

1940

George Saltas v. David A. Affleck and Kenneth Butte : Brief of Appellant

Utah Supreme Court

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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,

No. 6190

KENNETH BUTTE,
Defendant and Appellant.

Brief of Appellant, Kenneth Butte

STATEMENT

Spero Saltas, thirty-year old son of plaintiff and unmarried, died as a result of an accident occurring about 1:30 p. m. on the 27th day of January, 1938, at the intersection of Third Avenue and K Street, in Salt Lake City, Utah. This action was prosecuted by deceased's father to recover from appellant, Kenneth Butte, and his employer, David A. Affleck, damages alleged to have resulted from the negligence of the defendant.

The accident occurred near the center of the intersection of said named streets while deceased was proceeding north on K Street in a Ford V-8 automobile driven by Gerald A. Franz, and appellant, Kenneth Butte, was driving in a westerly direction on Third Avenue in a delivery truck owned by David A. Affleck.

To plaintiff's complaint, alleging the negligence of appellant, an answer (Dft. Ab. 9) was filed denying negligence and alleging that the proximate cause of the accident was the negligence of Gerald A. Franz in failing to yield the right of way to the automobile entering said intersection from the right, in driving at an excessive speed, in failing to keep his automobile under proper control, and in failing to observe the traffic upon the highway, and particularly the west-bound traffic at said intersection.

Plaintiff had a number of children in addition to deceased, including Paul, age twenty-one, working for the Utah Copper at \$5.00 a day; and Pete, age twenty, working for the B. & G. Railroad at \$5.65 a day. Plaintiff himself earned \$4.25 a day for twenty-two days a month, making total earnings to the family, not including deceased's wages, of about \$13.00 a day. (Dft. Ab. 20, 72-3) Deceased did not live at home all of the time, living a number of months at Cyprus Hall. (Dft. Ab. 83) How much, if anything, deceased contributed to plaintiff was very uncertain, as also was the question of the cause of the accident.

Upon the first trial a directed verdict (Pff. Ab. 15-16) was returned in favor of the defendant, David A. Affleck, for the reason that at the time of the accident, the appellant, Kenneth Butte, was operating the automobile of his employer during his lunch period upon a frolic of his own, in violation of his employer's instructions, and not in furtherance of any business or purpose of his employer, having driven the truck a distance of approximately ten blocks past the place where his employment took him and being then headed to a place an additional ten or twelve blocks further from any place where his employment might call him.

The issues of liability and damages were submitted to the jury as against the appellant, Kenneth Butte, and a unanimous verdict of \$800.00 was returned by the jury. (Dft. Ab. 27)

Plaintiff filed a motion for a new trial, (Pff. Ab. 16-18) claiming inadequate damages, appearing to have been given under the influence of passion or prejudice. A conditional order to increase the judgment to \$2400.00 or grant a new trial was made by the court. (Dft. Ab. 28-9) Appellant filed a motion (Dft. Ab. 29) to set aside such conditional order, which motion was denied, (Dft. Ab. 30) and thereafter objected to a retrial of the action (Dft. Ab. 31) for the reason and upon the ground that the order granting a new trial was improper and that the court had exceeded its jurisdiction and abused

any discretion that might exist, which objection was overruled. (Dft. Ab. 32-3)

Upon a second trial as against appellant, Kenneth Butte only, wherein plaintiff premeditatively and improperly advised the jury of the existence of insurance, a verdict of \$3,061.00 was returned and judgment entered thereon. (Dft. Ab. 128) Appellant thereupon moved (Dft. Ab. 128) to set aside the second verdict and reinstate the first verdict of \$800.00 which motion was denied, (Dft. Ab. 131) and filed his motion for a new trial, (Dft. Ab. 129-130) which motion was also denied. (Dft. Ab. 131)

ERRORS RELIED UPON

The errors relied upon by appellant, Kenneth Butte, may be classified and discussed under the following general headings:

I. That the court was without jurisdiction, or in any event was guilty of an abuse of discretion in granting plaintiff's motion for a new trial as against the defendant, Kenneth Butte, erroneously refused to set aside the conditional order for a new trial, erroneously failed to set aside the second verdict and reinstate the first verdict, and erroneously proceeded with the retrial of said action. (Assignments of Error 19, 20, 21, 22, 23, and 24)

II. That upon the second trial, plaintiff's counsel was guilty of prejudicial misconduct in deliberately conducting his examination of the jurors in such a manner as to tell them, erroneously, that appellant, Kenneth Butte, was insured, in cross-examining the witness, Norma Chamberlain concerning an alleged statement given to "an adjuster for an insurance company," in making a closing argument to the jury wherein he stated in effect that an insurance adjuster or investigator was at the scene of the accident the day it occurred or soon thereafter, which statement was not supported by any evidence, and then telling the jury that defendant's attorney spends all his time in the defense of this class (insurance cases) of cases. The court erred in not discharging the jury as repeatedly requested by appellant's counsel. (Assignments of Error 1, 2, 3, 4, and 5).

III. That the court erred in instructing the jury on the law of the case. (Assignments of Error 7, 8, 9, 10, 11 and 12).

IV. That the court erred in refusing to instruct the jury on appellant's theory and as requested by him. (Assignments of Error 13, 14, 15, 16, 17, and 18).

V. The court erred in erroneously permitting plaintiff's counsel to read from a deposition not offered or received in evidence. (Assignment of Error 6).

VI. Errors in rulings on admissibility of evidence, (Assignments of Error 26, 27, 28, 29, 30, 31, 32, and 33).

VII. Error in denying appellant's motion for a new trial. (Assignment of Error 25).

ARGUMENT

The principal assignments of error relate

1. To the granting of plaintiff's motion for a new trial.
2. To the refusal to discharge the jury at the second trial on account of prejudicial and deliberate misconduct of plaintiff's counsel.
3. Improper instructions given to the jury and proper instructions denied.
4. Rulings on admissibility of evidence.

IMPROPER GRANTING OF NEW TRIAL

We particularly call attention to the fact that Section 104-40-2, Revised Statutes of Utah, 1933, setting forth the grounds upon which a motion for a new trial may be granted does not provide that a new trial may be granted upon "INADEQUATE DAMAGES APPEARING TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE," which was the sole basis for the

granting of the new trial herein; that no showing of passion or prejudice was presented to the court and the court merely was "INCLINED TO THINK * * * THAT THE VERDICT WAS TOO LOW." (Dft. Ab. 28). In view of the extremely questionable case of liability, with clear and positive evidence that Gerald A. Franz was negligent, and unsatisfactory and purely speculative evidence of damage, it cannot be said that the \$800.00 unanimous verdict was such, without other showing, as to disclose that it was the result of passion and prejudice.

We will not set forth the evidence in this brief as even a cursory reading of it will clearly show that the jury could well have found that the sole proximate cause of the accident was the negligence of Gerald A. Franz, the driver of the car in which deceased was riding, in not looking to his right until he "was practically in the center of the intersection" and "believed I could beat it across the intersection." (Dft. Ab. 17) We will only mention that said driver witness endeavored to have appellant's truck driven one hundred to one hundred ten feet while the witness proceeded uphill "ten or twelve feet," (Dft. Ab. 18) at fifteen or twenty miles an hour, and taking all of the testimony into consideration, ample evidence was presented to show that had Gerald A. Franz made any observation whatsoever he would have seen the truck and could have stopped his automobile, at the speed he said he was traveling, before ever reaching the south curblin of Third Avenue. These and other facts disclosed by the evidence are mentioned for the

sole purpose of advising the court that the jury was justified in taking into consideration the questionable liability in arriving at a verdict of \$800.00.

There is an even stronger justification for the \$800.00 verdict. Plaintiff endeavored to claim that this thirty-year old son was his sole support. He testified, "Spero lived in my house. 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. He was the only one that helped. I had four boys going to school, nobody else worked." (Dft. Ab. 19) On cross-examination, plaintiff testified, "I have worked in Bingham thirty years. I have worked regularly for that time except in 1936. I am working regularly now and worked regularly in 1937. My next boy is Paul. He works for the Utah Copper." (Dft. Ab. 19) "He lives at home and helps me sometimes. Paul earns \$5.00 a day. My next boy is Pete. Pete earns \$3.65 a day. I make \$4.25 a day for twenty-two days a month. The total income for myself and two boys is about \$13.00 a day, except when we are only working twenty-two 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." (Dft. Ab. 20). The other boys had stepped in more than a year prior to the date of the accident and had taken over Spero's responsibility. At least, the jury could have so found. The facts developed on the cross-examination of plaintiff showed two things, *first*, a willingness on plaintiff's part to falsify the truth, and, *second*, that he was not financially

dependent upon his deceased son, as he tried at first to make appear. The jury may well have concluded that a little more of the truth as developed upon the second trial was the fact. Attention is called to the testimony of plaintiff upon the second trial, when he finally admitted that deceased had not lived at home as he had previously testified, but had lived for a number of months at Cyprus Hall. (Dft. Ab. 83). It is interesting to note that upon the second trial, plaintiff also admitted that Paul paid rent charged to him by the Utah Copper. (Dft. Ab. 76-77). There was no claim for special damages. Plaintiff was not impecunious or unemployed. Deceased was not his sole support. The jury could have found that the deceased, either while living away from home or at home, was not financially supporting the plaintiff, but that assistance of plaintiff had been taken over by Paul and Pete by reason of Spero's having previously carried his share of financial burden.

Certainly in view of the questionable liability, the facts testified to by plaintiff on the question of financial assistance, including his willingness to extend the truth, it was solely for the jury to determine the pecuniary loss, if any, suffered by plaintiff. The court had some kind of feeling or inclination that the verdict was too low and permitted such feeling to overrule the verdict of eight jurors, who had all the evidence before them, deliberated upon it, and concluded that plaintiff's pecuniary loss under all the circumstances was \$800.00.

In considering the amount of this verdict, your attention is also called to the result upon the second trial. The verdict was six to two, with two jurors holding out for no cause of action, clearly showing questionable liability. The affidavits in support of appellant's motion for a new trial after the second trial showed that one juror of the six returning a verdict was in favor of an \$800.00 verdict, and even upon PLAINTIFF'S PROOF of insurance, and a statement by one juror in the jury room that he was in favor of sticking the insurance company, (Dft. Ab. 131) a verdict of only \$3,061.00 was returned. (Dft. Ab. 128).

The situation is not unlike that in *Hirabelli v. Daniels*, 44 Utah 88, 138 Pac. 1172, which was an action of assault and battery, claiming \$1,000.00 general damages, \$50.00 medical expense, \$18.00 loss of wages, and \$500.00 punitive damages. Plaintiff's testimony was that besides receiving a rather severe injury, he lost \$18.00 for one week's work and paid \$50.00 for a doctor's bill. We are not concerned with the first trial of the case. Upon the second trial, a verdict was returned for \$35.00 actual damages, consisting of \$1.00 for pain and suffering, \$22.00 for medical expense, and \$12.00 loss of wages. There was conflicting testimony as to who was the aggressor in provoking the fight. The court granted a third trial on the theory that the damages were inadequate and not in harmony with the evidence. A third trial resulted in a verdict for \$119.00. The defendant then filed a motion to vacate the judgment and reinstate

the \$35.00 judgment, and, on the court's refusal, to grant a new trial. This motion was denied. A proper record of the proceedings was preserved as in the instant case, and defendant appealed. On appeal the judgment was reversed with directions to reinstate the second judgment on the grounds that "*as to the amount of the damages, the court could not set up his mere opinion or judgment against that of the jury and grant a new trial, because he may have thought the evidence apparently or fairly justified a larger verdict,*" and it could not be said that "the jury in rendering the verdict on the second trial * * * plainly disregarded or misapprehended the instructions or the evidence or acted upon the influence of passion or prejudice." The Hirabelli case is significant in its application to the instant case in that (1) a proper record of the proceedings having been preserved in the instant case, the improper granting of a new trial is reviewable, and (2) \$1.00 general damages for pain and suffering and \$22.00 for *reasonable* medical expenses, although \$50.00 was actually paid, was held not so inadequate as to warrant interference with the verdict by the trial court, there being no fixed rule to measure the amount of damages for the pain suffered, and the question of damages is left to the sound discretion of the jury.

We present two matters for separate consideration, namely (1) that the verdict of \$800.00 in this case, like in the Hirabelli case, was not so inadequate that the trial court could say it was rendered under misappre-

hension or disregard of the court's instructions, or under the influence of passion or prejudice, and the court usurped the functions of the jury and was guilty of an abuse of discretion in granting plaintiff's motion; and (2) the court's order granting a new trial was void, being unauthorized by statute and an illegal invasion of the province of the jury.

