS-EXAMINATION

I had heard some remarks after the accident that an accident had happened. I knew that an investigation had been made. I did not know that until after I went down last night.

168

ANDREW T. JACOBSEN, a witness for the defendant, testified as follows:

### DIRECT EXAMINATION

My name is Andrew T. Jacobsen and I am thirty-one years old. I, with my father, operate the Gem Grocery on Third Avenue and K Street.

169

I was in the store on the 27th day of January, 1938, when an accident occurred. I didn't see the accident but heard the crash and immediately went out the front door. The coupe, at least the front wheels, were up over the curb and almost to a large tree which stands in the parking on the northwest corner approximately where the C is on the blackboard. I saw the driver of the coupe. Evidently he had been thrown out of the car. He got into the car and backed it off the parking back into the middle of the road on K Street more or less where the impact perhaps took place. About

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in the center of the street, in the center of K

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Street. After he stopped the car he got out again  
and was on the curb. I heard him make a state-  
ment to one of the officers. I couldn't say which  
172 one. The statement was to the effect that the  
car was in the position then as when it was hit;  
that that is where it stopped after the impact.

### 174 CROSS-EXAMINATION

In referring to the statement that I heard  
I was talking about the man who drove the car  
that was in the accident. I don't know his name.  
The impact occurred approximately where you  
have it.

180 RAY VAN NOYES, a witness on behalf of  
the defendant testified as follows:

### DIRECT EXAMINATION:

My name is Ray Van Noyes and I live at  
765 Third Avenue, Salt Lake City, and lived there  
in January of 1938. My home is between L and M  
Streets on the north side of Third Avenue. I am  
an employee of Salt Lake City in the License De-  
partment and am a special police officer. I recall  
181 an accident that occurred at Third Avenue and K  
Street January 27, 1938, involving a D. A. Af-  
fleck truck. I was on my lawn going down to  
my car to go to work after lunch. My car was  
parked on the north side of Third Avenue facing  
west. I casually noticed the truck and am in

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182 the habit of observing cars. I watched it for 150 feet, somewheres around there. I didn't see the accident. I heard it and looked up. I have had experience in driving cars and in observing the speed of cars. I have made arrests for speeding and given tickets to trucks and automobiles.

183 In my opinion the speed of the truck was 20 or 25 or 30 miles an hour, around there.

184 CROSS-EXAMINATION:

I was going down to my car and was talking to my wife. It was just a matter of observing cars, the license plates on the back, to see if they have city license plates or not. I observed it as I would any other car, any truck goes by I look to see all of them. I check on all the merchants' and everybody elses trucks as they go by. In my judgment it was going between 25 and 30 miles, around there. It would be anywhere between 20 and 30. I figured it was a rate of speed that was within the law. After the car passed me before the crash occurred it was about a period of time running about one of those small blocks, about 400 feet I should judge, one of those small blocks. At the other trial I was asked to come, I think it was by Gerald Irvine. I think he was the attorney at that time. When I took the girls to the hospital I reported the accident to the police station. I don't know how Mr. Irvine knew that I saw the accident. I talked to the police and he

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186

187

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was working for the city. I reported to the police.  
That is all.

NORMA CHAMBERLAIN, a witness on behalf of the defendant, testified as follows:

#### DIRECT EXAMINATION:

My name is Norma Chamberlain and I am 25 years old and live in Salt Lake City. My home is in Cedar Valley but I have lived in Salt Lake five years and am working on Second Avenue.  
188 Vera Cook is in Cedar Valley. I was in the Af-fleck truck the day of the accident. I was sitting next to Kenneth Butte and had been acquainted with him before that day. We went down  
189 Third Avenue and Butte delivered at an address on Third Avenue. We stopped at all stop signs. There is one on N Street and one on Virginia Street. As we were going down Third Avenue we were traveling about 25 miles an hour, at the regular speed. As we approached K Street I saw a car in front of the grocery store. I saw it then  
190 it shot up in front of us. It was near the intersection. I saw it on K Street (referring to Exhibit D) down here at a point at the south end of the line running down the center of K Street in the middle of the street from the south curb line to Third Avenue. At that time our car was at a point at the east end of the dotted line running east in about the middle of Third Avenue.

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192 I have driven an automobile for about eight years. I have lost my driver's license but haven't had it taken away from me. I had a license. I have observed automobiles and speeds of automobiles. I saw the coupe as it came up K Street into Third Avenue. It was going fast, I should judge about 40 miles an hour. It shot up in front of us. Kenneth put down on his brakes and tried to turn off and avoid the accident. He turned north and I didn't know anything after that.

193 CROSS-EXAMINATION:

195 I was acquainted with Mr. Butte and have been to entertainments with him. He passed by in his truck and I got in. Miss Cook and I were sitting on a gingerale box. We were carrying on a general conversation. I did not observe the speedometer but am giving my best judgment as to the speed. The coupe just loomed right up in front.

195½ Q. Now, Miss Chamberlain, do you recall testifying on April 4, 1938, right in this same courtroom, the same place where you are sitting now, in the case of the State of Utah versus Kenneth Butte? Do you recall testifying as a witness in his behalf?

MR. STEWART: I object to the question and assign it as an improper question, and prejudicial misconduct.



MR. METOS: I just want to get the time and place, Your Honor.

MR. STEWART: I ask the court to instruct the jury to disregard the question in the form that it was put.

MR. METOS: This is cross-examination now, and you have to put it in any form.

MR. STEWART: I haven't any objection to your fixing the time and place, and the date.

THE COURT: The objection is overruled.

196 Q. Do you remember being cross-examined by Marion Romney, the District Attorney?

A. Yes. I want to say that the car loomed in front of me, I saw it before it came in front of us. I saw it then it was in front of me.

Q. Did you see it right in front of you? That is what I mean? You saw it when it was in front of you, for the first time?

A. I don't remember.

Q. Now, let me call your attention to this. Right after the accident you made out an affidavit to—you gave a statement to a man by the name of Parkinson, who is an adjuster for an

insurance company?

MR. STEWART: Just a moment.

197 MR. METOS. I want to know.

MR. STEWART: Just a moment, if Your Honor please: I assign that as prejudicial misconduct. Mr. Parkinson is associated with me. I take an exception to counsel's statement and at this time I ask that the jury be discharged; prejudicial misconduct of the worst kind, and counsel there knows it is, or should know it.

THE COURT: The objection is overruled.

Q. You made a statement to him, did you not?

A. Yes.

Q. And you stated to him, when he took your statement, that when you saw the Ford car it was going 35 miles an hour, didn't you?

A. Yes, about that.

198 I don't remember making a statement in answer to Mr. Romney that I didn't make such a statement to Mr. Parkinson. I don't remember making it.

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MR. STEWART: I have her statement here if you want to see it, the original affidavit that she signed, if you want to see it. If you want to see it, I will be glad to let you have it.

MR. METOS: That isn't the one.

MR. STEWART: That is the affidavit that she made to Mr. Parkinson,—the statement she made to him on January 28, 1938.

199 I don't remember telling the police officers  
the car was right in front of us when I first  
saw it. I thought I told them I saw the car and  
then it loomed up in front of me. I don't remem-  
200 ber telling the officers that I was uncertain which  
car was in the intersection first. I remember say-  
ing I did not notice the speedometer during the  
trip. I remember saying that we were near K  
Street still driving at the same speed when a car  
201 loomed up in front of us. I don't remember ex-  
actly what I said.

202 MR. STEWART: I want the record to show  
that the court is permitting the witness to refresh  
her recollection, not from any statement made by  
her, but from a report, or a copy of a report, of  
E. H. Christensen and G. M. Hopkins, and not a  
statement signed by this witness, and she is  
reading a hearsay report signed by the officers.

