

1949

J. Harold Mitchell v. Arrowhead Freight Lines, Ltd. And Marvin C. Van Patten : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Clyde, Mecham & White; Attorneys for Plaintiff and Respondent;

Recommended Citation

Brief of Respondent, *Mitchell v. Arrowhead Freight Lines, Ltd.*, No. 7242 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/962

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
SUPREME COURT
of the
STATE OF UTAH

FILED
JUL 28 1949

CLERK, SUPREME COURT, UTAH

J. HAROLD MITCHELL,

Respondent,

vs.

ARROWHEAD FREIGHT LINES,
LTD., a corporation, and MARVIN C.
VAN PATTEN,

Appellants.

Case No.
7242

RESPONDENT'S BRIEF

CLYDE, MECHAM & WHITE

*Attorneys for Plaintiff and
Respondent.*

INDEX

STATEMENT OF CASE	1
THE FACTS	5
<i>Some of the self-contradictions of Van Patten</i>	18
<i>Lay evidence showing permanent injury to plaintiff and permanent impairment of his earning capacity</i> ..	28
<i>Medical evidence of permanent injury and of injury permanently impairing plaintiff's earning capacity</i> ..	40
<i>Dr. Braodbent</i>	42
<i>Dr. Butler</i>	45
<i>Dr. Reed Smoot Clegg</i>	53
<i>Dr. Wilson</i>	65
<i>Dr. Richards</i>	65
<i>Dr. W. Les Warburton</i>	68
BRIEF OF ARGUMENT	75
<i>Point 1. The trial court did not err in admitting in evident the Annuity Table (Exhibit X) in its in- structions thereon</i>	76
(a) <i>There was ample evidence of permanent in- jury and of permanent impairment of earn- ing capacity</i>	76
(b) <i>The Annuity Table was in proper form</i>	85
(c) <i>The court's instructions on the Annuity Table were in all respects proper and if defendants desired amplification of the court's charge, they should have requested it</i>	89, 90
<i>Point 2. The court did not err in its other instruc- tions to the jury, except to the prejudice of the plaintiff</i>	95
(a) <i>Evidence of defendants' negligence was clear, convincing and uncontradicted</i>	95
(b) <i>There was no substantial evidence of con- tributory negligence which warranted the submission of that defense to the jury</i>	97
(c) <i>Assuming the sufficiency of the evidence of contributory negligence the court, neverthe- less, fully submitted and overemphasized such defense to the jury</i>	100
<i>Point 3. The defendants did not properly except to instructions they now complain of and cannot urge such exceptions on appeal</i>	122

<i>Point 4. The court did not err in its failure to give defendants' requested instruction</i>	128
<i>Point 5. The court did not err in denying defendants' motion for new trial</i>	133
CONCLUSION	138

Cases Cited

Abbot v. Goodyear Tire & Rubber Co., (California) 3 pac. 2d 56, 57, 58	112, 115
Beyerle v. Clift, 209 Pac. 1015	102
Borland v. Pacific Meat and Packing Company, (Wash- ington) 279 Pac. 94	85
Boyd v. San Pedro, L. A. & S. L. R. R. Co., 45 Utah 449, 146 Pac. 282	123
Brower v. Arnstein, 14 Pac. 2d 863	109
Connelly v. Felsway Motor Mart, Inc. (Mass.) 170 N.E. 467, 469	123
Cook v. Retzlaff, (Oregon) 99 P. 2d 22, 23	125
Davis v. Puckett Co., 144 Oregon 332, 23 Pac. 2d 909	125
Fowler v. Medical Arts Building Co. et al., 188 Pac. 2d 711, (Utah)	125
Goldberg v. Gintoff, (Vt.) 20 Atl. 2d 114	123
Gotsch v. Market Street Railway, (Calif.) 265 Pac. 268	85
Groat v. Walkup Drayage, et al. (California), 58 Pac. 2d 200 ..	85
James v. Chicago, St. Paul and M & O Railroad Company, (Minn.) 16 N.W. 2d 188 at page 192	92
Lovins v. City of St. Louis (Mo.), 90 S. W. 2nd 430	85
Martin v. Sheffield, 189 Pac. 2d 127	117
Meadows v. Pacific Mutual Life Insurance Co., Missouri, 1895, 31 Southwest 578	108
Morgan v. Mammoth Mining Co., 1903, 72 Pac. 88	105
Nebeker v. Harvey, 21 Utah 363	122
Nell v. Smith, Iowa, 147 N.W. 183	116
Newman v. Campbell, Cal. 73 Pac. 2d 1264, 1266	94
Olsen v. Oregon S. L. R. R. Co., 24 Utah 460, 68 Pac. 148, Page 152	102, 106
Pauley v. McCarthy, 109 Utah 431, 184 Pac. 2d 123	82