A. MEASURE OF DAMAGES IN DEATH CASES

An action for death differs materially from the ordinary common law action for personal injuries in that the measure of damages in each specific case is of necessity highly speculative, uncertain and problematical, and the amount of damages is a question upon which reasonable men may differ. Recovery was unknown to the common law, and our statute, Section 104-3-11, Revised Statutes of Utah, 1933, similar to most death statutes, provides that "such damages may be given as under all the circumstances of the case may be just." Some states only allow as recoverable damages, loss of "financial services and assistance," disallowing loss of "society, comfort, and protection," and "mental anguish, suffering, and bereavement," as being too remote and speculative and incapable of reduction to a monetary equivalent by any accurate method or certain criteria. Other states allow one or both of the last mentioned elements of damage to be considered by the jury in rendering a ver-

dict, notwithstanding the highly speculative nature thereof. Utah falls rather in a middle class, and the measure of damage is loss of "financial services and assistance" and loss measured by a pecuniary standard, if any, of "society, comfort, and protection." Nothing, however, is recoverable in Utah for "mental pain, suffering and bereavement," which is too remote and sentimental to be a proper element of damage under the statute. *Webb v. D. & R. G. W. R. Co.*, 7 Utah 17, 24 Pac. 616. And loss of "society, comfort and protection" cannot be considered if the deceased was not living with the beneficiaries. *White v. Shipley*, 48 Utah 496, 160 Pac. 441, *Burbidge v. Utah Light & Traction*, 57 Utah 566, 196 Pac. 556. Furthermore, any recovery must be for a *pecuniary* and not a sentimental loss. As stated in *White v. Shipley*, *supra*:

"The law awards damages for loss of comfort, society and companionship only in a pecuniary sense and not as solatium. * * * The loss must be such that in contemplation of law it amounts to the deprivation of some service, attention, or care that has in it the element of pecuniary value."

And in *Poole v. Southern Pacific Co.*, 7 Utah 303, 26 Pac. 654, it was said:

"As the testimony did not show that there were heirs living *who were pecuniarily injured by his death*, no recovery should be had, as in that case, no one has sustained any pecuniary loss or injury by his death."

See also *English v. Southern Pacific Company*, 13 Utah 407, 45 Pac. 47. The measure of damages is not the pecuniary value of deceased's life, but rather the pecuniary loss suffered by the plaintiff. This is peculiarly a question for the jury.

In an annotation in *L. R. A. 1916C* at page 810, it is said that such damages

“* * * are difficult of precise proof and in a measure are uncertain and problematical, and what would be a proper compensation for the pecuniary injuries suffered must always, on such proof as can be made, be left to the sound judgment of the jury. In assessing the damages in such cases, the jury are entitled to use their own experience and observation in connection with such light as the evidence may reflect upon the subject, and approximate as near as possible the pecuniary loss, for the matter is necessarily largely left to their sound sense, judgment, and discretion.”

On page 813, it is said:

“Where the question is presented to the court as to whether or not it should interfere with the jury's verdict, its solution does not depend upon whether its judgment as to the amount of damages awarded coincides with that of the jury, and the mere fact that the court, had it been acting as a jury in the particular case, would have assessed the damages at a larger or smaller amount than did the jury, in and of itself, is no ground for interfering with the verdict of the jury. In other words, the court will not impose upon the parties

to the suit its judgment as to the proper amount of damages to be assessed, in the place of that of the jury, who are expressly authorized in that regard by the statute."

Where it can reasonably be found from the evidence that deceased might not have continued to contribute substantial sums of money to his next of kin, jury verdicts from all jurisdictions ranging from several hundred dollars down to nominal damages are held to be binding upon the Court, the jury being entitled to take into consideration the habits of the deceased in saving his money, the size of the estate he had acquired, if any, at the time of his death and that he might have acquired but for his death, the age of his dependents and the possibilities that they might soon be self-supporting, the fact that most or all of deceased's earnings were used up for his own expense and support, the fact that he might have been thrown out of employment at any time, and all of the other factors and uncertainties which go to make up or determine what the actual financial worth of deceased was to those suing for his death.

In *Anderson v. Chicago*, (Neb.) 52 N. W. 840, a nominal verdict for \$1.00 for the death of an unmarried adult brakeman was upheld as being sufficient against the contention that it was inadequate. The court said:

"* * * The damages are not to be estimated by the value of the life lost, but such a sum as the proof shows will compensate the next of kin for the *pecuniary injury* which they have sustained by such death. * * * Deceased, at the time of his

death, was an unmarried adult. * * * There were surviving * * * eleven brothers and sisters, all of whom but two had reached their majority, the most of whom were married. The deceased was addicted to the use of intoxicating liquors, and was careless in his work. * * * He was receiving the sum of \$45.00 per month. The testimony fails to show that he saved his earnings, or that he had been in the habit of making contributions for the maintenance and support of any of his brothers and sisters. * * * Under the proof they were warranted in inferring that the next of kin were not pecuniarily injured by the death of the intestate; hence plaintiff was only entitled to recover nominal damages."

Nebraska, like Utah, allows the jury to consider loss of society and companionship in assessing the damage. *Ensor v. Compton*, (Neb.) 194 N. W. 458.

In *Barksdale v. Seaboard Air Line R. Co.*, (S. C.) 56 S. E. 906, a verdict for \$1,000.00 for the death of an engineer, was held not inadequate. South Carolina goes even further than Utah and most states, and permits the jury in assessing the damages to consider not only loss of society and companionship, but also mental anguish and suffering. *Birchman v. Southern R. R.*, (S. Car.) 54 S. E. 553.

In *Russell v. Tagliavore et al*, (La.) 153 So. 44, a \$500.00 verdict was held not inadequate where decedent left no children. The court said:

“Each case must depend upon its own peculiar facts and circumstances. In the present case, we cannot conceive that plaintiff has suffered damages for the negligent killing of his wife beyond a nominal amount. We think \$500.00 sufficient.”

Louisiana, like South Carolina, permits consideration of mental anguish and suffering of the heirs, and goes even further than South Carolina, allowing physical suffering of deceased. *Aymond v. Western Union Telegraph Co.*, (La.) 91 So. 671, and *Reed v. Warren*, (La.) 132 So. 250.

In *Foglia v. Pittsburgh*, (Penn.) 179 Atl. 871, a verdict for \$500.00 was held to be adequate for the death of a boy who expected to be a laborer. The funeral expenses amounted to \$265.50. Pennsylvania like Utah, allows recovery for loss of society. *Cokley v. Northern Penn. R. Co.*, (Pa.) 5 Clark 444.

In *Leahy v. Davis*, (Mo.) 25 S. W. 941, a verdict of \$175.00 for the death of a seventeen year old boy employed as a teamster was held to be not so inadequate as to warrant a new trial where the funeral expenses amounted to \$55.00 less than the total amount of the verdict. We quote from the case:

“* * * A new trial will not be granted on the sole ground of *smallness of damages* * * * There can be no invariable rule in a case like this. * * * When so much is left to the discretion and experience of the jury, the court should be very cautious in disturbing their judgment.”

At the time of this decision, Missouri, like Utah, permitted the jury to consider loss of society and association.

In *Cuniffe's Exec. v. Johnson*, (Ky.) 132 S. W. (2d) 47, a verdict of \$500.00 was held not so inadequate as to be said to be the result of passion, prejudice, or mistake, where the action was brought by a sister and the deceased had a life expectancy of 16.4 years and earned an average of \$200.00 per month. The court pointed out that damages in a death case are not so easily ascertainable as in a personal injury case, saying:

“Necessarily, such damages are speculative. They depend on many unpredictable factors such as the length of time the decedent would have lived but for the accident, the probable condition of his health thereafter and his ability to work, retention of his employment, amount of his earnings, and amount saved out of his earnings. Many contingencies must be considered, and the jury has a wide field to explore in reaching its verdict. In a case of this kind it is impossible to say with any reasonable degree of certainty what the injury to the estate was. The answer rests on probabilities, and, at best, is a matter of conjecture. It may have been much or little, according to the sequence of events, if the decedent had not been killed, which are unforeseeable.”

In *Burke v. Arcata & M. R. R. Co.*, (Cal.) 57 Pac. 1065, suit was brought by a sister and two brothers, all adults, for the death of the deceased, who was thirty-four years old, in good health, a competent and reliable loco-

motive engineer, unmarried and boarding with one of his brothers immediately before the accident, and on friendly terms with the plaintiffs. It was held reversible error to not submit a requested instruction limiting the damages to a nominal sum. The court among other things said:

“In this country the ruling is nearly unanimous that the statute gives a cause of action, and, if no damages are proven, nominal damages only can be recovered. * * * Let us consider upon what a sea of uncertainty the jury must embark. (1) Would the deceased have had the health to work and accumulate, and would he have done so? He never has saved anything, and it does not appear that he could. (2) May he not have married, and have had children of his own, who would inherit? (3) Might he not by will have disinherited the plaintiffs. And (4) might he not have outlived them? The majority of men die without much property. Whether the deceased would have succeeded in accumulating, and, if he had been successful, would have left it to plaintiffs, is matter of pure speculation. Such a guess as to probabilities is not, according to settled rules and maxims of the law, proper ground for the award of damages. I see no reason why this class of cases should constitute an exception.”

In *Vanek v. Chicago G. W. R. Co.*, 252 Fed. 871, a verdict of \$1.00 was upheld. The court said:

“The deceased was of middle age, in robust health, in full possession of his sight and hearing. * * * It is the settled rule of the Federal Courts that disputed questions of fact are to

be found by the jury, and such findings will not be disturbed by the court unless it was the result of passion, prejudice, or some manifest misconduct. It cannot be said that this verdict of \$1.00 under the circumstances of this case, indicates either passion, prejudice, or misconduct on the part of the jury. * * * The evidence would warrant a much larger verdict beyond a doubt. Indeed, it may be said that had the assessment been made by the court the recovery would have been considerably in excess of the sum awarded by the jury. But the question of damages was for the jury. * * * The verdict should not be disturbed, even though the court may regard it as inadequate unless something is shown which indicates passion, prejudice, or corrupt motive, or that they made an important and manifest mistake."

In *DeLuna v. Union Railway Co. of New York City*, 114 N. Y. S. 893, a verdict of \$189.75, the exact amount of the funeral expenses, was ordered reinstated as not being inadequate. Deceased was thirty-two years of age, unmarried, leaving a brother and two married sisters. She had been employed as a seamstress at \$9.00 a week, and was assistant to the foreman and in line for promotion. She lived with plaintiff and plaintiff's husband and paid for her board. The court said that the damages are "limited to such a sum as the *jury* terms to be fair and just compensation for the pecuniary injuries sustained by the persons for whose benefit the action is brought." The court further went on to say:

“Recognizing the general prospective and indefinite character of these damages and the impossibility of a basis for accurate estimate it allows a jury to give what they shall deem a just compensation * * * the damages to the next of kin in that respect are necessarily *indefinite, prospective, and contingent*. They cannot be proved even with an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. * * * *Human lives are not all of the same value to survivors.*”

In *Swanton v. King*, 72 App. Div. 578, 76 N. Y. S. 528, a \$600.00 verdict was held not inadequate as damages for the death of an unmarried man twenty-two years old, where the evidence showed that for twelve months prior to his death, while living with his father and mother, he had worked steadily for \$9.00 per week, which he brought home to his mother, his next of kin being his father, mother, sister, and four brothers.

In *Rhoads v. Chicago & A. R. Co.*, (Ill.) 81 N. E. 371, a verdict of \$1.00 for the death of a lawyer was held to be not inadequate. The deceased was forty-eight years old, had an earning capacity of \$10,000.00 per year, was unmarried and left surviving him a brother and three sisters.

In *Chesapeake Ohio & S. W. R. Co. v. Higgins*, (Tenn.) 4 S. W. 47, deceased was a capable, skillful, and experienced locomotive engineer. A suit brought by his wife resulted in a verdict of \$500.00. Upon motion a new trial was granted resulting in a \$5,000.00 verdict.

On appeal the Supreme Court set aside the latter judgment and entered judgment for \$500.00, the original verdict, saying: "The verdict of the jury for \$500.00 does not evince passion, prejudice, or corruption authorizing the court to set it aside."

In *Ratushny v. Punch et al*, (Conn.) 138 Atl. 220, it was held that the trial court erred in setting aside a \$1000.00 verdict for the death of a forty-nine year old foreman earning \$42.00 per week where there was no passion or prejudice of the jury shown. The deceased was sober and industrious, in good bodily health, employed at \$42.00 per week at Chase Metal works, where he had been for twenty years and had lost no time in that period. He was an expert drawer and for ten years had been subforeman, and during the last year had earned \$2100.00 and his life expectancy was 21.95 years. The court said:

"The question * * * is not whether this court or the trial court would have come to the same conclusion as the jury reached, but whether the jury was within its proper province * * *. Such problems are peculiarly appropriate for a jury's deliberation. * * * It is not to be overlooked that the pecuniary injuries resulting * * * are difficult of precise proof and in a measure are uncertain and problematical. In assessing damages in such cases, the jury are entitled to use their own experience and observation in connection with such light as the evidence may reflect upon the subject and approximate as near as possible the pecuniary loss, for the matter is necessarily largely left to

their sound sense, judgment and discretion. There was no certainty of future earnings, of work, of health, or even life, and this was a fact to be considered. All these uncertainties made the question."