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It would not be proper to so use such a hearsay report to refresh the recollection of this witness.

MR. METOS: I don't want to refresh her recollection, Your Honor. I just want to show her this thing, and see whether or not she did make this statement.

THE COURT: You may proceed.

Q. (By Mr. Metos) Will you answer that question?

A. I don't remember of saying when I first saw the car that it loomed up in front of me, but I know I saw the car before. I don't remember saying that I saw the car for the first time when it loomed up in front of me.

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### REDIRECT EXAMINATION

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The paper marked Exhibit 4 has my signature on the last page. It is dated January 28, 1938. I was taken directly to the hospital and that is where the officers talked with me. I don't remember signing anything for the officers. They saw me the day of the accident. When Mr. Parkinson talked with me on January 28th he showed me the statement made by Vera Cook. The writing on the last page is written by me. Her statement was correct except in one respect. She didn't see the car but I did. In my statement on January

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28th to Mr. Parkinson I signed that her statment was correct except that I did see the car going north.

MR. METOS: Just a minute, please. I object, Your Honor, on the ground that it is incompetent, irrelevant and immaterial, and hearsay, what she said to Mr. Parkinson.

MR. STEWART: You went into the statement she made to Mr. Parkinson.

THE COURT: The objection is sustained.

MR. STEWART: Exception.

Q. Did you or did you not see the north-bound car before it was right in front of you and as it was entering from the south?

A. Yes sir.

MR. BERNSTEIN: I object to that. Just a minute—let my objection show before she answered the question. I object to it as incompetent, irrelevant and immaterial and repetitious, and not proper redirect examination.

THE COURT: The objection is sustained.

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L. H. PETERSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

My name is L. H. Peterson and I live at 162 I Street. I operate a service station on the corner of Third Avenue and E and was so operating a station on January 27, 1938. I recall the accident at Third Avenue and L Street involving a D. A. Affleck truck. I was half of a small block from where the accident occurred. I was between J and K Street going east. I was driving along probably 20 or 25 miles an hour and slowed up because I had seen those cars traveling pretty fast going up this hill. I have seen so many accidents there. I was going up the street and saw the Franz coupe and the next thing I seen I seen the car, the truck, swirl around there in the middle of the street. I saw the coupe before it reached in front of the Gem Grocery. There is quite a clear vision and I saw the car before it entered the intersection about, oh, 10 feet I should imagine. I have driven a car about twenty years and observed speeds and ridden in them. I would say the coupe was going pretty fast. Yes I do. I should judge 35 to 40 miles an hour. It did not appear to slow down as it entered the intersection. I saw the Affleck truck coming but I couldn't say as to the speed. I couldn't judge its speed anywhere near as accurate as a car going in front of me. I saw the truck and it looked like they weren't going to make it. The car was traveling just a little too fast, I couldn't state how fast the truck was

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traveling. It looked like it was going to be a tie. I was the first one right on the scene. I wouldn't be honest with you to give an estimate as to the speed of the truck. It wasn't going nearly as fast as the other car, I know that, or there would have been something worse happen.

### CROSS-EXAMINATION

I am working for myself. I lease from the Utah Oil & Refining Company. I talked to the officers at the scene of the accident. I don't know  
210 who the officers were. I didn't want to be brought up here on the witness stand, to be honest with you. I remained at the scene of the accident until they took the pictures. They had taken the girls away and were taking pictures. I don't know who was taking pictures. I might have talked with  
211 the officers but don't remember what I said. I came here because Dave Parkinson came down there and was—heard I was up there and I was requested to come today. I took care of Dave Parkinson's car until he moved out of the neighborhood.  
212 Parkinson wanted to find out about the accident. I didn't write anything down. He came down and talked with me and I told him what I knew. I made no written statement. They don't travel pretty fast on Third Avenue because there are so many accidents. They still try to make this hill in high. I have seen them go up E Street.  
213 They try to make it in high. I am right on the

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corner. I see it. I have driven a Ford. I know that a Ford will go 40 miles an hour in second gear. You can go 50 miles an hour in second gear. I was about half way on one of those avenue blocks  
214 between J and K. The truck was coming west, the coupe was going north. There was nothing to stop me from seeing the truck but as I say you cannot tell as near accurate from here to the door as you can from here to across the room. I  
215 saw the coupe coming along here before it entered the edge of that store. You can see at least 10 or 15 feet before the coupe entered the intersection. The car going up K street was traveling pretty  
218 fast. I see them all the time. The majority of people go fast up there. 65 or 70 per cent of the people try to make those avenues on high gear. With the present day automobile they can do it. They can go to the top of Eleventh Avenue and E Street 40 miles an hour right to Eleventh Avenue. They don't generally go fast going east and  
219 west. I didn't tell Mr. Parkinson the coupe was going 45 miles an hour. I told him just the way I saw the car was going. If I told him any speed I said the same speed I am stating right now here in this court, 35 to 40 miles an hour.

### REDIRECT EXAMINATION:

I didn't want to testify in this case. I was very busy today but as a matter of courtesy I came down.



MR. STEWART: I understand it may be stipulated that at the close of the testimony photograph may be taken of the blackboard for the purpose of making such photograph a part of the record in this case.

MR. METOS: And introduce it as an exhibit.

MR. STEWART: Yes, introduce it as an exhibit, and the photograph take the place of the blackboard.

MR. BERNSTEIN: I think before it is done some of those marks should be identified.

MR. STEWART: Anything that isn't sufficient, we have no objection to having them identified, but, at this time, we will offer the blackboard, as Exhibit D in evidence.

THE COURT: Exhibit D may be received.

MR. STEWART: And then the photograph may be substituted in the record.

MR. METOS: That is right.

KENNETH BUTTE, testified in his own behalf, as follows:

## DIRECT EXAMINATION:

My name is Kenneth Butte and I am 26 years old. I am now living in Nevada. On the 27th day of January, 1938, I was driving the Af-fleck truck. The photographs, Exhibit 2 and 3, fairly represent the condition of K Street the day  
222 of the accident. Exhibit 3 fairly represents the condition of K Street looking south.

Exhibits 2 and 3 were offered and received in evidence without objection.

The overall length of a 1936 Ford coupe is  
223 15 feet 6½ inches. The overall width is 5 feet 10 inches. On the day of the accident I was de-livering in the northeast section of the city. I  
224 made the last delivery to Howard D. Travis and offered to take the girls down town. I proceeded west on Third Avenue to Alta Street or Virginia Street and stopped for the sign and then went west on Third Avenue to N Street. I stopped there  
225 for a stop sign. I then proceeded west from N Street at, oh, 25 or 30 miles an hour. I wasn't watching my speedometer all the way but that is my best judgment. I have been more or less familiar with the speed of automobiles without  
226 constantly watching my speedometer. At K Street and Third Avenue I collided with another car. As I was just about to enter the intersection I saw a Ford coupe coming north on K Street. I

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227 saw he wasn't going to stop or try to stop, came right up the middle of K Street at a very good rate of speed and seeing that if I didn't turn to the right and put on my brakes and try to parallel this coupe that he would crash into my left side so I put on my brakes and turned to the right and he caught the left front bumper, the left fender of my car and the front of my car hit his right side just about in front of the back bumper. The bumper must have caught in his car, and the speed of his car just whipped the rear end of my truck right around. Pretty soon the truck just couldn't take it any more and it rolled over on its side. When I first saw this car coming I was about 15 or 20 feet east of the intersection. When I first saw the coupe it was a little further south from the south curb line of K Street than I was east of the east curb line. I imagine it was within, oh, about 35 or 40 feet of the south intersection of K Street. When it entered the intersection I imagine it was going at a pretty good rate of speed, 35 or 40 miles an hour, right in the middle of the road. He didn't put on any brakes and he didn't seem to swerve out or anything, he just came right up the middle of the street. From the time I first saw him and the time of the crash was just a flash. I saw I couldn't miss him if I didn't turn and finally he was right into my left side, and just loomed up in the street, 228 and we hit. I took my foot off the gas as I ap-

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proached the intersection. I put on my brakes and turned to the north. At the time I applied my brakes I don't know exactly the speed, about 25 miles an hour. It could have been a couple miles off from that. I was going slower than he was.