Penley v. Teague & Harlow Co., (Maine) 140 Atl. 374	85
Ralph v. McMarr Stores, Montana 62 Pac. 2d 1285	92
Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332	107
Sacramento Suburban Fruitlands Co. v. Loucks (CCA 9) 36 Fed. 2d 921	123
Saltas v. Affleck, 99 Utah 381, 105 Pac. 2d 176	116
Senita v. Marcy, 324 Pa. 109, 188 A. 153, at 201	125
Schlatter v. McCarthy, 196 Pac. 2nd 968	82, 86, 87
Shortino v. Salt Lake & Utah Railroad Co., 52 Utah 476, 174 Pac. 869, 866	126
Southern Pacific Company v. Klinge, (C.C.A. 10) 65 Fed. 2d 85, page 87	88
State v. Riley, 41 Utah 225, 126 Pac. 294	123
St. Louis Southeast Railway Co. v. Grahm, Ark. 102 S.W. 700, 702	108
Woodward v. Wilbur, (R.I.) 169 Atl. 486	85

Statutes Cited

Utah Code Annotated, 1943, Section 104-39-3	5
Utah Code Annotated, 1943, Section 57-7-124	95
Utah Code Annotated, 1943, Section 57-7-170	99
Utah Code Annotated, 1943, Section 104-30-3	106
Utah Code Annotated, 1943, Section 104-24-18	122
Revised Statutes, 1898, Section 3151	122

Texts Cited

14 Ruling Case Law, 813	108
1 Blashfield's Instructions Juries, Section 152, page 351	101
1 Blashfield's Instructions Juries, Second Edition, page 937	127

In the
SUPREME COURT
of the
STATE OF UTAH

J. HAROLD MITCHELL,

Respondent,

vs.

ARROWHEAD FREIGHT LINES,
LTD., a corporation, and MARVIN C.
VAN PATTEN,

Appellants.

Case No.
7242

RESPONDENT'S BRIEF

STATEMENT OF CASE

All page references used are those of the record. The parties are referred to as in the court below. All *italics* are ours unless otherwise indicated.

This is an action by the plaintiff to recover for per-

sonal injuries and damage to property sustained by him in a collision with the defendant corporation's truck, which occurred on April 3, 1947 at about 2:15 p.m. Plaintiff was driving his 1946 Chevrolet pickup truck in a northerly direction on U. S. Highway 91 and upon reaching a point about 15 miles north of Paragonah, Utah, a dust storm enveloped the highway which rendered visibility poor while plaintiff was attempting to pull off on his side of the highway, because of the density of the dust storm, a large freight truck and trailer owned by the defendant corporation and being operated by the defendant Marvin C. Van Patten collided head-on with plaintiff's truck inflicting serious personal injuries on the plaintiff and demolishing his truck beyond repair. The defendants' truck was attempting to pass another vehicle, which was towing a boat trailer and was proceeding in the same direction as defendants' truck when the collision occurred on or near the shoulder on plaintiff's side of the highway. Plaintiff recovered a total verdict in the District Court of Salt Lake County, in the sum of \$21,594.22. Defendants' motion for new trial was presented to the trial judge, the Honorable Ray Van Cott, Jr., and on June 26, 1948, was by the court denied.

In his complaint plaintiff alleged that the defendants in the operation of their truck were negligent in the following particulars:

A. That U. S. Highway 91 at the point of collision was a two-lane public highway with 19½ feet of pavement and four feet of gravel shoulders on each side; that

said traffic lanes were well marked and separated by a well-defined yellow line, and that the defendants negligently, carelessly and recklessly drove their truck across the center line of said highway and across the traffic lane provided for northbound vehicles and onto the graveled shoulder on the extreme east side of the highway into collision with plaintiff's truck.