In the following cases the verdicts indicated were all held not inadequate: *Chesapeake and Ohio Railway Co. v. Williams*, (Ky.) 200 S. W. 451, \$1,000.00 for the death of a bus driver; *Wilkin's Admin. v. Hopkins*, (Ky.) 128 S. W. (2d) 772, \$500.00 for the death of an elderly man earning \$5.94 a day and with a life expectancy of 7.4 years; *Mulchahey v. Washburn Car Wheel Co.*, (Mass.) 14 N. E. 106, \$1.00 for the death of a machinist; *Price v. Glynea & C. Coal & Brick Co.*, 85 L. J. K. B. N. S. (Eng.) 1278—C. A., 225 pounds for the death of a miner, leaving surviving him a widow and a twenty-eight year old daughter; *Smith v. Chicago, M. & St. P. R. Co.*, (S. Dak.) 62 N. W. 967, \$1.00 for an adult child where the father was left surviving; *Powell v. Canadian P. R. Co.*, 7 Sask. L. R. 43, \$1,000.00 for a car repairman, thirty-six years of age, unmarried, and earning \$75.00 per month, leaving surviving his mother, who was seventy-one years and receiving about ten shillings a week from deceased; *Howard v. Delaware & H. Canal Co.*, 40 Fed. 195, \$1.00 for a thirty-seven year old trackman on a railroad, leaving surviving three brothers and two sisters, no wife, children, or parents; *Haley v. Mobile & O. R. Co.*, 7 Baxt. (Tenn.) 239, \$5.00; *Such v. Cleveland, C. & C. R. Co.*, 2 Ohio Dec. Reprint 353, \$150.00 where defendant's lia-

bility was questionable; *Schnable v. Providence Public Market*, (R. I.) 53 Atl. 634, \$750.00 for a five year old boy; *Kinser v. Soap Creek Coal Co.*, (Iowa) 51 N. W. 1151, \$300.00 for a young man twenty years of age, strong, healthy, intelligent, industrious, and saving; *Snyder v. Lake Shore & M. S. R. Co.*, (Mich.) 91 N. W. 643, \$250.00 for a twelve year old boy attending school and in addition assisting at home; *Gubbitosi v. Rothschilds*, 78 N. Y. S. 286, \$200.00 for a six year old boy; *Overholt v. Vieths*, (Mo.) 6 S. W. 74, \$10.00; *Thompson v. Town of Ft. Branch*, (Ind.) 153 N. E. 507, \$1.00; *Atchison, T. & S. F. R. Co. v. Weber*, (Kan.) 6 Pac. 877, nominal damages; *Hartsell v. Harris*, (N. C.) 178 S. E. 120, \$1,000.00 for a twenty-four year old woman employed in a hosiery mill and earning \$15.00 per week; *Purnell v. R. Co.*, (N. C.) 130 S. E. 313, \$1,000.00 for a ten year old boy of bright mind, good health, habits and character, and a fine physique.

In *Webb v. D. & R. G. W. R. Co.*, 7 Utah 17, 24 Pac. 616, it was said:

“The damages, the pecuniary injury in cases under this statute, cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded and the jury is to give such damages as may be just under all the circumstances.”

In the instant case, plaintiff's pecuniary loss on account of the death of his son is purely speculative for the following reasons:

(a) Deceased was unmarried and left no family of his own.

(b) Plaintiff admitted his deceased son had agreed to assist him only until the next older boys were working, and such boys had been working for nearly a year, and, with himself, were earning between \$13.00 and \$15.00 per day. It is not likely this one son would continue to contribute to the support of his family indefinitely when other members of the family had taken over the burden.

(c) Deceased had indicated he would not get married until the other boys were old enough to step in and help, and as they were then helping, the assumption would be that deceased would have married and acquired responsibilities of his own.

(d) Plaintiff had other children living with and aiding him, who would more or less take the place of the son lost through the accident.

(e) Deceased had been living away from home at Cyprus Hall for a number of months.

(f) Plaintiff did not by his complaint assert any claim for special damages.

(g) Up to the time of his death, deceased had not acquired an estate, and the probabilities were that he never would have acquired anything substantial.

(h) Living and other expenses of deceased would probably have taken substantially all his future earnings.

(i) How long deceased would have lived or been employed or helped plaintiff would be pure speculation.

(j) Plaintiff was not entitled to recover anything for solace to his feelings, sorrow or other losses not measurable in money.

(k) Because of plaintiff's apparent willingness to falsify the truth on certain matters relating to damage, the jurors may have been convinced that plaintiff was suffering mostly from an itching palm.

Under these circumstances, the jury evidently concluded that the pecuniary loss suffered by plaintiff was not substantial. Under our practice, particularly where a plaintiff demands a trial by jury, he submits all questions of fact, including the question of damage to the sound judgment and discretion of the jury, and is bound by the verdict returned by it. He is not entitled to have that verdict set aside merely because he is dissatisfied with the amount or the court has a feeling it is not enough. The matter of damages in this case was fairly presented to the jury under proper instructions, not objected to by defendant, and their unanimous verdict was \$800.00. Much smaller amounts have been held not inadequate. There was absolutely no showing of disregard or misapprehension of the instructions given by

the court or that the jurors acted under the influence of passion or prejudice. The evidence sustained the verdict, and the court was not entitled to set up its opinion or judgment against that of the jury, merely because he thought the verdict small or that the evidence *may* have justified a larger verdict. As was done in the Hirabelli case, the verdict rendered on the first trial should be reinstated.

B. THE ORDER MADE BY THE COURT WAS VOID

Let us now consider the validity or invalidity of the order as made by the court. We have pointed out that the Utah Statutes make no provision for the granting of a new trial upon "inadequate damages," and although Section 104-40-7 Revised Statutes of Utah, 1933, provides, "A verdict of jury may also be vacated and a new trial granted by the court * * * when there has been a plain disregard by the jury of the instructions of the Court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice." The order of the trial court was not and could not be made under this statute because:

- (1) There was no showing that there had been a plain disregard by the jury of the instructions of the court or the evidence in the case as to show the verdict

was rendered under the influence of passion or prejudice, and

(2) The court ordered the verdict increased to \$2400.00 or a new trial granted, thus setting up its own verdict in place of the jury's.

This is not the same as an order reducing an excessive verdict to a lower figure, a practice sometimes indulged in, because in such case the jury has already found the reduced sum owing and more, but when the verdict is increased by the court the jury has never rendered a verdict against the defendant for such an amount. The order as made required defendant to pay \$2400.00 or submit to a new trial. In effect, the court said: "You must find more than \$2400.00 damage." We have cited numerous cases holding damages much less than \$800.00, and even nominal damages, as not being inadequate. The court's action was most certainly an unlawful usurpation of the province of the jury and interference with the right of trial by jury and was void.

We submit for separate consideration:

(1) That the verdict of \$800.00 plus costs in this case was not so inadequate that the court could say it was rendered under a misapprehension or disregard of the court's instructions or under the influence of passion or prejudice, and

(2) The court's order granting a new trial was void, being unauthorized by statute, and an illegal invasion of the province of the jury.

EXISTENCE OF INSURANCE INDEMNIFICATION

This court is not concerned as to whether appellant, Kenneth Butte, is, or is not insured, but under the form of policy issued in this case, the Supreme Court of Pennsylvania, under similar facts, has held that insurance protection is not extended to the driver of the car. See *Laroche v. Farm Bureau Mutual Auto Ins. Co.* (Penn.) 7 Atl. (2d) 361. We mention this only because if the question of insurance influenced the jury, it may well be that Kenneth Butte will suffer the consequences of a verdict resulting from a grossly unfair trial. Whether Kenneth Butte or an insurance company pays a verdict, if such verdict results from improper evidence or the injection of improper elements into a case, there has been a failure in the administration of justice.

A reference to Assignments of Error 1, 2, 3, 4, and 5 and the record in the transcript and the abstract shows a deliberate intention prior to the examination of the jurors to "tell" the jury of the existence of liability insurance. (Dft. Ab. 34-35) Then followed a systematic and conscientious fulfillment of that intention in questioning each and every one of the fourteen jurors concerning insurance, after the court by a proper examina-

tion had substantially eliminated the possibility of any of the jurors, with one exception, having any connection with an insurance company. (Dft. Ab. 35-41).

Appellant's counsel then clearly presented to the court the deliberately planned and systematically carried out purpose of plaintiff's counsel and moved for a discharge of the jury, (Dft. Ab. 42-44), but counsel for plaintiff was not satisfied that the jury fully understood his wishes, and during the trial in examining Norma Chamberlain, a witness for defendant (Dft. Ab. 96-97), he asked her if she "gave a statement to a man by the name of Parkinson, who is an adjuster of an insurance company?" The record clearly shows that this was not done in good faith for the purpose of eliciting any information, because when such statement was offered to counsel, he declined to use it, and after the damage was done in asking the question, he withdrew the question.

In conducting his examination of the jurors and the question asked Norma Chamberlain, counsel was guilty of prejudicial and deliberate misconduct, but this still did not satisfy him for he then went entirely outside the record in his closing argument to the jury and stated, "that on the day of the accident or soon thereafter an investigator or adjuster was out at the scene of the accident," (Dft. Ab. 123-124) and still not being satisfied, he endeavored to tell the jury that the appellant was being defended by an insurance company through its counsel,

by stating "that the defendant secured an attorney who spends all his time in the defense of this class of cases." (Dft. Ab. 123).

In addition to moving for a discharge of the jury at the close of the examination of the jury and before the introduction of evidence (Dft. Ab. 42), appellant renewed such motion before the case was submitted to the jury (Dft. Ab. 111). Appellant also presented affidavits in support of his motion for a new trial, showing that the question of insurance has been discussed in the jury room and that one of the jurors had stated he was in favor of "sticking an insurance company." These affidavits are a part of the record. (Dft. Ab. 131)

AUTHORITIES

In presenting this matter, we are fully conscious of the rule in this jurisdiction and others that when the defendant has liability insurance jurors may be examined on voir dire appropriately in good faith concerning their connection with insurance companies, for the purpose of determining their possible prejudice against plaintiff's cause. *Balle v. Smith*, 81 Utah 179, 17 Pac. (2d) 224. This is a qualified privilege, however, and counsel must proceed in the utmost good faith and for the sole purpose of determining the bias or prejudice of jurors, and any attempt to bring insurance before the jury to impress upon them the fact that defendant is

indemnified is misconduct and grounds for a new trial or reversal on appeal. AFTER THE JURY IS QUALIFIED AND THE CASE PROCEEDS TO TRIAL, THERE IS THEN ABSOLUTELY NO CAUSE FOR INJECTION OF "INSURANCE" INTO THE CASE AND ANY REFERENCE THERETO DIRECTLY OR INDIRECTLY IS CAUSE FOR A MISTRIAL, and this applies equally to questions and answers of witnesses or to argument and suggestion in the presence of the jury. There are exceptions, yes, but these exceptions are well defined and may be summarized as follows: (1) where the fact is a necessary incident to some material and proper fact in the case (as in *Reid v. Owens'* (Utah) 93 Pac. (2d) 680, where the reference to insurance was a part of an admission of liability or responsibility which was proved, and perhaps provable only by the admissions of the defendant, W. F. Owens, and the allusion to insurance was so freighted with the admission that it could not be separated.); (2) if the interest of a witness can only be shown by such reference (as where an agent or doctor employed by the insurance company is called as a witness); (3) where the matter comes out through inadvertence as by an *unintentional* and unresponsive answer. (This can hardly be classified as an exception, but the courts sometimes hold a mistrial will not be granted if the trial court promptly handles the situation by instruction or otherwise and it appears there was no prejudice.); (4) where the insurance company is a party to the suit. Otherwise any matter suggestive of insurance injected into the case *during the*

trial is considered misconduct, as depriving the defendant of a fair trial, and constitutes reversible error.

A. EXAMINATION OF JURORS

It is significant that defendant in examining the prospective jurors on voir dire did not pursue a method least suggestive of insurance. In *Balle v. Smith*, this court suggested a procedure sufficient for any proper purpose. It said:

“The examination must be in good faith and precaution taken to ask the questions in such manner as will not convey the impression that the defendant is in fact insured. It would be misconduct on the part of counsel for plaintiff in such actions to so frame his questions that they go beyond what is reasonably necessary to serve the legitimate purpose of eliciting the fact he is entitled to adduce in order to secure a jury free from bias and prejudice. *Daniel v. Asbill*, 97 Cal. App. 731, 276 P. 149. The Supreme Court of Michigan in *Harker v. Bushouse*, 254 Mich. 187, 236 N. W. 222, 224, has suggested a method of conducting the examination of jurors relative to the matter of insurance which we approve as sufficient and proper to give plaintiff the information to which he is entitled and at the same time protect defendant from prejudice. Such a method of examination might well be followed by counsel seeking to elicit such information, or by the trial judge. It is there said:

“‘We also might suggest to the trial judges who so frequently examine the jury on the voir dire that they might make a brief statement calling attention to the fact that some automobile drivers do, and others do not, carry insurance; that under no circumstances should it make any difference whatever as to the outcome of the case whether such insurance is carried or not; that the judge asks the question about to be put in every negligence case, and that he does not know, nor does the asking of the question signify, whether defendant carried insurance; that the law does not permit any further reference to be made to the subject during the trial of the case, but that the plaintiff has a right to know whether any of the members of the jury are officers, employees, or stockholders in any insurance company or members of any mutual insurance company. If, after asking the question, the answer is in the affirmative, further questions may follow and challenges made, if desired. If it is in the negative, the question is disposed of with finality. Such an action on the part of the trial judges should result in the further exclusion of all reference to insurance under penalty of a reversal of the case, should counsel persist in again purposely referring to it. * * * As a rule, there is no necessity of naming an insurance company.’”

Other courts have prescribed similar procedure. In *Bergendahl v. Rabeler*, (S. Ct. of Neb.) 268 N. W. 459, where a judgment was reversed because of improper examination of jurors, it was said:

“To say that such interrogation in this case was made to secure information for use in the

exercise of challenges is not worthy of belief. To allow such an interrogation in all cases because it might in some cases have a legitimate use is to allow the unscrupulous and unethical to use it under a false guise for a purpose that no ethical lawyer would desire to attain. The pernicious, unethical purpose for which an unrestricted right to such an interrogation on voir dire may be used is such that restriction is necessary to an attainment of a proper consideration of issues in actions tried to juries. To deny such a right entirely would work far less perversion of proper verdicts than does its unrestricted use.