229 I was not in a hurry and neither of the girls requested me to hurry. Neither of them said anything about being late in keeping an appointment.

Q. From the time that you saw this north-bound coupe—when you first saw it—did you do everything that you, in that instant thought that you could do in an effort to avoid an accident?

MR. METOS: I object to that as calling for a conclusion of the witness.

230 THE COURT: The objection is sustained.

The accident occurred approximately in the center of K Street slightly north of the center line of Third Avenue. When the collision occurred the coupe was facing north and my truck was in kind of a northwesterly direction. I observed the tire marks on the road. The mark

231 which runs west on Exhibit D from point Y was not a straight mark. It ran in a kind of a northwesterly direction. It wasn't just a single mark. That single line is wrong. There was more

232 than one mark. There was two. The other mark

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233 was right along here immediately below this dotted line. The tire marks did not run straight east and west. They went straight east and west for a ways and then swerved north.

MR. STEWART: In your opinion, and in your judgment, which car entered the intersection first, your truck or the coupe?

MR. METOS: I object to that as calling for a conclusion.

THE COURT: The objection is sustained.

Q. In your judgment, from what you saw, which car entered the intersection first, your car or the northbound coupe?

MR. METOS: We object to that on the ground it is calling for the conclusion of this witness. The same question as the other.

THE COURT: The objection is sustained.

Q. Do you have an opinion as to what would have been the result so far as the collision is concerned, if you had not applied your brakes and turned your wheels to the right?

MR. METOS: We object to that on the ground it is calling for a conclusion of this witness.

THE COURT: The objection is sustained.

MR. STEWART: That is all.

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## CROSS-EXAMINATION:

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My recollection is a little better than in January, 1938. When my deposition was taken I said that I put on my brakes and swerved to the right and saw this car the first time it was on the intersection. I recall thinking the thing over, the position the cars were in when they hit. I said it was right to my left. I didn't say in my deposition that the first time I saw it was when it was in the intersection. I didn't testify to that, not to my knowledge. I said I saw that car just as a flash. I might have made a statement to the officers that I did not see the car until you got right almost right on it and then saw the car loom right before me. I might have made that statement, I was pretty well jammed up right after the accident. I might have said that I was unable to say how fast the other car was going as it loomed right in front of me. Yes sir I swerved to the north and he did not even apply any brake or anything or decrease his speed, just kept coming. On this particular day I wasn't late. I had not had my lunch yet. I was late for my lunch but wasn't in a hurry. Going down Third Avenue I was in the right zone for traffic, about 10 or 12 feet from the curb in that vicinity.

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256 I didn't swerve my car very far to the north, maybe two or three feet. Yes in my deposition on page 9 I said that as I approached the intersection I saw a car right to my left. I put on my brakes and swerved to the right. It was on the intersection, practically in front of me.

264 REDIRECT EXAMINATION:

When I said in my deposition that the car was to my left I can show you what I meant. When I was about here—when I said the car was to my left, when I got to about the intersection I saw the car to my left down here, meaning to my left as I was proceeding into the intersection. When I said in my deposition just as I got to the intersection I did not mean in the exact instant my front wheels crossed the imaginary curb line. I meant just as I approached the intersection. On page 10 and 11 of my deposition when I was asked whether I saw it right in front of me, I answered, I saw it to my left, and in the next question in answer to the question how far to my left, I answered, oh, not every far, about 20 feet or 30 feet. When I answered the question that I just saw the car as a flash I meant that he flashed right in front of me. When I answered about seeing the tire marks I meant that I did not examine them right after the accident before going to the hospital. In the deposition on page 140 I stated that it was my best

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estimation the car was going 35 or 40 miles an  
270 hour. The right front fender on my truck was  
not damaged.

272 Defendant rests.

296 MR. STEWART: (Jury excused from court  
room) If Your Honor please, I have submitted and  
handed to the court a requested instruction in con-  
nection with the question of insurance, and I  
have done so without waiving the request twice  
made for a mistrial.

At this time I want the record to clearly  
show that at approximately the close or at the  
close of the case, plaintiff's counsel's examination  
of the jury and before I examined them, that  
counsel asked each and every one of the fourteen  
prospective jurors, including all of the women,  
whether they were officers, directors or agents of  
the Northwest Casualty Company; and I assign  
that as prejudicial.

MR. METOS: And stockholders.

MR. STEWART: And stockholders; and I  
assign that as prejudicial misconduct, and re-  
quest the discharge of the jury.

297 Subsequently, and during the trial, counsel  
in asking a question of one of the witnesses,



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stated in substance, or asked in substance, if such witness did not make a certain statement to Mr. Parkinson, the insurance company adjuster, at which time I assigned the asking of any such question as prejudicial misconduct, and again request the court to discharge the jury.

It is my firm belief that the misconduct in the respects mentioned were prejudicial, and that no instruction that the court could possibly give would eradicate from the minds of the jurors the suggestions or implications upon the questions asked both of the jurors and of the one witness referred to, and that those jurors, and each of them, in going into the jury room will have those suggestions and implications in the back of their minds.

In requesting an instruction such as I have requested, or in making any instruction on that subject, I do not do so with the belief that an instruction will cure the error, and we do not waive the motions heretofore made for a mistrial and discharge of the jury, by making such a request.

THE COURT: Let the record show counsel's remarks.

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The blackboard, Exhibit D, was received in evidence without objection. It was also stipulated that the width of Third Avenue was 50 feet instead of 45 as testified to by police officers.

The jury was instructed in part as follows:

No. 11

145        You are instructed that the law imposes a duty on every person who operates an automobile to keep a proper lookout ahead and to exercise ordinary and reasonable care and vigilance under the conditions and circumstances surrounding him, which means that degree of care which the circumstances and surroundings require and which is commensurate with the danger that may be encountered. In this case it was the duty of the defendant, Kenneth Butte, to drive his automobile on said highway, using reasonable care and prudence so that he could avoid injuring anyone or colliding with any person on the highway, and while operating said automobile thereon, it was his duty to keep a careful and prudent lookout for pedestrians and other cars on said highway and intersection and to give warning, if necessary, of his approach with said automobile and to avoid colliding with them, and it was his duty to drive said car at such speed which would permit him to exercise control of the same so as to decrease speed, or to stop, if necessary, in the exercise of due care, to avoid colliding with any person, or other car, on the highway.

## No. 12

146        You are instructed that it is provided by the Ordinances of Salt Lake City that it is unlawful for any person to drive a vehicle in a residential district in excess of 25 miles per hour; and you are instructed that if, in this case, you find by a preponderance of the evidence that at the time and place complained of the defendant, Kenneth Butte, drove his truck at a speed in excess of 25 miles per hour and that such speed was the proximate cause of the accident and injuries resulting in the death of Spero George Saltas, and that the said Spero George Saltas was free from contributory negligence as herein defined, then your verdict must be for the plaintiff and against the defendant.

## No. 13

147        You are instructed that it is provided by the ordinances of Salt Lake City that it shall be unlawful for any person to drive a vehicle on any street in Salt Lake City at a speed greater than is reasonable and prudent, having due regard for the traffic, surface, and width of the highway and the hazard at intersections, and any other conditions existing, and no person shall drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease the speed, or to stop, as may be necessary to avoid colliding with any person,

vehicle, or other conveyance upon, or entering, the highway, in compliance with legal requirements, and with the duty of drivers and other persons using the street to exercise due care; and, if you find from a preponderance of the evidence in this case that the driver of said truck drove said truck in violation of said ordinance and that said violation was the proximate cause of the accident and injuries resulting in the death of said Spero George Saltas, and that the said Spero George Saltas was free from contributory negligence as herein defined, then your verdict must be for the plaintiff and against the defendant.