B. That the defendants negligently, carelessly and heedlessly failed to maintain a proper lookout for plaintiff and for other vehicular traffic proceeding along said highway, in that defendants either failed to observe the presence of plaintiff's truck on the extreme east shoulder of said highway, or, having observed the same, failed to pay any heed or take any reasonable measures to avoid colliding with plaintiff's truck.

C. That for sometime prior to, and at the time of the collision, a dust storm covered the highway and impaired visibility, and that under such circumstances it became and was the duty of the defendants to stop their truck or to operate it at such a speed as would enable them to avoid colliding with other vehicular traffic upon the highway, including plaintiff's truck; but, notwithstanding said duty the defendants drove their heavy truck and trailer along said highway in the dust storm at an unreasonable and excessive rate of speed, under the circumstances, to-wit: at a speed in excess of 15 miles per hour.

Plaintiff further alleged that as a direct and proximate result of the negligent acts and omissions of the

defendants he suffered severe, permanent, and disabling injuries which caused him excruciating pain and impaired his ability to perform work and earn his livelihood. The specific injuries alleged and proved will be hereafter shown in the statement of facts.

Plaintiff also claimed property damage to his truck and personal effects in the amount of \$1344.00.

In the Answer, the defendants admitted that defendant, Van Patten was the servant, agent and employee of the defendant corporation and that there was a collision between the plaintiff's vehicle and the defendants' truck which occurred on the shoulder east of the highway, about 15 miles north of Paragonah, Utah, but they deny that the collision was proximately caused by any carelessness, or negligence on their part. Defendants also denied the allegations of the complaint with respect to plaintiff's injuries and special damage.

As affirmative defenses the defendants alleged that while the defendants were on the left side of the highway, passing a passenger car and trailer proceeding in the same direction, plaintiff approached from the opposite direction on the wrong side of the highway and suddenly and unexpectedly cut across the center line of the highway immediately in front of defendants' truck, creating an emergency; and that the ensuing collision was solely caused or proximately contributed to by plaintiff's negligence in approaching defendants on the wrong side of the highway and unexpectedly creating an emergency by turning across the highway immediately in front of

defendants, in failing to keep a proper look-out, in failing to keep his truck under proper and safe control, in failing to exercise ordinary care to avoid collision, and in driving his truck while it was overloaded with four people in the front seat, which interefered with his control of the truck.

Plaintiff filed a reply denying the affirmative allegations of defendants' answer.

Defendants complain of the size of the verdict and contend that certain erroneous instructions were given by the court and that certain rulings of the court with respect to the admission in evidence of the annuity tables (Exhibit X) were erroneous; but defendants altogether fail to point out wherein the claimed erroneous instructions or rulings resulted in a miscarriage of justice. It has been long established in this jurisdiction that the jury's verdict will not be reversed in the absence of a showing of prejudicial error, resulting in a miscarriage of justice (Sec. 104-39-3, Utah Code Annotated 1943). The instructions given by the court were correct, except in those instances where the court gave instructions more favorable to the defendant than justified by law. Indeed, the court overemphasized defendants' theories of defense upon which, there was no substantial evidence.

THE FACTS

We regard defendants' statement of facts incomplete and disagree with their interpretation of the evidence.

We, therefore, deem it expedient to present to this court a more complete review of the evidence.

The evidence is clear, convincing, and uncontradicted that the collision occurred on plaintiff's side of the highway, near the east edge of the paved portion. Defendants in their brief refer to a conflict in the evidence with respect to the point of impact, which was described as 10 or 15 feet east of the paved portion (R. 429) and again as 15 feet east of the center line (R. 454-5). Both references were to testimony of the defendant Van Patten. The evidence is also clear, convincing, and uncontradicted that the defendant was attempting to pass another vehicle at the time the collision occurred, notwithstanding the poor visibility caused by a dust storm which enveloped the highway. The defendant, however, sought to excuse his presence on the extreme wrong side of the highway by saying that as he was passing another vehicle proceeding in the same direction, he saw plaintiff approaching on the highway on the wrong side of the road, and that plaintiff's vehicle cut over creating an emergency which required him to turn off the wrong side to avoid collision. That defendant had considerable difficulty in respect to this amazing contention is indicated by his testimony.