“We feel that if such an interrogation is made at all, it should only be made when its legitimate purpose cannot be otherwise attained. We therefore hold that, upon the voir dire examination of jurors in a trial to a jury of an action for damages alleged to have arisen from negligence, counsel should scrupulously avoid any act, statement or question of such a nature as will reasonably inform the jury as to whether or not the defendant is indemnified by one not a party to the action against having to pay any verdict the jury may render against him. * * * *To ask of the juror whether or not he is an agent of or stockholder in any corporation and, if he says he is either, to make inquiry of him as to the kind of corporation to which he bears such relation will usually give all information needed without use of the word ‘insurance.’* This method of inquiry was suggested in *Fielding v. Publix Cars, Inc.*, supra.”

In *Avery v. Collins*, (Miss.) 157 S. 695, it was said:

“The proper means of ascertaining the qualifications of a tendered juror in respect to his insurance connections is to ask him what business he is engaged in and if the answer is, for instance, that he is a farmer, then the further precautionary question may be put to him whether he had any other business or business connections, and, if he answers that he has not, that usually ought to end the privilege so far as inquiry into his insurance connections are concerned.”

To the same effect see *Holman v. Cole*, (Mich.) 218 N. W. 795.

Oklahoma prescribes a similar procedure stated in *Safeway Cab Service Company v. Miner*, 70 Pac. (2d) 76 at page 78.

In the instant case, plaintiff's counsel in examining each and every juror, even the widow of Tommy Williams, County Building elevator operator, and after learning the business and business connections of each juror and the improbability of their having any connection with the Seattle insurance company, asked them if they were stockholders, officers or employees of the Northwest Casualty Company of Seattle, Washington. Such examination was made of housewives, a musician, a tailor, a contractor, a store clerk, a food products district manager, and others solely for the purpose of emphasizing the insurance question. (Dft. Ab. 33-44, Dft. Tr. 19-35).

In *Alexiou v. Nockas*, (Wash.) 17 Pac. (2d) 911, it was said:

“(14) The examination of the jurors by respondent’s counsel constituted reversible error. We cannot countenance such inappreciation of the ethics as counsel manifested. The purpose of his question was, patently, to inform the jury that the loss would fall upon an insurance company instead of the appellant.”

In *Miller v. Kooker*, (Iowa) 224 N. W. 46, similar procedure was held to be reversible error when the prospective jurors consisted largely of farmers and farm wives. The court said that “the references to the matter of liability insurance were prejudicial misconduct, not cured by the plaintiff’s disclaimers or the court’s instructions.”

In *Ryan v. Simeons*, (Iowa) 229 N. W. 667, where eight of the jurors were farmers and had been all of their lives, three were housewives, one of which was retired and another the wife of a common laborer, in reversing the judgment, the court said:

“It would not be fair to learned and distinguished counsel who tried the case for the plaintiff to assume that they really suspected that the farm and laboring men who were being examined on voir dire were stockholders in the Great Western Casualty Company of Ft. Scott, Kansas, or any other or similar organization.”

In *Purcell v. Degenhardt*, 202 Ill. App. 611, it was held that there was no occasion to ask a talesman and a groceryman if they were interested in any insurance or casualty company doing liability business.

Reference to insurance after the jury is qualified and during the course of the trial is strongly indicative of counsel's bad faith in examining the jurors on voir dire.

In *Helton v. Prater's Admin.*, (Ky.) 114 S. W. (2d) 1120, where the examination of the jurors had been similar to that in the instant case and counsel made reference to insurance on his own car in his closing argument, in reversing the judgment the court said:

"We seriously question the sufficiency of the showing made by plaintiff's attorney to show his good faith and to authorize the interrogation of the jurors on the question of insurance, but *when in his closing argument to the jury he made the uncalled-for and unnecessary statement concerning insurance, the real purpose of the voir dire examination was disclosed.* * * * The defendant moved to discharge the jury and continue the case, and his motion should have been sustained. On another trial, all references to insurance should scrupulously be kept from the jury and interrogation of prospective jurors on voir dire concerning insurance should not be permitted unless a satisfactory showing is made that one or more of the jurors maybe connected with or interested in the company in which the defendant was insured, thus furnishing some reasonable basis for

the interrogator's claim of good faith. * * * Usually a method of inquiry can be adopted which will elicit the information sought without conveying to the jury the information that defendant carried insurance."

In *Volkman v. Brosman*, 129 Ill. App. 182, it was said that the purpose of the voir dire examination suggesting insurance "was made obvious in the course of the trial."

See also *Bergendahl v. Rabeler*, (Neb.) *supra*, and *Harris v. Elliot* (Okla.) 61 Pac. (2d) 1089.

In the following cases, misconduct of counsel on voir dire examination, either alone, or coupled with subsequent misconduct required a reversal, the error being incurable by instruction to the jury.

Tom Reed Gold Mines Co. v. Morrison, (Ariz.) 224 Pac. 822;

Arnold v. California Portland Cement Co., (Cal.) 183 Pac. 171;

Pickwick Stage Lines Inc. v. Edwards, (10th C. C. A.) 64 Fed. (2d) 758;

Stewart v. Brune, (8th C. C. A.) 179 Fed. 350;

Eckhart & Swan Milling Co. v. Schaefer's Admin., 101 Ill App. 500;

G. A. Fuller Co. v. Darragh, 101 Ill. App. 664;

Volkman v. Brosman, 129 Ill. App. 182;

Crowley v. Stresenreuter, 174 Ill. App. 538;

Purcell v. Degenhardt, 202 Ill. App. 611;

Bunch v. Abbott, 256 Ill. App. 33;

Mithen v. Jeffrey, (Ill.) 102 N. E. 778;

- Martin v. Lilley*, (Ind.) 121 N. E. 443;
Ryan v. Simeons, (Iowa) 229 N. W. 667;
Miller v. Kooker, (Iowa) 224 N. W. 46;
W. G. Duncan Coal Co. v. Thompson's Admin.,
 (Ky.) 162 S. W. 1139;
Helton v. Prater's Admin. (Ky.) 114 S. W. (2d.)
 1120;
Janse v. Haywood, (Mich.) 259 N. W. 347;
Holman v. Cole, (Mich.) 218 N. W. 795;
Pettit v. Goetz Sales Co., (Mo.) 281 S. W. 973;
Chambers v. Kennedy, (Mo.) 274 S. W. 726;
Wilson v. Thurston, (Mont.) 267 Pac. 801;
Bergendahl v. Rabeler, (Neb.) 268 N. W. 459;
Lassig v. Barsky, 87 N. Y. S. 425;
Rothenberg v. Collins, 146 N. Y. S. 762;
Lipshutz v. Ross, 84 N. Y. S. 632;
Chernick v. Independent American Ice Cream Co.,
 121 N. Y. S. 352;
Gebo v. Findlay, 11 N. Y. S. 950;
Hoge v. Soissions, (Ohio) 192 N. E. 860;
Berry v. Park, (Okla.) 90 Pac. (2d) 425;
Harris v. Elliott, (Okla.) 61 Pac. (2d) 1089;
Alexiou v. Nockas, (Wash.) 17 Pac. (2d) 911;
Lucchesi v. Reynolds, (Wash.) 216 Pac. 12;
Adams v. The Cline Ice Cream Co., (W. Va.) 131
 S. E. 867.

When the case of *Balle v. Smith* was before this court, it is apparent a warning was issued to trial counsel to proceed fairly and cautiously in ascertaining the possible bias of jurors. A suggestive procedure was outlined. The case was one of first impression and, undoubtedly, the court hesitated under the circumstances to say the conduct was deliberate. Counsel have generally

heeded these words of caution, but certainly the time and circumstances shown by the record in this case justify more than another caution, in fact, a condemnation of inexcusable and deliberate misconduct.

Cases should be tried upon facts and the law applicable, not upon an appeal to bias, prejudice, or ignorance. A small verdict on the first trial and two jurors holding out for no cause of action on the second trial justify a conclusion that the jurors were not satisfied either on the question of liability or damages. If prejudicial misconduct was ever resorted to in an effort to secure an unjustified verdict, it is disclosed by the record in this case.

B. QUESTIONING WITNESSES

Wholly aside from any issue in the case, counsel boldly asked the witness, Norma Chamberlain, if she "gave a statement to a man by the name of Parkinson, who is an adjuster for an insurance company?" This was misconduct sufficient in and of itself to require a reversal of the judgment. (Dft. Ab. 96)

Attention is here called to the case of *Berry v. Park*, (Okla.) 90 Pac. (2d) 425, in which the matter came up on voir dire examination of the jurors rather than during the course of the trial, but the language used is so

much like that in the instant case, we feel it merits comment here. During such examination, the following question was asked: "Do you know Mr. Crowe, the adjuster for Mr. Berry, setting over there, the man from Oklahoma City?" In reversing the judgment, the court had this to say:

"The word 'adjuster' has been so closely associated with the term 'insurance' in the investigation and trial or settlement of claims arising out of automobile accidents during recent years that in common parlance or usage and in the minds of the public generally it has become synonymous with or an abbreviated way of referring to an 'insurance adjuster.' * * * Because of this current common knowledge, the slightest intimation under certain circumstances is all that is necessary to transform a suspicion into an actual belief or conviction in the minds of present day jurors that a defendant is insured. For the foregoing reasons, we cannot bring ourselves to the conclusion that counsels' use of the word in question is 'too remote and too far-fetched to attribute to it' any 'pernicious effect' as we said of the use of the same word in *Teeters v. Frost*, 145 Okl. 273, 292 P. 356, 361, 71 A. L. R. 179. * * * In his brief, said counsel argues that his use of the term 'adjuster' in referring to Mr. Crowe effected no further implications than that Crowe was an 'agent' for the defendant. In our opinion such an assertion merely begs the question and makes one wonder why then did counsel not use the word 'agent' instead of a term as suggestive as 'adjuster.' * * * We hold that the question propounded to the jury by the plaintiff's counsel on voir dire examination, which constitutes the

error discussed in the defendant's first proposition, was prejudicial and ground for reversal.

In *Consolidated Motors Inc. v. Ketcham*, (Ariz.) 66 Pac. (2d) 246, on cross examination of one of the defendants, plaintiff's counsel concerning a statement, asked, "Who did you make it to?" The answer, "A lawyer for the insurance company, at that time, Charlie Young." In reversing the case, the court said:

"It will be seen that the rule laid down by us is, that unless it appears that the plaintiff was entirely without blame in creating the situation which caused the reference to the question of insurance, we have always reversed the case whenever the matter was in any way brought to the attention of the jury, regardless of whether it came through a witness for plaintiff or defendant, or upon direct or cross-examination. It is not sufficient that plaintiff did not mean to bring out the prohibited matter, but he must mean not to.

"It is evident from the cross-examination, which referred to a specific signed statement made at a certain time, that counsel for plaintiff had in mind one particular statement of which he had knowledge. We are of the opinion that since this must have been true, it was the duty of counsel, even if the statement itself might be admissible for any purpose, to so carefully guard the manner in which it was introduced as to, if possible, avoid any reference to the insurance company. This he might easily have done by issuing a subpoena duces tecum to the person to whom he knew it was made, and then, since it was a

signed and written statement, identifying it through the testimony of the defendant, and if it in any particular thereof was admissible, offering or using it in evidence. He chose not to do this but went into the matter in such a manner that he should have known it was but natural for the question of insurance to come out during the cross-examination. * * * In view of what we have said as to the highly prejudicial effect of allowing a jury even to surmise from statements made during the trial that back of the nominal defendants there stands an insurance company, and the great care which a plaintiff must use to see that the matter does not come into the case through any fault of his, we are of the opinion that the case must be reversed for a new trial on this ground, regardless of the other assignments of error."

Bluebar Taxi Cab & Transfer Company v. Hudspeth, 216 Pac. 246, and *Fike v. Grant*, 8 Pac. (2d) 242, both from the State of Arizona, are to the same effect.

Ward et al v. Haralson et al, (Ark.) 120 S. W. (2d) 322;

"(5) There is one other matter we feel constrained to mention which would call for a reversal of the judgment even though the record was otherwise free from error. In the cross-examination of appellants' witness, Bowden, by one of counsel for appellees, this occurred: 'Q. You went out there, representing the State of Arkansas, representing the defendants and an insurance company, and made those measurements?' to which objection was made, and the court said:

'That is improper and you better not make any other remarks like that.' An exception was taken and counsel asked for a mistrial on those remarks, to which the court replied: 'If he does it again I will grant a new trial.'

"The statement of counsel for appellees, injecting into the case the fact, if it be a fact, that appellants had insurance coverage, was wholly inexcusable, uncalled for by anything that had previously occurred in the case, and was highly prejudicial. We think the remarks of the court were not sufficient to remove the prejudice and that a mistrial should have been declared. The obvious and only purpose in making the statement was to advise the jury that an insurance company would have to pay any judgment rendered. This was error."

In *Peay v. Panich*, (Ark.) 87 S. W. (2d) 23, it was asked: "Q. Mr. Henson has shown you a statement you signed that was made before an insurance adjuster, who called on you shortly after the accident? Mr. Henson: 'Defendant objects to the question as being prejudicial and asks the court to declare a mistrial.'" Although the trial court admonished the jury, the appellate court held that there was reversible error and the prejudice was not removed.

In *Poland v. Dunbar*, (Maine) 257 Atl. 381, counsel for the defense had introduced without objection a statement of the plaintiff unfavorable to her case. On cross-

examination, plaintiff's counsel after having plaintiff identify her signature asked: "'After the statement was made and signed, did you then learn who this man represented?' A. 'I did.' Q. 'And whom did he represent?'" and over defendant's objection, she answered, "'The insurance company.'" The court held this reversible error.