## No. 14

148

You are instructed that it is provided by the laws of this State that the driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has first entered the intersection. When two vehicles enter the intersection at the same time, the driver of the vehicle on the left shall yield to the driver on the right. You are therefore instructed that if in this case you are satisfied by a preponderance of the evidence that at the time and place complained of the Franz car in which the deceased was riding entered the intersection of Third Avenue and "K" Street before the defendant's truck entered the same, then the Franz car had the right of way over the defendant's truck and it was the truck driver's duty to yield the right of way to

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the Franz car, and if you find by a preponderance of the evidence that the failure of the defendant to yield said right of way to the Franz car, if you shall believe that the Franz car had the right of way, was the proximate cause of the injury to the deceased, then your verdict must be for the plaintiff and against the defendant.

### No. 15

149

You are instructed that the deceased, Spero George Saltas, at the time of the collision, was an invitee, or guest, of Gerald Franz, the driver of the automobile in which he was riding, and if you find from a preponderance of the evidence that the deceased was injured by reason of the negligent acts of the defendant, and as a proximate cause thereof, as alleged in plaintiff's complaint, and that said Spero George Saltas was free from contributory negligence as herein defined, then the fact that the driver of the car in which the deceased was riding, if you find such to be the fact, was also guilty of negligence in the operation of his car and his negligence contributed to the accident and injuries resulting in the death of said deceased, such negligence on the part of Gerald Franz would be no defense in this action, and your verdict must be in favor of the plaintiff and against the defendant.

## No. 17

151        You are instructed that if by a preponderance of the evidence you shall find that at the time the Franz car had entered the intersection of Third Avenue and "K" Street, the defendant's truck was at a point east of said intersection, then you are instructed that the driver of the car in which the deceased was riding was entitled to assume that the driver of the truck would proceed in a lawful manner and yield the right of way to him, and if by a preponderance of the evidence you shall further find that the driver of the truck so failed to proceed in a lawful manner and yield the right of way to the Franz car and that such failure was the proximate cause of the accident and injuries therein complained of, your verdict must be for the plaintiff and against the defendant.

The court refused to give the following instructions requested by the defendant, Kenneth Butte, to which exception was duly taken. (Dft. Tr. 323):

## No. 7

186        While the deceased, Spero Saltas, was a guest in the automobile driven by Gerald Franz, and the negligence, if any, of Gerald Franz is, therefore, not imputable to him, that does not necessarily mean that the defendant is liable in this action in the event you find that defendant was

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negligent. Negligence alone is of no consequence unless it proximately causes or contributes to cause an accident. Defendant may be negligent and such negligence may not be a proximate cause. In order for negligence of a defendant to be the proximate cause of an accident such accident must be the natural and probable result of the negligence of the defendant and be of such character as an ordinarily prudent person would have known or would or ought to have foreseen would probably result in an accident. It is also that cause from which the injury results, unbroken by a sequence of events put in motion by a third person, which defendant could not reasonably have foreseen and expected. Therefore, in this case, even though you find from the evidence that defendant was negligent, yet if the accident was not the natural and probable result of such negligence and the negligence, if any, of the defendant was not of such a character as an ordinarily prudent person would have known or would or ought to have seen might probably result in an accident, but the accident was caused by the independent act of Gerald Franz, which act could not reasonably have been foreseen and expected by the defendant, then such negligence, if any, of the defendant would not be the proximate cause of the accident and your verdict should be for the defendant.

## No. 13

195        You are instructed that if Gerald Franz, the driver of the automobile in which deceased was riding, could in the exercise of reasonable care, have avoided the accident by yielding the right of way or slowing down or keeping a proper look-out or other means, that it was his duty to do so, and if he did not, he was negligent, and if such negligence was the sole proximate cause of the accident, your verdict must be in favor of the defendant and against the plaintiff, although you should also find that the defendant was negligent.

## No. 14

196        You are instructed that the defendant in this action claims that the accident was unavoidable so far as he is concerned, that is, that it was not the result of any negligence on his part, but resulted from a combination of circumstances not the result of any act or failure of said defendant. The law does not permit a recovery for an accident which is unavoidable so far as defendant is concerned, but leaves the loss to be borne by him on whom it falls, and if in this case you find that the accident and resulting death of Spero Saltas was unavoidable insofar as the defendant in this action is concerned, then your verdict must be in favor of defendant.



## No. 15

197           You are further instructed that an accident which could not have been reasonably foreseen or reasonably anticipated as the probable result of negligence is not actionable and creates no liability. Therefore, even though you find in this case that the defendant was negligent, yet if you also find that defendant could not in the exercise of reasonable and ordinary care have foreseen or reasonably anticipated that an accident would probably result from such negligence, but that the accident in fact resulted from a condition over which the defendant had no control and which he could not reasonably have expected would result in causing an accident, then your verdict must be in favor of the defendant.

## No. 18

201           You have been instructed on the duty of the driver of an automobile to keep a careful lookout. In this case, Gerald Franz had the duty in approaching Third Avenue to keep a lookout, particularly for automobiles approaching from his right. A person who attempts to cross an intersection looking directly ahead without looking up intersecting streets for approaching vehicles must be deemed guilty of negligence. While there is no specific standard as to the extent of observation, nevertheless the observation of the driver

of an automobile for approaching traffic should be at the first opportunity and at a point where observation will be reasonably efficient for self-protection. If the circumstances are such that a prudent person would have observed an automobile approaching the intersection and in view of its speed and other circumstances, it would appear to him that such automobile would continue across the intersection, then the failure to keep a lookout and make repeated observations would constitute negligence. The duty is not met by merely looking. He must not only look, but must observe the traffic and the general situation in the vicinity. He must look in such an intelligent and careful manner as to enable him to see what a person in the exercise of ordinary care and caution for the safety of himself and others could have seen under like circumstances. If you find in this case that the said Gerald Franz either failed to keep such a careful lookout for automobiles approaching from his right as in this instruction set forth, or if you find that he looked and failed to see what was visible to be seen had he looked, then the said Gerald Franz was negligent. Also if the said Gerald Franz either saw the truck driven by defendant, or should have seen the same in time to avoid the accident and failed to apply his brakes or otherwise control his automobile in an effort to avoid said accident, the said Gerald Franz was negligent. If you

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202 find that the said Gerald Franz was negligent as in this instruction or in the other instructions set forth and that such negligence on his part was the sole proximate cause of the accident, then your verdict must be for the defendant.

No. 19

200 You are instructed that there is no evidence in this case that the defendant, Kenneth Butte, failed to keep a proper lookout in approaching the intersection of Third Avenue and K Street and that claim of negligence against the defendant is therefore withdrawn from your consideration.

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320 During the argument of Mr. Metos to the jury the following occurred:

MR. STEWART: I want the record to show that counsel is reading from the deposition that was taken before the first trial.

MR. METOS: All right. "When you approached the intersection did you see any car?" That is the question.

MR. STEWART: Now, if Your Honor please, I assign counsel's reading of the deposition as unprofessional conduct on his part, and assign it as error in this case, and ask the court to instruct the jury to disregard it.

MR. METOS: What is the deposition for if we cannot read it?

THE COURT: You are only reading what you asked the witness in this case?

MR. METOS: Yes.

THE COURT: You may proceed.

MR. STEWART: Exception.