In *Simpson v. Foundation Company*, (N. Y.) 95 N. E. 10, there was reversible error where it was brought out in the evidence that certain statements had been made and conversations had with employees of a certain insurance company.

In *Manigold v. Black River Traction Company*, 80 N. Y. S. 861, the question was asked: "Didn't Dr. Rockwell go there to try and settle with Manigold, and wasn't he representing the insurance company back of this company?" The court said:

"In order to protect the defendant, its counsel was forced to object to the question and yet by doing so, he in effect admitted the fact."

Dr. Rockwell was not a witness in the case, and,

"No other conclusion can be reached than that the witness was asked and the statement made by plaintiff's counsel for the sole purpose of getting before the jury a fact which he was not entitled to and for the purpose of improperly influencing its action."

See also:

Levy v. J. L. Mott Iron Works, 127 N. Y. S. 506;
 Wilkins v. Schwartz, (W. Va.) 132 S. E. 887;
 Fleming v. Hartrick, (W. Va.) 141 S. E. 628;
 Wiersema v. Lockwood & Strickland Co., 147 Ill.
 App. 33.

In each of the California cases of *Citti v. Bava*, 266 Pac. 954, *Squires v. Riffe*, 287 Pac. 360, *Rising v. Veatch*, 3 Pac. (2d) 1023, and *Schlenker v. Egloff*, 24 Pac. (2d) 224, it was held that the matter of insurance being injected into the case was prejudicial error based upon the fact that the attorney for the plaintiff knew or was presumed to have known that the answer of the witness would refer to the matter of insurance, and that he intentionally asked the objectionable question for that purpose and the fact that the matter was sought to be brought in under guise of an admission was no excuse. In the *Citti* case, it was said:

“The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant.

“It is impossible for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted.”

In the *Rising* case it was said:

“The courts have so frequently, and in the strongest terms, condemned the eliciting of evidence concerning insurance against liability carried by defendants that no excuse can be conceived for counsel bringing it out, and the practice is so recurrent as to call for the sternest measures by both trial and appellate courts whenever it occurs.”

In *Hankins et al v. Hall*, (Okla.) 54 Pac. (2d) 609, judgment was reversed where it was brought out through questioning a witness that a gentleman from an insurance company had taken a statement.

In *Allen v. Wilkerson*, (Mo.) 87 S. W. (2d) 1056, the question was asked: “I want you to state to the jury whether or not you signed any report or statement for this insurance adjuster who came and talked with you?” The court said:

“Inasmuch as no legitimate purpose could be subserved by the development of the insurance features and the only effect it could have was that it would impress the jurors’ minds with the idea that the woman defendant was not really interested in the outcome of the case and that an indemnity insurance company would have to bear the loss in any event, it necessarily follows that its effect could not be otherwise than harmful to the defendant’s side of the case.”

In *Trent v. Lechtman Printing Company*, (Mo.) 126 S. W. 238, in cross examination of one of defendant's witnesses, counsel in referring to one of defendant's attorneys asked: "When he came down, didn't he say that he had been sent there by the insurance company to investigate the matter?" Judgment reversed.

In *Cameron v. Pacific Lime and Gypsum Company*, (Ore.) 144 Pac. 446, it was held reversible error where there was an intentional effort on counsel's part on cross-examination, to bring out that a certain statement was given to an agent of the insurance company.

In *Wilson v. Wesler*, (Ohio) 160 N. E. 863, in cross-examining a witness, after asking about certain facts concerning the accident, counsel asked: "'Didn't you report to your Insurance Company that you went straight catercornered across that corner?' A. 'No, Sir, I did not.' The trial court at that time instructed the jury that the question was improper and that they should disregard it." In reversing the judgment on appeal the court said:

"The only purpose to which this question could have been asked was to have it brought to the attention of the jury that an insurance company was defending the action."

In *Stoskoff v. Wickland*, (N. Dak.) 193 N. W. 312, it is said:

“By objection, the matter was particularly called to the attention of the jury. On the other hand, a party should not be deprived of his privilege to urge a valid objection because a greater prejudice might follow. He should not be subject to a possible penalty for insisting upon a proper regard for his rights. Rather the penalty, if penalty there be, should be visited upon the real party at fault.”

In *Georgeson v. Nielson*, (Wis.) 260 N. W. 461, it was said:

“The situation is one that all too frequently arises. A remark is made by counsel, known by him to be improper and made with intent and expectation that it will improperly influence the jury to the advantage of his client and the disadvantage of the opposing party. No extraneous evidence is needed to establish such intent. If such result is not intended, why are such remarks made? Objection to the remark of opposing counsel enhances likelihood that the intended effect will be produced both by attracting attention to it and by invoking a repetition. The remark being made, or made and repeated, the intended effect is probably produced. * * * Even a reprimand to offending counsel ‘does not cure the wrong done to litigants’ by prejudicial remarks.”

The following cases hold misconduct of counsel in questioning or eliciting answers from witnesses injecting the matter of insurance directly or indirectly into the case during the course of the trial and in the presence of the jury is inexcusable and so prejudicial, particularly where

there is a conflict in the evidence as to defendant's liability, as to require a new trial or a reversal of the judgment, and an instruction cannot cure the error.

- Watson v. Adams*, (Ala.) 65 So. 528;
Blue Bar Taxi Cab & Transfer Co. v. Hudspeth,
 (Ariz.) 216 Pac. 246;
Fike v. Grant, (Ariz.) 8 Pac. (2d) 242;
Consolidated Motors Inc. v. Ketcham, (Ariz.) 66
 Pac. (2d) 246;
Ward v. Haralson, (Ark.) 120 S. W. (2d) 322;
Peay v. Panich, (Ark.) 87 S. W. (2d) 23;
Nichols v. Smith, (Cal.) 28 Pac. (2d) 693;
Citti v. Bava, (Cal.) 266 Pac. 954;
Squires v. Riffe, (Cal.) 287 Pac. 360;
Rising v. Veatch, (Cal.) 3 Pac. (2d) 1023;
Schlenker v. Egloff, (Cal.) 24 Pac. (2d) 224;
Coe v. VonWhy, (Colo.) 80 Pac 894;
James Stewart & Co. v. Newby, (4th C. C. A.) 266
 Fed. 287;
Crossler v. Safeway Stores, (Ida.) 6 Pac. (2d) 151;
Wiersema v. Lockwood & Strickland Co., 147 Ill.
 App. 33;
Rudd v. Jackson, (Iowa) 213 N. W. 428;
Rutherford v. Gilchrist, (Iowa) 255 N. W. 516;
Floy v. Hibbard, (Iowa) 287 N. W. 829;
Coffman v. Shearer, (Kan.) 34 Pac. (2d) 97;
Forsyth v. Church, (Kan.) 42 Pac. (2d) 975;
Star Furniture Co. v. Holland, (Ky.) 117 S. W.
 (2d) 603;
Poland v. Dunbar, (Maine) 157 Atl. 381;
Herrin v. Daly, (Miss.) 31 So. 790;
Whatley v. Bovlas, (Miss.) 177 So. 1;
Allen v. Wilkerson, (Mo.) 87 S. W. (2d) 1056;

- Trent v. Lechtman Printing Company*, (Mo.) 126 S. W. 238;
Olian v. Olian, (Mo.) 59 S. W. (2d) 673;
Rytersky v. O'Brine, (Mo.) 70 S. W. (2d) 538;
Robinson v. McVay, (Mo.) 44 S. W. (2d) 238;
Vonault v. O'Rourke, (Mont.) 33 Pac. (2d) 535;
Gerry v. Newgebauer, (N. H.) 136 Atl. 751;
Young v. Osgood, (N. H.) 163 Atl. 398;
Manigold v. Black River Traction Co., 80 N. Y. S. 861;
Simpson v. Foundation Co., (N. Y.) 95 N. E. 10;
Chernick v. Independent American Ice Cream Co., 121 N. Y. S. 352;
Levy v. J. L. Mott Iron Works, 127 N. Y. S. 506;
Hordern v. Salvation Army, 109 N. Y. S. 131;
Loughlin v. Brassil, (N. Y.) 79 N. E. 854;
Stoskoff v. Wicklund, (N. D.) 193 N. W. 312;
Wilson v. Wesler, (Ohio) 160 N. E. 863;
Hankins v. Hall, (Okla.) 54 Pac. (2d) 609;
Brotten v. White, (Okla.) 75 Pac. (2d) 474;
Dolliver v. Lathion, (Okla.) 82 Pac. (2d) 675;
Rosumny v. Marks, (Ore.) 246 Pac. 723;
Cameron v. Pacific Lime & Gypsum Co., (Ore.) 144 Pac. 446;
Ross v. Willamette Valley Transfer Company, (Ore.) 248 Pac. 1088;
Zeller v. Pickovsky, (S. D.) 268 N. W. 729;
Gose v. Ballard, (Tex.) 12 S. W. (2d) 1067;
Texas Co. v. Betterton, (Tex.) 88 S. W. (2d) 1038;
The Fair v. Preisach, (Tex.) 77 S. W. (2d) 725;
Water Light and Ice Co. of Weatherford v. Barnett, (Tex.) 212 S. W. 236;
Page v. Thomas, (Tex.) 71 S. W. (2d) 234;
Beaumont Traction Co. v. Dilworth, (Tex.) 94 S. W. 352;
Carter v. Walker, (Tex.) 165 S. W. 483;
Roman v. J. G. Turnbull Co., (Vt.) 131 Atl. 788;

Lanham v. Bond, (Va.) 160 S. E. 89;
Iverson v. McDonnell, (Wash.) 78 Pac. 202;
Wesley v. Washington Brick, Lime & Man. Co.,
 (Wash.) 82 Pac. 271;
Birch v. Abercombie, (Wash.) 133 Pac. 1020;
Shay v. Horr, (Wash.) 139 Pac. 604;
Wilkins v. Schwartz, (W. Va.) 132 S. E. 887;
Atkins v. Bartlett, (W. Va.) 132 S. E. 885;
Papke v. Haerle, (Wis.) 207 N. W. 261.

C. ARGUMENT TO THE JURY

Wholly outside the record, counsel in his closing argument stated: "On the day of the accident, or soon thereafter, an investigator or adjuster was out at the scene of the accident." (Dft. Ab. 123-124). And still not being satisfied, he endeavored to tell the jury that the appellant was being defended by an insurance company through its counsel by stating: "That the defendant secured an attorney who spends all his time in the defense of this class of cases." (Dft. Ab. 123). This was misconduct itself sufficient to require a reversal and being coupled with misconduct in examination of jurors and questioning witnesses requires a reversal of this case.

Wagnon et al v. Brown, (Okla.) 36 Pac. (2d) 723:

"(3) Assignment 6 is based on the following remark of plaintiff's attorney in his closing argument to the jury:

"I may in my weak way be unable to answer the argument of Mr. Sandlin, and with all these other counsel here for the insurance people."

“Counsel for defendants objected to the reference to insurance and the objection was sustained; the court also instructed the jury to disregard any evidence to which it had sustained objection.

“* * * For reasons which are fully set forth in that opinion, we hold that assignment of error No. 6 should be sustained.

“This cause is reversed and remanded for new trial.”

In *Messinger v. Karg*, (Ohio) 192 N. E. 864, it was argued to the jury that “she (meaning Mrs. Messinger) is just trying to defend herself. Maybe these folks have her scared by trying to make her believe she has to pay. * * *” The judgment was reversed for misconduct of counsel, there being conflicting testimony on the issue of negligence in the case, the court pointing out:

“It might well be that the insurance company would have some defense, or as sometimes happens in these days, it might prove to be insolvent.”

and thus the responsibility of paying falls on the defendant personally.

In *Brotherhood of R. R. Trainmen v. Brown*, (Okla.) 38 Pac. (2d) 529, where counsel during his argument to the jury suggested the defendant might be under bond, in reversing the judgment, the court said:

“‘In a suit for personal injuries, after the jury has been sworn and placed in the jury box, no references should be made as to whether or not the defendant carried insurance, and if such references are made it is reversible error, although the trial court instructs the jury not to consider the same.’

“This sort of argument we cannot approve. It is not harmless error. It is like a rapier thrust in a vital spot and then withdrawing the blade with apologies. Lawsuits should be won on their merits, and not by ingenious argument fraught with unfair assertions sought to procure an unfair advantage over one’s adversary based upon propositions that in the very nature of things counsel should know is not, and could not be, competent testimony in the case. As above stated, neither an attorney nor his client should be permitted to gain an advantage by such conduct.”

In *Ingerich v. Mess*. (2nd C. C. A.) 63 Fed. (2d) 233, in reversing the judgment for improper argument, it was said:

“(4) In summing up to the jury, the attorney for the plaintiff seized the opportunity to say, ‘We have sued here merely for \$5,000.00 for reasons which we cannot explain, which we are not permitted to explain;’ and, after alluding to the injuries the plaintiff had sustained, urging the jury to award the full amount sued for, and stating that the actual damages sustained were ‘many thousand more,’ to say, in speaking of the defendant, that ‘while my friend has been shedding crocodile tears for John Mess, this nice boy here,

we do not even want a button off his vest.' The defendant immediately moved for a mistrial, but his motion was denied. Plainly these remarks had but one purpose. That was to convey to the jury the information that a verdict for the entire *ad dumnum* would be for no more than the amount of the insurance carried by the defendant."

In *Standridge v. Martin*, (Ala.) 84 So. 266, where counsel's argument to the jury was suggestive of insurance, the judgment was reversed, the court saying:

"Such a subject once lodged in the minds of the jury is almost certain to stick in their conscience and to have its effect upon their verdict, regardless of any theoretical exclusion of it by the trial judge."

In *Edwards v. Earnest*, (Ala.) 89 So. 729, plaintiff's counsel in argument indirectly by illustration mentioned insurance and the fact that a Mr. Trockmorton was in the insurance business. There was reversible error and the admonitions of the trial judge could not eradicate the error.

The following cases hold misconduct of counsel in suggesting directly or indirectly in argument to the jury that there is insurance in the case, either alone, or together with the mentioning of insurance through witnesses or on voir dire examination of jurors, particularly where there is a conflict in the evidence on the issue of liability, is inexcusable and so prejudicial as to require

a new trial or a reversal of the judgment, and an instruction cannot cure the error.

- Standridge v. Martin*, (Ala.) 84 So. 266;
Edwards v. Earnest, (Ala.) 89 So. 729;
Pickwick Stage Lines Inc. v. Edwards, (10th C. C. A.) 64 Fed. (2d) 758;
Ingerick v. Mess, (2nd C. C. A.) 63 Fed. (2d) 233;
Volkman v. Brossman, 129 Ill. App. 182;
Emery Dry Goods Co. v. DeHart, 130 Ill. App. 244;
Turner v. Lovington Coal Mining Co., 156 Ill. App. 60;
Briggs v. Golden Cream Dairy, (Ill.) 19 N. E. (2d) 126;
Ryan v. Simeons, (Iowa) 229 N. W. 667;
McCornack v. Pickerell, (Iowa) 283 N. W. 899;
Pool v. Day, (Kan.) 40 Pac. (2d) 396;
Fidelity & Deposit Co. of Md. v. Commonwealth, (Ky.) 21 S. W. (2d) 452;
Easton v. Medema, (Mich.) 224 N. W. 636;
Bergendahl v. Rabeler, (Neb.) 268 N. W. 459;
Stanley v. Whiteville Lumber Co., (N. Car.) 114 S. E. 385;
Messinger v. Karg, (Ohio) 192 N. E. 864;
Wagon v. Brown, (Okla.) 36 Pac. (2d) 723;
Harris v. Elliott, (Okla.) 61 Pac. (2d) 1089;
Leonard v. Stepp, (Okla.) 53 Pac. (2d) 1110;
Yoast v. Sims, (Okla.) 253 Pac. 504;
Brotherhood of R. R. Trainmen v. Brown, (Okla.) 38 Pac. (2d) 529;
Burgess v. Germany-Ray-Brown Co., (S. Car.) 113 S. E. 118;
Kloppenburg v. Kloppenburg, (S. Dak.) 280 N. W. 209;
Coon v. Manley, (Tex.) 196 S. W. 606;

Texas & N. O. R. Co. v. Owens, (Tex.) 54 S. W. (2d) 848;

Landry v. Hubert, (Vt.) 137 Atl. 97;

Rinehart & Dennis Co. Inc. v. Brown, (Va.) 120 S. E. 269;

Georgeson v. Nielson, (Wis.) 260 N. W. 461.

IMPROPER INSTRUCTIONS

I. The court's instruction No. 11 (Dft. Ab. 113) legally and practically instructed the jury that appellant, Kenneth Butte, was required to drive the automobile truck "so that he could avoid injuring anyone or colliding with any person on the highway," that is, so as to avoid an accident resulting from any danger that might be encountered. Appellant's duty in the operation of his automobile was to operate the same *in a reasonable and prudent manner*, so as to avoid injuring any person upon the highway and in the exercise of due care, and was not *to avoid injuring anyone or colliding with any person*, if such persons were not in the exercise of due care, at least unless and until appellant had an opportunity of knowing that such other persons were not exercising due care and at which time an accident could then be avoided. Stating it another way, this instruction and particularly the language above quoted, and the portions particularly excepted to (Dft. Ab. 124) failed to take into consideration the right of the defendant to assume that all other persons would lawfully use the

highway and would exercise reasonable and ordinary care until put upon notice to the contrary.

It is the rule in this jurisdiction and others, that one has a right to assume that others using the highway will obey the law of the road and exercise ordinary care and when two automobiles approach an intersection at approximately the same time, the driver on the right (having the statutory right of way) has the right to assume that the disfavored driver (on the left) will obey the law of the road and not approach at an excessive speed nor dart in front of the other car, but will yield the right of way to him, and such driver coming into the intersection from the right may proceed acting on such assumption until reasonably put on notice to the contrary.

In *Ferguson v. Reynolds*, 52 Utah 583, 176 Pac. 267, it was said:

“ * * * The plaintiff had a right to assume that the driver of the automobile would exercise ordinary care in driving the car. This certainly is the law everywhere. No one using a public street or being lawfully thereon is required to assume otherwise than that all persons using the same will exercise ordinary care in doing so and will not expose any one on the street to unnecessary danger.”

In *Williams v. Globe Grain & Milling Company*, 64 Utah 82, 228 Pac. 192, it was held that the plaintiff

approaching from the right, even if the other vehicle could or should have been seen "would not alone preclude his recovery, because it would remain for the jury to say whether under all the circumstances the plaintiff was justified in depending upon defendant's driver observing his duty to keep his omnibus under control and yield the right of way to plaintiff," and it was error to direct a verdict in favor of defendant, who had approached from plaintiff's left.

In *Barrett v. Alamito Dairy Co.*, (Neb.) 181 N. W. 550, recovery in favor of the plaintiff who was approaching the intersection from the right was sustained as against the other driver on this theory, the court saying that the "driver had the right to act on this assumption until a situation was presented which would suggest to a reasonable person that the occupants of the car were being placed in a position of danger. It then became the duty of the wagon driver to exercise all reasonable precaution to avoid a collision."

In *Simon v. Lite Bros. Inc.*, (Pa.) 107 Atl. 635, regarding such duty, it was said that he was not "required to anticipate and guard against the want of ordinary care on the part of another" and "guard against collision with a car approaching at * * * excessive speed."

In *Richards v. Neault*, (Maine) 135 Atl. 524, the situation was precisely like that in the instant case, there being conflicting testimony on the right of way

and speed. A verdict for defendant was sustained, the court saying:

“It would not be unreasonable for the jury to conclude, as the defendant testified that he did not realize that the Lovioe car was not going to stop and give him the right of way until he was so near the point of collision that he could not avoid it, that he turned his car to the left so far as he could and put on his brakes, *that he was not guilty of negligence in assuming that Lovioe would give him the right of way*, and that his exceeding the statutory limit of speed in no way contributed to the accident.”

See also *Sliter v. Clark*, (Wash.) 220 Pac. 785; *Roe v. Kurtz*, (Iowa) 210 N. W. 550; and *Merrifield v. Hoffberger*, (Md.) 127 Atl. 500.

The application of this rule of reasonable reliance until put on notice to the contrary would particularly apply in the instant case in that there was a store on the ~~north~~^{South} east corner, eighteen feet south of the south curb line of Third Avenue (Dft. Ab. 88); that Gerald Franz was traveling forty miles per hour, or fifty-nine feet per second, and did not even see the Butte truck until he was into the intersection (Dft. Ab. 66) and then tried to beat it across the intersection. (Dft. Ab. 62). As described by Miss Chamberlain, “It shot up in front of us.” (Dft. Ab. 94). The testimony and the physical facts both show that Kenneth Butte, as soon as it was reason-

ably apparent that the Franz car was not going to yield the right of way, did everything possible to avoid a collision in applying his brakes and turning to the right to parallel the cars. (Dft. Ab. 106). In *Farrell v. Cameron*, (Utah) 94 Pac. (2d) 1068, it is pointed out that, "it takes .75 seconds for a normal person to act after observing danger." Under such circumstances, it would be reasonable for the jury to find that before a reasonably prudent person in the position of Kenneth Butte, in the exercise of ordinary care could observe that Gerald Franz was approaching at an unlawful speed intending to recklessly usurp the right of way by cutting directly in front of defendant's truck, that reasonable action on his part could not have avoided the accident.

In *Knutson v. Lurie*, (Iowa) 251 N. W. 147, a case arising out of an intersection collision, an instruction much like that in the instant case was held to erroneously define the duty of defendant and was reversible error. The instruction first stated in general terms that it was the duty of the defendant to exercise ordinary care, but added that if there was danger of collision, "it is his duty to reduce the speed of his car so * * * he can bring his vehicle to a stop and avoid injury." The court said that this instruction was erroneous because it required her to avoid injury "whether a reasonably prudent person could do so or not. * * * Obviously the instruction, even when read with the remainder of the court's charge was prejudicial."

In *Loony v. Parker*, (Iowa) 230 N. W. 570, an instruction requiring the defendant "to maintain such control of his car as to enable him to stop without hitting the car ahead of him" was erroneous as requiring the driver to exercise such control as to "avoid collision whether he was negligent or not."

In *Gregory v. Suhr*, (Iowa) 268 N. W. 14, a new trial was properly granted where an instruction had been given which tended to impose upon the defendant the absolute duty of having his automobile under such control as to avoid a collision. See also *Fry v. Smith*, (Iowa) 253 N. W. 147.

In *Boutelle v. White*, (Ga.) 149 S. E. 805, an instruction among other things requiring defendant to exercise "the degree of diligence * * * necessary to avoid injuring others" was properly refused as imposing the duty of an insurer. And in *Giles v. Voiles*, (Ga.) 88 S. E. 207, the giving of an instruction containing the same language as in the Boutelle case was held reversible error, the court saying:

"This imposed on defendant the duty of observing the diligence required of an insurer and eliminated all such questions as accident, contributory negligence, and the duty of plaintiff to exercise ordinary care to avoid the consequences of defendant's negligence."

In *Grandhagen v. Grandhagen*, (Wis.) 225 N. W. 935, it was reversible error to instruct the jury "that it is the duty of every driver of a motor car upon the highway to keep his automobile at all times under control, and if he fails to have his car under control he is guilty of want of ordinary care." The court said that this "imposed an undue burden upon the defendant. The duty of Oscar Grandhagen was to exercise ordinary care to keep his automobile under control. The instruction imposed the absolute duty to keep the automobile under control at all times, regardless of the question of whether ordinary care was exercised in so doing."

Instruction No. 11 is further erroneous in that it attempts to define defendant's duty to pedestrians as well as occupants of other vehicles. This is misleading in that at an intersection where there is a crosswalk, if there is reasonable probability of collision, the pedestrian has the right of way over the automobile, (Section 57-7-35 Revised Statutes of Utah, 1933) whereas between automobiles the right of way is determined from other considerations. In *Merrifield v. Hoffberger Co.*, (Md.) 127 Atl. 500, it is pointed out that the duty of an automobile driver as to pedestrians is different from that of his duty to other automobile drivers for two reasons, namely (1) the pedestrian would have the right of way at intersections, whereas another automobile might not; (2) because of the capacity to injure a pedestrian, the duty

toward such pedestrian is increased. Instruction No. 11 should have eliminated the reference to pedestrians.

Instruction 11 given by the court was of the utmost importance and highly prejudicial to the defendant in that it erroneously defined to the jury the duty of defendant in the operation of his automobile and had a direct bearing on the issue of defendant's negligence. Had the jury been properly instructed on the duty of defendant, it might well have found from the evidence either that the defendant was not negligent or that the speed of Gerald A. Franz, his failure to keep a lookout and to yield the right of way and his attempt to beat defendant's truck across the intersection was the sole proximate cause of the collision.

II. Instruction No. 12 (Dft. Ab. 114) duly excepted to by appellant (Dft. Ab. 125) is clearly erroneous and prejudicial. The City Ordinance, Section 1382, (Dft. Ab. 7) is the same ordinance that this court construed in the case of *State v. Lingman*, (Utah) 91 Pac. (2d) 457, which ordinance was held to be in violation of Section 57-7-16, Revised Statutes of Utah, 1933, as amended by Chapter 48, Laws of Utah, 1935, in that the state statute provides among other things in substance, that driving in excess of twenty-five miles an hour in any residential district is *prima facie* evidence that the speed is not reasonable or prudent, and hence unlawful; whilst the instruction given based on the ordinance held void in the Lingman case provided that "it is unlawful for any

person to drive in a vehicle in a residential district in excess of twenty-five miles per hour" and that defendant was negligent if he exceeded such speed. This instruction was a clear misstatement of the law and most prejudicial to defendant on the issue of negligence, defendant being entitled to have the jury correctly instructed on the question of unlawful speed.

III. Instruction No. 14 (Dft. Ab. 115) duly excepted to (Dft. Ab. 125) was improper and misleading in two respects; (1) That it failed to define, and the remainder of the instructions failed to define, what constituted a first entry into the intersection. In other words, under such instruction, even though the jury concluded that the cars entered the intersection at substantially the same time so that if each continued at the same rate of speed that an accident would occur, yet, if the Franz car entered the intersection one inch ahead of defendant's car, or one-one-hundredth of a second before the defendant's car entered the intersection, then it would have the right of way, although defendant was approaching from the right. Such a construction is a strained and unreasonable one and such as would operate to encourage drivers approaching an intersection from the left to increase speed in an effort to beat the other automobile approaching from the right by a fraction of a second or of an inch, rather than fairly place the responsibility on the driver approaching from the left to yield to the driver on the right. (2) That the instruction wholly

fails to take into consideration contributory negligence on the part of the deceased, but unqualifiedly tells the jury that if the defendant failed to yield the right of way and such failure was the proximate cause of the injury that their verdict should be for plaintiff. There was ample evidence to show that the deceased failed to exercise any care for his own safety. It was stipulated (Dft. Ab. 87) that deceased made no complaint about speed, nor warning of the approaching truck driven by appellant, and as there was evidence that the Ford V-8 in which deceased was riding was traveling in excess of thirty-five miles an hour across an intersection in a residential district, and as there was evidence that the vision to the right was unobstructed for a distance of more than a block, the jury would have been justified in finding that deceased, who was riding on the right side of the car with an opportunity to observe the approaching truck and appreciate the danger of crossing an intersection at such a rate of speed, did not use reasonable and ordinary care. The fact that instruction No. 16 specifically instructed the jury on the issue of contributory negligence of deceased and that most of the other instructions took into consideration the same issue, but that this instruction did not do so, but placed upon the jury the absolute duty of finding for the plaintiff regardless of deceased's negligence, makes this instruction particularly vicious, and authorities hold such erroneous instruction is reversible error.