321 After the jury left the courtroom at the conclusion of the arguments and before the instructions and exhibits were delivered to the jury, the following took place:

MR. STEWART: Before these instructions are given I would like to have the court approve my showing in the record that Mr. Metos, in his closing argument to the jury, in discussing the question as to whether or not the defendant was at a disadvantage, stated the fact that on the day of the accident an investigator was out at the scene of the accident in this case; and, further, in his closing argument to the jury stated in substance, that the defendant secured an attorney who spends all his time in the defense of this class of cases. May I have the record show that?

THE COURT: Yes, the record may so show.

MR. METOS: Let the record show we deny we made those statements in that language and in that form. I want to show the investigator was out there that day or soon thereafter.

MR. STEWART: The statement that I made was substantially correct.

322 THE COURT: Well, I think with the qualification as to the inspector going soon thereafter, is a proper qualification.

MR. STEWART: Otherwise my statement is correct?

MR. METOS: Yes.

323 MR. STEWART: Comes now the defendant and takes the following exceptions to the court's instructions to the jury:

324 The defendant excepts to Instruction No. 11, and to the whole thereof.

Further excepts to Instruction No. 11, and particularly to the following words: "For pedestrians." Also to that part of said Instruction: "And to give warning." Also to that part of Instruction No. 11, as follows: "And to avoid colliding with them."

Defendant excepts to Instruction No. 12, and to the whole thereof.

Defendant excepts to Instruction No. 13, and to the whole thereof.

Defendant excepts to Instruction No. 14, and to the whole thereof, and particularly the failure in said instruction to include the element of the deceased's own failure to use reasonable and ordinary care, it appearing from said instruction that if the defendant was negligent, as in said instruction described, that plaintiff could recover even though the deceased himself was negligent in failing to use ordinary care for his own safety.

Defendant excepts to Instruction No. 15, and to the whole thereof.

Defendant excepts to Instruction No. 16, and to the whole thereof, and more particularly for the failure to give defendant's requested instruction covering the same subject matter.

Defendant excepts to Instruction No. 17, and to the whole thereof, and particularly excepts to that part reading as follows: "The defendant's truck was at a point east of said intersection."

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The instruction, as given, in effect tells the jury that if the defendant's truck was one foot or one inch east of the east curb line of K Street when Gerald Franz entered the intersection, or was one foot or one inch into the intersection, that defendant was required to yield the right of way.

Defendant excepts to the refusal of the court to give his requested Instruction No. 1.

Defendant excepts to the refusal of the court to give his requested Instruction No. 2, as requested.

Defendant excepts to the refusal of the court to give his requested Instruction No. 4, as requested.

Defendant excepts to the refusal of the court to give his requested Instruction No. 5, as requested.

Defendant excepts to the refusal of the court to give his requested Instruction No. 6.

Defendant excepts to the refusal of the court to give his requested Instruction No. 7.

Defendant excepts to the refusal of the court to give his requested Instruction No. 8, as requested.

Defendant excepts to the refusal of the court to give his requested Instruction No. 11, as requested.

Defendant excepts to the refusal of the court to give his requested Instruction No. 13.

Defendant excepts to the refusal of the court to give his requested Instruction No. 14.

326 Defendant excepts to the refusal of the court to give his requested Instruction No. 15.

Defendant excepts to the refusal of the court to give his requested Instruction No. 16, as requested.

Defendant excepts to the refusal of the court to give his requested Instruction No. 18.

Defendant excepts to the refusal of the court to give his requested Instruction No. 19.

The defendant also excepts to the refusal of the court to submit to the jury special interrogatories, which, if given and answered, would have enabled the court to determine the correctness of the verdict of the jury; that is, whether it was based upon proper application of the law to the facts found by the jury.



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140 &amp;

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On the 12th day of May, 1939, a six to two verdict was returned in favor of the plaintiff and against the defendant, Kenneth Butte, for the sum of \$3,061.00 and judgment was entered thereon.

209

On the 15th day of May, 1939, the defendant, Kenneth Butte, filed his motion herein to set aside the second verdict and reinstate the previous verdict, which motion is as follows:

(Title of Court and Cause)

# MOTION TO SET ASIDE VERDICT AND REINSTATE PREVIOUS VERDICT

TO THE PLAINTIFF ABOVE NAMED AND TO  
HARRY METOS AND SAMUEL BERN-  
STEIN, HIS ATTORNEYS:

The defendant, Kenneth Butte, hereby moves the court to set aside the verdict entered herein on the 12th day of May, 1939, and reinstate the verdict of the jury and the judgment entered thereon, which verdict and judgment was for the sum of \$800.00, upon the following grounds:

1. That the court had no authority or right to make the alternative order to increase the judgment to \$2400.00 or grant a new trial.

2. That the verdict for \$800.00 against the defendant, Kenneth Butte, was not insufficient.

3. That the court could not set up its judgment, opinion or feeling concerning such verdict as against the finding and decision of the jury.

4. That the alternative order was contrary to and against the law.

GERALD IRVINE,  
RALPH T. STEWART,

*Attorneys for Defendant  
Kenneth Butte.*

211 On the 15th day of May, 1939, the defendant, Kenneth Butte, served and filed his motion for a new trial as follows:

(Title of Court and Cause)

NOTICE OF INTENTION TO MOVE FOR AND  
MOTION FOR A NEW TRIAL

TO THE PLAINTIFF ABOVE NAMED AND TO  
H. G. METOS AND SAMUEL BERNSTEIN,  
HIS ATTORNEYS:

YOU, AND EACH OF YOU, WILL PLEASE

TAKE NOTICE that the defendant, Kenneth Butte, one of the defendants in the above entitled

cause, intends to move, and does hereby move, to set aside the verdict of the jury rendered herein on the 12th day of May, 1939, and to grant a new trial in the above entitled cause upon the following grounds, to-wit:

1. Irregularity in the proceedings of the court and orders of the court by which the defendant was prevented from having a fair trial.

2. Abuse of discretion by the court which prevented the defendant from having a fair trial.

3. Newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial.

4. Insufficiency of the evidence to justify the verdict.

5. That the verdict is contrary to and is against the law.

6. Error in law occurring at the trial and excepted to by the defendant.

212      This motion will be and is made and based upon the minutes, records and files of the court

in the above entitled cause and upon affidavits to be hereafter submitted and filed herein.

GERALD IRVINE & RALPH T. STEWART,

*Attorneys for Defendant*

*Kenneth Butte.*

220 May 20, 1939, the motion of the defendant, Kenneth Butte, for a new trial and to vacate second verdict and reinstate original verdict was duly argued and taken under advisement by the court.

233 On the 2nd day of June, 1939, the court denied the motions of the defendant. (See Dft. Tr. p. 2)

224 Three of the jurors upon the second trial made affidavit that during the deliberations of the jury one of the jurors stated that he was in favor of sticking the insurance company and that all of the jurors had in mind that an insurance company would have to pay the judgment.

129 That on the 19th day of April, 1939, an order was duly made and entered herein allowing the defendant, Kenneth Butte, to and including the 15th day of June, 1939, in which to prepare, serve, settle and file his wayside bill of exceptions.

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237

On the 5th day of June, 1939, an order was duly entered allowing the defendant, Kenneth Butte, to and including the 1st day of September, 1939, in which to prepare, serve, settle and file his wayside bill of exceptions.

239

Stipulation providing that the judgment roll upon plaintiff's appeal should be transmitted to the Supreme Court for use of both appellants on their respective appeals.

438

Within the time allowed by law and the orders of the court plaintiff's transcript of the evidence, together with the proceedings, orders and rulings of the court, was settled as a wayside bill of exceptions for the defendant, Kenneth Butte.

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2

On the 2nd day of June, 1939, the motion of the defendant, Kenneth Butte, to set aside the verdict and reinstate the first verdict was denied.