In *Keena v. United R. R. Co. of S. F.*, (Cal.) 207 Pac. 35, an instruction like that given in the instant case was reversible error in that by its terms it purported to settle the conditions necessary to the predication of a verdict for plaintiff, but omitted from its consideration the issue of contributory negligence, and the fact that the court, in other places, had fully instructed the jury on the defenses of contributory negligence and its importance in the case, could not and did not cure the error, because this merely created a hopeless conflict between the instructions, and, therefore, was not capable of being harmonized. It was said:

“In such case it is impossible to determine which of the conflicting rules presented to them was followed by the jury and the error in any of the instructions must be deemed prejudicial.”

The following cases all sustain the same rule:

Peirce v. United Gas & Elec. Co. (Cal.) 118 Pac. 700;

Beyerle v. Clift, (Cal.) 209 Pac. 1015;

Sinan v. Atcheson T. & S. F. R. Co., (Cal.) 284 Pac. 1041;

LaRue v. Powell, (Cal.) 42 Pac. (2d) 1063;

Oklahoma R. Co. v. Milam, (Okla.) 147 Pac. 314;

Shell Pipe Line Co. v. Robinson, (10th C. C. A.) 66 Fed. (2d) 861;

Bauer & Johnson Co. v. National Roofing Co., (Neb.) 187 N. W. 59;

Birmingham E. & B. R. Co. v. Hoskins, (Ala.) 39 So. 338;

McVey v. St. Clair Co., (W. Va.) 38 S. E. 648.

RIGHT OF WAY

Section 57-7-31, Revised Statutes of Utah, 1933, provides:

“The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. 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.”

Section 57-1-1, Revised Statutes of Utah, 1933, defined an “intersection” as:

“The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then of the lateral boundary lines of two or more highways which join one another at an angle, whether or not one highway crosses the other.”

The impracticability of this definition as relating to the respective rights of way at intersections was acknowledged in that said section was expressly repealed, Chapter 46, Laws of Utah, 1935, and no attempt was made to define an intersection in the 1935 laws, nor as last amended, Chapter 65 Laws of 1937. In interpreting “intersection” therefore, reference must be made to the cases and not the statutes.

The first sentence of *Section 57-7-31*, *supra*, is simply declarative of the common law. In *Knox v. North Jersey St. Ry. Co.*, (N. J.) 57 Atl. 423, it is said: “The rule is

* * * the first to reach the crossing traveling at a reasonable rate of speed has the right to pass first. * * * This rule is a part of the common law of the state." In *Mayer v. Mellette*, (Ind.) 114 N. E. 241, as "appellee was * * * closer to the intersection than appellant and the record disclosing no ordinance or regulation to the contrary, appellee apparently had the right of way." In *Barrett v. Alamito Dairy Co.*, (Neb.) 181 N. W. 550, supra, it is said that "under the law of the road, defendant's driver, having first entered upon the intersection of the two streets, in the absence of some regulation to the contrary, had the right of way." See also *Yuill v. Berryman*, (Wash.) 162 Pac. 513; *W. F. Jahn & Co. v. Paynter*, (Wash.) 170 Pac. 132; *Couchman v. Snelling*, (Cal.) 295 Pac. 845; *Page v. Mazzei*, (Cal.) 3 Pac. (2d) 11.

The second sentence of *Section 57-7-31* is a regulation unknown to the common law, but, like in most states, adopted for the purpose of determining precedence between vehicles that would otherwise collide. Many states in determining the right of way hold that regard should be had to the "point of intersection of the automobiles" while a few states hold that regard should be had to the boundaries of the street or the area within the prolongation of the lateral curbs. As above pointed out the Utah Legislature expressly revoked the latter definition but at any rate, under either view, the authorities hold that the rule in determining the right of way is one of practical application rather than a matter of fractions of feet or seconds, and that if the cars appear that

they will intersect at "approximately" the same time, having due regard to the relative speeds and all the circumstances, and a collision or interference between them is reasonably to be apprehended, then the car on the left should yield the right of way.

In *Founier v. Zinn*, (Mass.) 154 N. E. 268, where the intersection is treated as the place common to both highways and not the intersecting paths of the automobiles, the court says as to the duty of the driver from the left:

"Nor could he take the risk of proceeding because he was a *few feet nearer* the intersecting point than the defendant and concluded he could proceed across the intersection area in time to avoid a collision."

And in *Neumann v. Apter*, (Conn.) 112 Atl. 350, where "intersection" is similarly defined, the term "arriving at such intersection at approximately the same instant" is to be interpreted such that "the driver of an automobile approaching the intersection * * * must when an automobile is approaching such intersection from his right give such approaching automobile the right to cross the intersection before him, if a man of ordinary prudence in his situation in the exercise of due care would reasonably believe that if the two automobiles continued to run at the rate of speed at which they are then running, such continuance of their course would involve the risk of a collision."

In *Roe v. Kurtz*, (Iowa) 210 N. W. 550, it is said: "Regard will not be had to fractions of seconds." In *Weber v. Gruenbaum Co.*, (Pa.) 113 Atl. 413, there should be "a substantial distance." In *Schumann v. Hall*, 219 N. Y. S. 228, the court said that the right of way rule applies where "the relative distances and speeds are not materially unequal." In *Ray Mead Co., Inc. v. Products Mfg. Co.*, 180 N. Y. S. 641, it was held that an instruction should not be confined to mere distances. And in *Shirley v. Larkin Co.*, (N. Y.) 145 N. E. 751, it was said:

"Neither * * * is the statute to be interpreted as meaning that the driver of a car limited by subordinate rights may go forward to the point of intersection because a hasty and unreliable computation seems to indicate that *he is a few feet nearer* the point of intersection than the car on his right, and that, therefore, he possibly might be able to dash across the line of the latter and escape a collision. The rule of construction must be guided by reason and common sense, and if it appears that the relative positions of the two cars, taking into account distances from the point of intersection and speed, is such that damage of a collision may reasonably be apprehended, if the car on the left proceeds, it is the duty of its driver to slow up or stop and give the car on the right the precedence which is guaranteed by the statute."

In *Collins v. Liddle*, 67 Utah 242, 247 Pac. 476, the rule was stated as follows:

"If under the circumstances of the case the relative situation of the parties and the speed at which they are driving are such that a collision is reasonably to be apprehended, then, as we understand the law, it is the duty of the driver on the left to yield the right of way to the driver on the right. This interpretation of the meaning of statutes and ordinances, in substance, the same as the Utah statute, finds support among both text-writers and adjudicated cases. An instruction to that effect is quoted with approval in *Bryant v. Bingham Stage Line*, 60 Utah, at page 309, 208 P. 541."

And it was held erroneous to use the word "imminent" in place of the words "reasonably to be apprehended."

In *Golden Eagle Dry Goods Co. v. Mockbee*, (Colo.) 189 Pac. 850, an instruction similar to instruction No. 14 given in the instant case was held erroneous and reversible error in that such instruction fails to take into consideration the point of possible collision and other practicable considerations. The court said:

"The instruction is impracticable because, in many cases in which collision is likely, when two machines are near enough to know that they will reach the street intersection simultaneously, it is too late to consider the question of right of way.

"Again, the instruction requires every driver to look both right and left to see whether any of the cars on either side will touch the street intersection before or with him, an impracticable task.

“We think the right rule is that it is the duty of every driver when approaching a street intersection to use *reasonable care to see whether there is likelihood of collision with any car approaching from the right, and, if there is, to yield to it the right of way, and to keep his car under such control that he can do so.* Livingstone v. Barney, 62 Colo. 528, 163 Pac. 863; Colo., etc., Ry. Co. v. Cohun, 180 Pac. 307.”

We submit that Instruction 14 erroneously stated the rule of right of way and erroneously excluded as a condition essential to recovery the issue of plaintiff's contributory negligence and was reversible error.

IV. Instruction No. 15 (Dft. Ab. 116) excepted to (Dft. Ab. 125) is confusing and would certainly mislead the jury. It in substance told the jury that if the defendant was negligent, that the negligence of Gerald Franz, with whom deceased was riding, would not constitute a defense. If both cars were negligently driven, the jury upon a proper presentation of the law could well have found that the negligence of Gerald Franz was the sole proximate cause of the accident. As for example, appellant in driving west on Third Avenue could have been driving two miles an hour in excess of the speed limit, which might constitute negligence. On the other hand, Gerald Franz, with whom deceased was riding might under the evidence have been driving north on K Street forty miles an hour, with a failure to yield the right of way to appellant's car first entering from the right. In such event, both might be negligent, and

yet the jury could have properly found that the sole proximate cause was the negligence of Gerald Franz, and that the accident would still have occurred even had appellant been driving less than twenty-five miles an hour. In view of the evidence the effect of this instruction was to lead the jury to believe that it should pay no attention to the negligence, if any, of Franz, and in effect made the defendant liable regardless of the question of proximate cause. *Bennett v. Robertson*, (Vt.) 177 Atl. 625. Cases are hereafter cited to the effect that negligence is not always the proximate cause of the accident.

V. Instruction No. 17 (Dft. Ab. 117) excepted to (Dft. Ab. 125) is erroneous for the same reason that Instruction No. 14 was erroneous and constituted such a duplication of that erroneous rule as to place undue emphasis upon it. As pointed out in the exception (Ab. 126) it undertook to lay down an impracticable rule by leaving it up to the drivers of automobiles approaching intersections at such speeds that they would travel thirty-six feet a second and could not apply brakes before traveling from the curbline to the center of the intersection before determining which one should yield the right of way. In other words, no responsibility would be placed upon the driver from the left to determine that he should yield until he first discovered upon entering the intersection whether he was first there by a foot or an inch, and at that time it would be too late to avoid

an accident and he would undoubtedly "attempt to beat the other car across."

It fails to define what is meant by an "intersection" and leaves that to the speculation of the jury.

The instruction as given suggests that one may absolutely rely on the right of way and the assumption that the other drivers will proceed in a lawful manner and yield such right of way and fails to consider that one cannot rely on due care of others after reasonably put on notice to the contrary. *Bullock v. Luke*, (Utah) yet unreported; *St. Mary's Academy of Sisters of L. v. Newhagen*, (Colo.) 238 Pac. 21.

Like Instruction No. 14, it purports to lay down a formula under which the jury's verdict must be for the plaintiff, but wholly fails to take into consideration the issue of plaintiff's contributory negligence. This creates an irreconcilable conflict in the instructions and was itself reversible error.

INSTRUCTIONS DENIED

I. The court erred in refusing to give appellant's requested instruction No. 7 (Dft. Ab. 117) excepted to (Dft. Ab. 126). Such a request was proper on defendant's theory of the case and might have removed some of the objections to Instructions 11 and 15. As already pointed out, a speed on the part of defendant of one or five

miles an hour in excess of twenty-five miles an hour might constitute negligence, and yet such speed might well have no relation to the cause of the accident. Assuming appellant was traveling thirty miles an hour, and that Gerald Franz, approaching from the left was traveling forty miles an hour, failed to see appellant until he was at or near the center of the intersection and failed to yield the right of way, certainly appellant's excessive speed of either two or five miles an hour would not have changed the ultimate result, but only the exact point of contact between the two cars. Under such circumstances, appellant might have struck the Franz car at another point or appellant might have turned more sharply and hit it in the same place, but certainly reasonable jurors or judges under such circumstances could well conclude that the sole proximate cause was the negligence of Franz. Appellant was entitled to have the jury instructed on that theory.

Speed was held not a proximate cause of the collision in *Wallace v. Yellow Cab Co.*, 238 Ill. App. 283, and *Geitzenauer v. Johnson*, (Wash.) 297 Pac. 174, and in *Balvoll v. Pinnow*, (Wis.) 208 N. W. 466, plaintiff's negligence was held to not be a proximate cause of the collision. Cases are hereafter cited in which the jury could find that the failure to yield the right of way was the sole proximate cause of the accident.

II. Appellant's request No. 13 (Dft. Ab. 119) excepted to (Dft. Ab. 127) should have been given on his

theory of the case, as shown by the evidence, it appearing that Gerald Franz, had he looked to the right upon approaching the intersection, would necessarily have seen appellant's truck approaching and its speed, and at that time the said Gerald Franz could have avoided the accident. Under such circumstances, he would have had a duty to avoid an accident to be reasonably apprehended and his failure to do so might under the evidence constitute the sole proximate cause of the accident. Under similar circumstances the jury was held justified in so finding in *Bryant v. Bingham Stage Lines Company*, 60 Utah 299, 208 Pac. 541. In *Collins v. Liddle*, 67 Utah 242, 247 Pac. 476, and *Williams v. Globe Grain and Milling Company*, 64 Utah 82, 228 Pac. 192, the matter of whether defendant failed to yield the right of way and whether such failure was the sole proximate cause was for the jury. Failure to yield the right of way was the sole proximate cause as a matter of law in *Boemer v. Wiemann*, (Minn.) N. W., yet unreported, and *Barrett v. Alamito Dairy Co.*, (Neb.) 181 N. W. 550. These authorities sustain defendant's right to have this and other instructions presented to the jury on the theory set forth in each request and justified by the evidence that the negligence, if any, of defendant was not a proximate cause of the accident and that the negligence of Franz was the sole proximate cause.