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235

On the 5th day of June, 1939, and within the time allowed by law, the defendant, Kenneth Butte, was allowed to and including the 1st day of September, 1939, in which to prepare, serve, settle and file his bill of exceptions herein.

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On the 25th day of August, 1939, and within the time allowed by law and the orders of the court, the defendant, Kenneth Butte, was allowed

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to and including the 1st day of October, 1939, in which to prepare, serve, settle and file his bill of exceptions herein.

3 It was stipulated that the original judgment roll filed in the Supreme Court should be considered as a part of the record of the defendant, Kenneth Butte, on his appeal and that subsequent proceedings should also be certified to the Supreme Court and considered as a part of the original judgment roll and that all such should be considered and treated as the judgment roll of the defendant, Kenneth Butte, on his appeal.

5 On the 29th day of September, 1939, the defendant, Kenneth Butte, served and filed his Notice of Appeal as follows:

(Title of Court and Cause)

### NOTICE OF APPEAL

TO GEORGE SALTAS, PLAINTIFF HEREIN,  
AND HARRY G. METOS, HIS ATTORNEY,  
AND TO DAVID A. AFFLECK, doing business under the name and style of D. A. Affleck Grocery, ONE OF DEFENDANTS,  
HEREIN, AND STEWART, STEWART AND PARKINSON, HIS ATTORNEYS:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the defendant, Kenneth Butte, one of the defendants herein, hereby appeals to the Supreme Court of the State of Utah from the verdict of the jury entered herein on the 12th day of May, 1939, the judgment entered thereon and the refusal and denial of the undersigned defendant's motion for a new trial, and from the whole thereof, including the granting by the court of the plaintiff's motion for a new trial from the first verdict and judgment entered thereon, which motion was granted on the 2nd day of March, 1939, and including also the refusal to reinstate the first verdict.

This appeal is taken on both questions of law and fact, including proceedings relating to the granting of plaintiff's motion for a new trial, the refusal by the court to set aside the second verdict and reinstate the first verdict.

Dated this 29th day of September, 1939.

GERALD IRVINE,  
RALPH T. STEWART,

*Attorneys for Appellant,  
Kenneth Butte.*

330

## CERTIFICATE OF THE COURT

STATE OF UTAH  
COUNTY OF SALT LAKE } ss.

I, the undersigned, Clarence E. Baker, the judge before whom the above entitled cause was tried, do hereby certify that the foregoing bill of exceptions, consisting of pages 1 to 317, with 17A to 17J, inclusive, contains all of the evidence, both oral and documentary, offered and received in said cause, including all exhibits, which said exhibits and documentary evidence when not attached or contained in the transcript of evidence are treated and considered as attached to and a part of the bill of exceptions, and said proposed bill of exceptions contains all objections made, rulings by the court and exceptions taken and all proceedings on the trial of said cause, and the parties have stipulated that the same may be settled and filed as the defendant's bill of exceptions herein.

NOW, THEREFORE, the same is hereby settled, allowed and approved as and for the bill  
331 of exceptions in the above entitled cause insofar as the same do not otherwise appear in the judgment roll or on record.



Dated this 29th day of September, 1939.  
CLARENCE E. BAKER,  
*Judge.*

ATTEST  
WILLIAM J. KORTH,  
*Clerk*

By C. L. COUNTRYMAN,  
*Deputy Clerk* (Seal)

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(Title of Court and Cause)

7

## CLERK'S CERTIFICATE

I, WILLIAM J. KORTH, Clerk of the above entitled Court do hereby certify that the record in the above entitled case, was on the 24th day of August, A. D. 1939 transmitted to the Supreme Court of the State of Utah, on appeal.

That the hereto attached papers, including the Notice of Cross Appeal, and Bill of Exceptions was filed in this office after the said files had been transmitted to the Supreme Court, and that the same are this date transmitted to the Supreme Court to be made a part of the said record on Appeal.

I further certify that the within appellants did on the 29th day of September, A. D. 1939,

file an Undertaking on Appeal in due form, and that the same was filed on the 29th day of September, A. D. 1939.

WITNESS my hand and the Seal of said court at Salt Lake City, Utah, this 6th day of October, A. D. 1939.

WILLIAM J. KORTH,  
*Clerk Third District Court,*

By ALVIN KEDDINGTON,  
(Seal) *Deputy Clerk.*

# In the Supreme Court of the State of Utah

Case No. 6173

GEORGE SALTAS,

*Plaintiff and Respondent,*

vs.

DAVID A. AFFLECK, doing business under the name and style of D. A. AFFLECK GROCERY,

*Defendant,*

KENNETH BUTTE,

*Defendant and Appellant*

ASSIGNMENTS  
OF ERROR

Comes now the defendant, Kenneth Butte, and upon the record heretofore transmitted to and filed in this court pursuant to the appeal herein, assigns the following errors upon which he will rely for a reversal of the verdict of the jury and judgment entered thereon on the 12th day of May, 1939, which judgment became final on the 2nd day of June, 1939, upon the trial court overruling and denying his motion for a new trial:

## ASSIGNMENT OF ERROR No. 1

The court erred in permitting plaintiff's counsel to interrogate prospective jurors respecting insurance indemnification after it had been made to appear that the insurance policy issued to the defendant, Affleck, did not extend protection to

defendant, Kenneth Butte, and in not holding that such interrogation would be prejudicial to the defendant, Kenneth Butte. (Dft. Tr. 19-23; Ab. 33-44.)

### ASSIGNMENT OF ERROR No. 2

The court erred in permitting plaintiff's counsel to ask each and every one of the fourteen prospective jurors whether or not they were stockholders, officers or employees of the Northwest Casualty Company, particularly after it had been made to appear from the court's examination of such jurors that at least twelve of the fourteen jurors could not possibly have any such connection with any insurance company, and in failing and refusing to discharge the jury on motion of counsel of Kenneth Butte. (Dft. Tr. 23-35; Ab. 35-44.)

### ASSIGNMENT OF ERROR No. 3

The court erred in failing and refusing to grant the motion of the defendant, Kenneth Butte, for a discharge of the jury on motion of the defendant, Kenneth Butte, for misconduct of plaintiff's counsel in interrogating the jury respecting the question of insurance. (Dft. Tr. 296-297; Ab. 111-112.)

### ASSIGNMENT OF ERROR No. 4

The court erred in overruling the objection of the defendant, Kenneth Butte, and in failing

and refusing to discharge the jury for prejudicial misconduct of plaintiff's counsel in his cross-examination of Norma Chamberlain, as follows:

"Q. Now, let me call your attention to this. Right after the accident you made out an affidavit to—you gave a statement to a man by the name of Parkinson, who is an adjuster for an insurance company?

"MR. STEWART: Just a moment.

"MR. METOS: I want to know.

"MR. STEWART: Just a moment, if Your Honor please; I assign that as prejudicial misconduct. Mr. Parkinson is associated with me. I take an exception to counsel's statement and at this time I ask that the jury be discharged; prejudicial misconduct of the worst kind, and counsel there knows it is, or should know it.

"THE COURT: The objection is overruled.

"MR. STEWART: At this time I want the record to clearly show that at approximately the close or at the close of the case, plaintiff's counsel's examination of the jury and before I examined them, that counsel asked each and every one of the fourteen prospective jurors, including all of the women, whether they were officers, directors or agents of the Northwest Casualty Company; and I assign that as prejudicial.

"MR. METOS: And stockholders.

"MR. STEWART: And stockholders; and I assign that as prejudicial misconduct, and request the discharge of the jury.

"Subsequently, and during the trial, counsel in asking a question of one of the witnesses stated in substance or asked in substance, if such witness did not make a certain statement to Mr. Parkinson, the insurance company adjuster, at which time I assigned the asking of any such question as prejudicial misconduct, and again requested the court to discharge the jury.