III. The court erred in refusing to give appellant's requested Instruction 14 (Dft. Ab. 119) excepted to (Dft. Ab. 127), or in fact any proper instruction on

unavoidable accidents. The evidence presents several theories upon which this accident could be considered unavoidable, and it was error to refuse such instruction.

The following cases hold that the issue of unavoidable accident is raised when there is evidence tending to prove that the injury resulted from some cause other than the negligence of the parties, as when there is evidence that the negligence of some other party is the sole cause thereof, or that the accident was unavoidable so far as the defendant was concerned, and it is reversible error to refuse an instruction on unavoidable accident. *Jones v. Nugent*, (La.) 166 So. 193; *National Cash Register Company v. Rider*, (Tex.) 24 S. W. (2d) 28; *Dallas R. R. Co. v. Spear*, (Tex.) 299 S. W. 507; *Dallas R. Co. v. Brown*, (Tex.) 97 S. W. (2d) 335; *Orange & N. W. R. Co. v. Harris*, (Tex.) 59 S. W. (2d) 217; *Tyler v. Wilhite*, (Okla.) 222 Pac. 997; *Alabama Products Company v. Smith*, (Ala.) 141 So. 674.

IV. The court erred in refusing to give defendant's request 15 (Dft. Ab. 120) excepted to (Dft. Ab. 127). This instruction was appropriate on appellant's theory of the case and was not covered by the court's instructions. A similar instruction was held appropriate in *Bryant v. Bingham Stage Line Co.*, 60 Utah 299, 208 Pac. 541.

V. Appellant's requested Instruction No. 18 (Dft. Ab. 120) refusal to give being excepted to (Dft. Ab. 127) properly set forth the nature of the observation legally

required of Gerald Franz. This was important because Gerald Franz first testified that he did not see appellant's truck until he was about in the center of the intersection, and in any event, until he was entering the intersection, when it affirmatively appeared that at a distance 17 feet south of the south curblineline of Third Avenue a driver had a clear vision east on Third Avenue for more than a block. Had the jury been properly instructed as to the type of observation required of a driver, it could well have found that Gerald Franz, with whom deceased was riding, could and should have seen the approaching truck in ample time to stop his car and avoid the collision. In *Bromley v. Dillworth*, 274 Fed. 267, the rule of lookout is stated as follows: "He was not only required to look, but he must look in such an intelligent and careful manner as will enable him to see the things which a person in the exercise of ordinary care and caution for his own safety and the safety of others would have seen under like circumstances." Defendant was entitled to this requested instruction defining to the jury a proper lookout and which clearly presented defendant's theory justified by the evidence that the failure of Gerald Franz to keep a proper lookout was the sole proximate cause of the accident.

Defendant was entitled to have his case submitted to the jury on any theory justified by his evidence, and refusal of a proper instruction, which is requested on a material issue, on defendant's theory of the evi-

dence, affects defendant's substantial rights and is reversible error.

Morgan v. Bingham Stage Line Co., 75 Utah 87, 283 Pac. 160;

Hartley v. Salt Lake City, 41 Utah 121, 124 Pac. 522;

Pratt v. Utah Light & Traction Co., 57 Utah 7, 169 Pac. 868;

Pate v. Smith, (Okla.) 261 Pac. 189;

Atcheson T. & S. F. R. Co., v. Ridley, (Okla.) 249 Pac. 289;

Smith v. Lenzi, 74 Utah 362, 279 Pac. 893.

Assignment of Error No. 6

The court erred in erroneously permitting plaintiff's counsel to read from a deposition not offered or received in evidence.

It is fundamental that arguments of counsel must be confined to the evidence and counsel should never be permitted to argue anything on which no proof has been made on the trial.

In *Dew v. Reid*, (Ohio) 40 N. E. 718, it was held reversible error for the court to permit counsel in his argument to the jury to read from a deposition which had not been put in evidence.

ERRORS IN RULINGS ON THE EVIDENCE

As assignments of error 28 and 31 also relate to prejudicial misconduct of counsel, we will discuss these first.

Assignment of Error No. 28

Counsel elicited the prejudicial fact from his own witness, Gerald Franz, that his claim against the defendant "was taken care of," and then the trial court doubly emphasized this matter by having the question and answer read over defendant's objection in the presence of the jury. This was prejudicial error.

As the policy of the law encourages the settlement of legal controversies, settlements or offers of compromise are not to be brought into the case. "This salutary rule," it is said in *2 R. C. L.*, page 418, "which is grounded upon considerations of public policy, absolutely forbids that the making of such an offer shall be mentioned or commented upon by counsel in argument to the jury. When it is, unless it shall clearly appear from the record in the particular case that the verdict of the jury was not affected, the misconduct is such as to require that a new trial be granted."

In *McKinney v. Carson*, 35 Utah 180, 99 Pac. 660, it was held that where evidence of a compromise had come into the case, it was reversible error, the court saying:

"We are of the opinion, therefore, that, in view of the record, the court erred in admitting the evidence. A jury is very apt to seize upon such an offer as an admission of liability upon the part of one making it, when the law does not authorize such offers to be considered for that purpose."

In *Toledo St. L. & W. R. Co. v. Burr & Jeakle*, (Ohio) 92 N. E. 27, it was prejudicial error where plaintiff's counsel in his argument mentioned an offer of settlement.

In *Demara v. R. I. Co.*, (R. I.) 107 Atl. 89, a judgment was reversed for similar reasons where the testimony on the issue of liability was conflicting.

Assignment of Error No. 31

Counsel's question in the form it was put to the witness, Norma Chamberlain, being calculated to call the attention of the jury to a criminal proceeding against Kenneth Butte and thus arouse the prejudice of the jury against him, was reversible error in that it denied to the defendant a fair trial.

In *Burbank v. McIntyre*, (Cal.) 27 Pac. (2d) 400, an intimation on the part of counsel for the plaintiff of conviction of the defendant was held to be reversible error in that it undoubtedly had the effect of influencing the feelings of the jury, the court saying:

"We believe the general admonition of the court to the jury to disregard the statements of counsel and the testimony stricken out cannot offset the damaging effect of its erroneous admission or its prejudicial effect upon the jury."

Assignment of Error No. 26

It was error for the court to permit Officer Hopkins to testify as to conditions of visibility on the corner of the accident in the absence of a showing that such conditions of visibility were the same then as at the time of the accident.

In *Billingsley v. Gulick*, (Mich.) 233 N. W. 225, when an accident had occurred at twelve o'clock at night, it was reversible error to permit a witness to testify that early the next morning at the scene of the accident, there was a pool of blood on the gravel at the side of the pavement and a deep depression in the gravel for about thirty feet from the south to the pool of blood, without affirmative proof that there had been no change of conditions after the accident.

In *Trask v. Boston & M. R. R.*, (Mass.) 106 N. W. 1022, it was held a witness could not testify as to the dazzling effect on one's vision of an arc light near the scene of the accident, it not being shown that the conditions were the same as those on the night of the accident.

Assignment of Error No. 27

This assignment relates to the improper sustaining of a question asked Officer Hopkins on cross examination. The witness was making an investigation after the accident for the purpose of fixing responsibility as shown by the positions of the automobiles and the tire and other markings on the highway. Franz had testified that his car stopped in the middle of K Street, near the north part of the intersection and had denied driving his car up to the tree across the lawn, and backing it down off the curbing. He had pointed out to the officer that that was where the car stopped and such matters had been gone into with the witness on direct examination. The matter was material in at least three particulars: (1) Defendant was entitled to develop on cross examination whether Officer Hopkins' testimony and conclusions were based solely on his own knowledge and observations or on what he was told by Franz or others who were present at the time of the accident, particularly in the determination of whether the markings and physical surroundings testified to by him had any connection with this accident. (2) The matter was certainly material in connection with the question of speed, in ascertaining as to how the Franz car plowed up the grass on the parking, proceeded north forty-five feet to the big tree and then returned to K Street, as indicating the car had been driven with such speed and force as to hit the tree and bounce back into the street. (3) If Franz drove his car off the highway and then told the officers that it

stopped in the middle of the street after the accident, such false statement would go to the credibility of Franz and would aid the jury in determining the facts on which to predicate liability or non-liability.

Assignment of Error No. 29

On cross-examination, in view of the testimony previously given and the statement that Franz attempted to beat the Butte car across the intersection, it was proper to question Franz as to his knowledge of his duty to yield the right of way as going to the probability of his having failed to yield the right of way and also as bearing upon his credibility. "The possession of the right of way by one of two motorists colliding at an intersection is a material factor in determining the relative degree of care required." 9 *Blashfield*, Sec. 6199, page 501, and "it is always permissible to elicit facts on cross examination of witnesses which would tend * * * in any manner to discredit their testimony." 9 *Blashfield*, Sec. 6298, page 574.

Assignment of Error No. 30

The sustaining of the objection to the question on cross-examination concerning income was error. The matter of damages had been gone into by plaintiff and defendant was entitled on cross-examination to go into that matter in full. Plaintiff could not recover anything but compensatory damages measured by the pecuniary loss suffered. This was dependent upon how much plaintiff himself was earning, how much deceased was earn-

ing, and how much Paul and Pete were earning and contributing to plaintiff's support or would likely have contributed in the future, thus relieving deceased from contributing, had deceased survived. This was of particular importance because of the admission of plaintiff that deceased had agreed to assist him financially only until the next older boys, Paul and Pete, were working. The jury was entitled to know all of these facts and circumstances, including the family income, in determining what deceased would have contributed to plaintiff had he survived and the exclusion of this material evidence was prejudicial to the substantial rights of the defendant on the issue of damages.

Assignments of Error No. 32 and 33

The only objection to the questions asked here was that they called for the conclusion of the witness. In *Penton v. Penton*, (Ala.) 135 So. 481, it was held the driver of a car could testify she had the car under control as against the contention that it was objectionable as being a conclusion. Certainly asking the driver if from a certain point he did everything that he thought he could do in that instant in an effort to avoid the accident much less calls for a conclusion of the witness.

Certainly the question of which car reached a point first is not a conclusion, but is a fact testified to by the witness and is a proper fact to be brought out, particularly where the right of way was so important as in this case. *9 Blashfield, Sec. 6199, supra.*

NEW TRIAL

By Assignment of Error No. 25 appellant complains of the trial court denying his motion for a new trial. All the points urged on the new trial have heretofore been argued and reference thereto is made in support of this assignment.

CONCLUSION

The questions presented by the assignments of error, argument and authorities cited will in our opinion make necessary the setting aside of the verdict on the second trial. Error was committed on account of misconduct of counsel, rulings on evidence, improper instructions, improperly refusing requested instructions, improper examination of jurors, and improper argument to the jury at the conclusion of the evidence.

Two vitally important and fundamental questions are squarely presented to this court. The first is important if the jury system is to have any legal foundation, and the second, if the law is to provide for the fair and impartial trial of cases. If a court can disregard a jury's verdict when it is clearly justified by the evidence, then we should abolish the jury system. If trials should not be conducted in a fair and legal manner, then we should abolish the courts and hand the settlement of disputes to lay boards or commissions unlearned in the law and

having the normal prejudices of those interested in the result.

The evidence in this case, in view of the pleadings, with no positive showing of actual pecuniary loss, would have justified a verdict of \$10.00. The evidence relating to liability would have sustained a no cause of action verdict. Two jurors upon the second trial held out against a plaintiff's verdict. The plaintiff's evidence showed a willingness on the part of plaintiff to make it appear, contrary to the facts, that deceased was his sole support. The jury would have been justified in disbelieving and disregarding all of plaintiff's evidence relating to damage and could have returned a purely nominal verdict.

We believe the trial court in granting the new trial erroneously assumed that because a plaintiff's verdict was returned in a death case that a substantial verdict was necessary. We believe the trial court without regard to questionable liability erroneously assumed that he had an unlimited discretion. We believe the trial court disregarded the legal limitations placed upon his right to exercise a sound discretion and permitted his "feelings" to overcome his judgment and persuade him to act contrary to the duties imposed upon a trial court under the constitution and statutes of our state.

The entire record is before this court. That record, in our opinion, clearly sustains the first verdict and

clearly impeaches the second. The court's action in granting a new trial has placed an unjustified, unnecessary and undue burden upon the defendant. This court at this first opportunity should set aside the second verdict, reinstate the first and end this litigation.

While we are satisfied that a retrial of this action will not be necessary or permitted, the record upon the second trial is such as to call upon this court to settle questions of trial practice and procedure that have caused trouble and will continue to cause trouble until definitely and clearly settled. Deliberate, premeditated, intentional and prejudicial misconduct was in effect ratified and approved on the second trial. This should not pass the censure of this court. Other errors were committed and should be pointed out for the benefit of both court and counsel.

We respectfully submit that the order granting a new trial should be vacated, that the second verdict should be set aside, and the verdict on the first trial reinstated.

Respectfully submitted,

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