"It is my firm belief that the misconduct in the respects mentioned was prejudicial, and that no instruction that the court could possibly give would eradicate from the minds of the jurors the suggestions or implications upon the questions asked both of the jurors and of the one witness referred to, and that those jurors, and each of them, in going into the jury room will have those suggestions and implications in the back of their minds.

"THE COURT: Let the record show counsel's remarks." (Dft. Tr. 196, 197, 296, 297; Ab. 96, 97, 111, 112.)

#### ASSIGNMENT OF ERROR No. 5

That plaintiff's counsel was guilty of wilful and prejudicial misconduct in again and in his closing argument to the jury suggesting that the defendant, Kenneth Butte, was defended by an

insurance company which would have to pay the verdict, by following up his examination of the fourteen jurors, his cross-examination of the witness Norma Chamberlain, by a statement not supported by the record, to the effect that an insurance adjuster or investigator was out at the scene of the accident the day it occurred and that defendant, Kenneth Butte, secured an attorney who spends all of his time in the defense of such cases, which record is as follows:

“MR. STEWART: Before these instructions are given I would like to have the court approve my showing in the record that Mr. Metos, in his closing argument to the jury, in discussing the question as to whether or not the defendant was at a disadvantage, stated the fact that on the day of the accident an investigator was out at the scene of the accident in this case; and, further, in his closing argument to the jury stated in substance, that the defendant secured an attorney who spends all his time in the defense of this class of cases. May I have the record show that?

“THE COURT: Yes, the record may so show.

“MR. METOS: Let the record show we deny we made those statements in that language and in that form. I want to show the investigator was out there that day or soon thereafter.

"MR. STEWART: The statement that I made was substantially correct.

"THE COURT: Well, I think with the qualification as to the inspector going soon thereafter, is a proper qualification.

"MR. STEWART: Otherwise my statement is correct?

"MR. METOS: Yes." (Dft. Tr. 321-322; Ab. 123-124.)

#### ASSIGNMENT OF ERROR No. 6

The court erred in permitting plaintiff's counsel, over objection, to read to the jury from the deposition of the defendant, Kenneth Butte, which deposition had not been offered or received in evidence, upon the following record:

"MR. STEWART: I want the record to show that counsel is reading from the deposition that was taken before the trial.

"MR. METOS: All right. 'When you approached the intersection did you see any car?' That is the question.

"MR. STEWART: Now, if Your Honor please, I assign counsel's reading of the deposition as unprofessional conduct on his part, and assign it as error in this case, and ask the court to instruct the jury to disregard it.

"MR. METOS: What is the deposition for if we cannot read it?



“THE COURT: You are only reading what you asked the witness in this case?”

“MR. METOS: Yes.

“THE COURT: You may proceed.

“MR. STEWART: Exception.” (Dft. Tr. 320; Ab. 122-123.)

#### ASSIGNMENT OF ERROR No. 7

The court erred in giving to the jury instruction No. 11, to which instruction defendant duly excepted. (Pff. Tr. 145; Dft. Tr. 324; Ab. 113, 124.)

#### ASSIGNMENT OF ERROR No. 8

The court erred in giving its instruction No. 12, and particularly in instructing the jury that it was unlawful for any person to drive a vehicle in a residential district in excess of twenty-five miles an hour and that if defendant drove his truck at a speed in excess of twenty-five miles an hour and that such speed was the proximate cause of the accident, and that deceased was free from contributory negligence, that a verdict should be returned for the plaintiff, and to which instruction defendant duly excepted. (Pff. Tr. 146; Dft. Tr. 324; Ab. 114, 125.)

#### ASSIGNMENT OF ERROR No. 9

The court erred in giving its instruction No. 13, to which instruction defendant duly excepted. (Pff. Tr. 147; Dft. Tr. 324; Ab. 114, 125.)

## ASSIGNMENT OF ERROR No. 10

The court erred in giving its instruction No. 14, to which instruction defendant duly excepted. (Pff. Tr. 148; Dft. Tr. 324; Ab. 115, 125.)

## ASSIGNMENT OF ERROR No. 11

The court erred in giving its instruction No. 15, to which instruction defendant duly excepted. (Pff. Tr. 149; Dft. Tr. 324; Ab. 116, 125.)

## ASSIGNMENT OF ERROR No. 12

The court erred in giving its instruction No. 17, to which instruction defendant duly excepted. (Pff. Tr. 151; Dft. Tr. 324; Ab. 117, 125.)

## ASSIGNMENT OF ERROR No. 13

The court erred in refusing to give defendant's requested instruction No. 7, to which defendant duly excepted. (Pff. Tr. 186; Dft. Tr. 325; Ab. 117, 126.)

## ASSIGNMENT OF ERROR No. 14

The court erred in refusing to give defendant's requested instruction No. 13, to which defendant duly excepted. (Pff. Tr. 195; Dft. Tr. 325; Ab. 119, 127.)

## ASSIGNMENT OF ERROR No. 15

The court erred in refusing to give defendant's requested instruction No. 14, to which de-

defendant duly excepted. (Pff. Tr. 196; Dft. Tr. 325; Ab. 119, 127.)

#### ASSIGNMENT OF ERROR No. 16

The court erred in refusing to give defendant's requested instruction No. 15, to which defendant duly excepted. (Pff. Tr. 197; Dft. Tr. 326; Ab. 120, 127.)

#### ASSIGNMENT OF ERROR No. 17

The court erred in refusing to give defendant's requested instruction No. 18, to which defendant duly excepted. (Pff. Tr. 201; Dft. Tr. 326; Ab. 120, 127.)

#### ASSIGNMENT OF ERROR No. 18

The court erred in refusing to give defendant's requested instruction No. 19, to which defendant duly excepted. (Pff. Tr. 200; Dft. Tr. 326; Ab. 122, 127.)

#### ASSIGNMENT OF ERROR No. 19

The court erred in holding as a matter of law that the \$800.00 verdict against the defendant Kenneth Butte, was inadequate and in granting plaintiff's motion for a new trial upon the grounds of "inadequate damages appearing to have been given under the influence of passion or prejudice" and in holding that a verdict may be set aside on

the grounds of inadequency. (Pff. Tr. 92, 430, 119; Ab. 27, 28.)

#### ASSIGNMENT OF ERROR No. 20

The court erred in setting up his own personal belief or thought as against the unanimous decision of the jury upon the first trial and as against at least three of the jurors upon the second trial in holding that as a matter of law the verdict of \$800.00 was inadequate, particularly in this case where liability was so questionable that upon the second trial two jurors were unwilling to agree upon any verdict for the plaintiff, one juror upon such second trial was in favor of an \$800.00 verdict and all eight jurors upon the first trial agreed upon an \$800.00 verdict. (Pff. Tr. 92, 430, 119, 224; Ab. 27, 28, 131.)

#### ASSIGNMENT OF ERROR No. 21

The court erred in holding that the verdict in the first trial was inadequate and in granting plaintiff's motion for a new trial when it appeared from the evidence that plaintiff suffered no special damages; that deceased was thirty years of age and plaintiff and two younger sons were earning approximately \$13.00 a day and that damages to plaintiff resulting from deceased's death were purely speculative. (Pff. Tr. 92, 430, 119; Ab. 27, 28.)

## ASSIGNMENT OF ERROR No. 22

The court erred in denying the motion of defendant, Kenneth Butte, to set aside the alternative order providing that a new trial would be granted unless defendant, Kenneth Butte, consented to increase the verdict to \$2400.00. (Pff. Tr. 124, 127; Ab. 29, 30.)

## ASSIGNMENT OF ERROR No. 23

The court erred in proceeding to retry the case as against the defendant, Kenneth Butte, and in refusing to sustain the objection of said defendant. (Dft. Tr. 11-18; Ab. 31, 33.)

## ASSIGNMENT OF ERROR No. 24

The court erred in refusing to set aside the verdict upon the second trial and reinstate the \$800.00 verdict returned in the first trial. (Pff. Tr. 209, 233; Dft. Tr. 2; Ab. 128, 131, 132.)

## ASSIGNMENT OF ERROR No. 25

The court erred in failing and refusing to grant defendant's motion for a new trial. (Pff. Tr. 221, 220, 233; Ab. 129, 131.)

## ASSIGNMENT OF ERROR No. 26

The court erred in overruling defendant's objection to the examination of Officer Hopkins as follows:

"Q. Now, officer, did you go down on K Street and look over towards Third Avenue?

"MR. STEWART: I make the further objection that there is no proper foundation laid. No showing that the condition and visibility was the same, or there were no obstructions at the time the accident occurred which were not present when the witness made the observation.

"Q. Well, officer, did you make the observation that I asked you, about how far you could see over on Third Avenue from K Street?

"MR. STEWART: Just answer that yes or no.

"A. Yes.

"Q. All right now, assuming that there were no obstructions at the scene of the accident, about how far could you see from K Street over on Third Avenue?

"MR. STEWART: We object to that as containing an improper assumption. This witness cannot assume there were no cars there.

"THE COURT: The objection is overruled.

"MR. STEWART: I make the further objection it is incompetent, irrelevant and immaterial, there is no proper foundation laid.

"THE COURT: The objection is overruled.

"MR. STEWART: I make the further objection that the question, if answered, would have no probative value, there being no position fixed, and no basis to make it of any materiality.

"The COURT: The objection is overruled." (Dft. Tr. 43-44; Ab. 46-47.)

#### ASSIGNMENT OF ERROR No. 27

The court erred in sustaining plaintiff's objection to defendant's cross-examination of Officer Hopkins on the following record:

"Q. Did you ask Mr. Franz how his car got from point X to point C and back to point 2?

"MR. BERNSTEIN: We object to this as immaterial.

"THE COURT: The objection is sustained." (Dft. Tr. 55; Ab. 51.)

#### ASSIGNMENT OF ERROR No. 28

The court erred in refusing to discharge the jury and permit the answer of the witness, Gerald Franz, to stand and to have the question and answer read by the reporter in the presence of the jury, upon the following record:

"Q. You haven't any claim against the defendant in this case, of any kind?

"A. No sir, that was taken care of—

"MR. STEWART: Just a moment. I take an exception to counsel asking the question of the witness and answering before I can make an objection, and assign it as misconduct on the part of counsel and ask the court to discharge the jury. The witness started to answer and then answered the question before I had a chance to object.

"MR. METOS: He didn't answer it, I think.

"MR. STEWART: He answered enough of it.

"MR. METOS: I don't want any error in this record. It may go out.

"MR. STEWART: After you brought it out, it is then too late.

"THE COURT: Read the question.

"MR. STEWART: Just a moment. I don't want the answer read right in the presence of the jury.

"THE COURT: Mr. Reporter, will you please read the answer and the question.

(Question and answer read to the court)

"MR. STEWART: I take an exception to the question and answer being read.

"THE COURT: The motion is denied." (Dft. Tr. 82-83; Ab. 56-58.)



## ASSIGNMENT OF ERROR No. 29

The court erred in sustaining plaintiff's objection to the following examination of Gerald Franz:

"Q. All right, you knew, as you approached Third Avenue that it was your duty to yield the right of way to a driver approaching from the right if the car was approaching as close to the intersection as you were?

"MR. METOS: I object to that on the ground that it is calling for a legal conclusion.

"THE COURT: The objection is sustained." (Dft. Tr. 104: Ab.65-66.)

## ASSIGNMENT OF ERROR No. 30

The court erred in sustaining plaintiff's objection to the following cross-examination of the plaintiff:

"Q. Now, between you and Paul and Pete, at the time of Spero's death, you were earning about \$13.00 a day, were you not?

"MR. METOS: I object to that as immaterial and irrelevant and incompetent and entirely prejudicial. I never asked this witness if they made any money or contributed anything to him.

"THE COURT: The objection is sustained." (Dft. Tr. 148; Ab. 73-74.)

## ASSIGNMENT OF ERROR No. 31

The court erred in overruling defendant's objection to the cross-examination of Norma Chamberlain. as follows:

"Q. Now, Miss Chamberlain, do you recall testifying on April 4, 1938, right in this same courtroom, the same place where you are sitting now, in the case of the State of Utah vs. Kenneth Butte?

"MR. STEWART: I object to the question and assign it as an improper question, and prejudicial misconduct.

"MR. METOS: I just want to get the time and place, Your Honor.

"MR. STEWART: I ask the court to instruct the jury to disregard the question in the form that it was put.

"THE COURT: The objection is overruled." (Dft. Tr. 195½; Ab. 95-96.)

## ASSIGNMENT OF ERROR No. 32

The court erred in sustaining plaintiff's objection to the following question asked the defendant, Kenneth Butte:

"Q. From the time that you saw this northbound coupe—when you first saw it—did you do everything that you, in that instant, thought that you could do in an effort to avoid an accident?

"MR. METOS: I object to that as calling for a conclusion of the witness.

"THE COURT: The objection is sustained." (Dft. 229-30; Ab. 107-109.)

### ASSIGNMENT OF ERROR No. 33

The court erred in sustaining plaintiff's objection to the following question asked of the defendant, Kenneth Butte:

"MR. STEWART: In your opinion, and in your judgment, which car entered the intersection first, your truck or the coupe?

"MR. METOS: I object to that as calling for a conclusion.

"THE COURT: The objection is sustained.

"Q. In your judgment, from what you saw, which car entered the intersection first, your car or the northbound coupe?

"MR. METOS: We object to that on the ground that it is calling for the conclusion of this witness. The same question as the other.

"THE COURT: The objection is sustained." (Dft. Tr. 233; Ab. 108.)

WHEREFORE, the defendant, Kenneth Butte, prays that the alternative order made and

entered on the 2nd day of March, 1939, granting the plaintiff a new trial herein be vacated and set aside and that the \$800.00 verdict and the judgment entered thereon on the 23rd day of May, 1938, be reinstated as the verdict and judgment in this case. Appellant further prays that the verdict of the jury and judgment entered thereon in the amount of \$3061.00 on the 12th day of May, 1939, be vacated, set aside and reversed and that this appellant have and recover his costs on this appeal and costs incurred in the second trial herein.

*Respectfully submitted,*

RALPH T. STEWART,

GERALD IRVINE,

*Attorneys for Appellant,*

*Kenneth Butte*

Received copy of foregoing Assignments of  
Error this 2nd day of November, 1939.

HARRY G. METOS,

JOE P. BOSONE,

SAMUEL BERNSTEIN,

*Attorneys for Respondent.*

(Filed November 30, 1939)

# In the Supreme Court of the State of Utah

-----  
GEORGE SALTAS,

*Plaintiff and Respondent,*

vs.

DAVID A. AFFLECK, doing business  
under the name and style of D.

A. AFFLECK GROCERY,

*Defendant,*

KENNETH BUTTE.

*Defendant and Appellant.*

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Appeal from the Third Judicial District Court, in and  
for Salt Lake County, State of Utah  
Honorable Clarence E. Baker, Judge

-----

## Brief of Appellant, Kenneth Butte

-----  
RALPH T. STEWART,

GERALD IRVINE,

*Attorneys for Defendant and  
Appellant, Kenneth Butte.*

HARRY G. METOS,

SAMUEL BERNSTEIN,

*Attorneys for Plaintiff and  
Respondent, George Saltas.*

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