Defendant described his vehicle as being about 60 feet long (R. 423). He testified that as he came over the ridge, he could see a dust storm on the flats and as he proceeded onto the flats, he came onto a car pulling an open two-wheel boat trailer; that he followed the

trailer for 2 or 3 miles and that it was pretty windy and dusty (R. 424); that during one of the breaks in the storm he started to pass the vehicle in front of him and as he got about half way alongside the trailer, he noticed a car coming up from the opposite side. It seemed that plaintiff crossed the center line just as the defendant saw him and he couldn't get back behind the car he was attempting to pass, so he pulled completely off the road where the collision occurred; that the car he was attempting to pass, was going between 10 and 15 miles per hour (R. 425); that as he attempted to pass the other car he could see possibly 200 yards ahead and there were no cars coming from the opposite direction on the east side of the highway and there were no cars coming from the opposite direction on the west half of the highway (R. 426); that it seemed like plaintiff's truck came from the center of the road or opposite side, like he crossed over (R. 426); that the plaintiff's truck was possibly 100 yards —maybe not that far, when he first saw him. Defendant believes that he got the whole truck and trailer off the road before the collision; that he turned off the highway when he saw the other car at about 45 degree angle (R. 427); that as he attempted to pass the other car, Van Patten shifted into third direct and was going possibly between 15 and 20 miles per hour (R. 429); that the point of impact was approximately 10 or 15 feet off the highway and he didn't travel much over 5 or 10 feet after the impact (R. 429); that the right front corner of defendants' truck collided with the left front corner of plaintiff's (R. 430-1-2).

On cross-examination, the defendant, Van Patten, stated that he had no idea how fast plaintiff's truck was going when he hit it (R. 438) yet he knows he was moving more than 5 miles per hour (R. 439). Then he flies in the face of physics, and states that the small truck continued on in the direction it was moving after the impact, even though the right front corner of the heavy truck struck the left corner of the light truck, (R. 439). Van Patten knew there was a heavy dust storm enveloping the highway and he entered it behind the car and trailer. He didn't like the idea of being behind anything. (R. 441) At the time the dust broke and he decided to pass, he could see about 200 yards ahead of him, but in his sworn deposition before trial, he stated he could see just 100 yards ahead (R. 442). Since the deposition, he has had time to compute the distance and he computes the distance at 200 yards. The break in the storm continued so he could continue to see 200 yards, ahead. (R. 443) He started to go about 20 miles per hour, or perhaps faster so he could pass the car and trailer and he realized at the time, that his equipment was 60 feet long and that he would have to have time to pass the other car and get back on his side of the road (R. 444). He looked down both sides of the highway and saw the plaintiff's car just straddle the center line. (R. 446) He was watching the highway, both sides all the time. He was passing the other vehicle and he could see 200 yards down the highway, but he couldn't see plaintiff until he got within 100 yards, at which time plaintiff was astraddle the center line. Van Patten had no idea how fast plaintiff

was going. He didn't have time to either pass in front and get on his side or to stop and get behind, although he realized that when he passes traffic on a highway in a dust storm, that is what he has to have time to do. He knew from his experience in traveling Highway 91, that it was a pretty busy highway with cars going in both directions all the time, and he had in mind at the time he started to pass, that out of the dust storm a car might come in another direction and he also realized how much distance he would have to travel before he could safely pass the car he was passing (R. 447-448). He does not believe that he told the sheriff that when he first saw the other car it was 100 yards away, but if Sheriff Smith took the stand and testified that Van Patten told him the car was only 20 or 25 feet away, he could not say whether that would be true or not. He may have told the sheriff that. (R. 451). We desire to quote the following testimony directly from the record, commencing near the bottom of page 451:

“Q. You didn't think Mr. Mitchell was to blame, did you?

A. No, sir.

Q. You don't think that now, do you?

A. No, sir.

Q. In driving in the manner you have described, you don't think you were to blame?

A. No, sir.

Q. You think you drove your truck on that occasion in a safe prudent way?

A. Yes.

Q. Despite the length and size of your truck?

A. Yes.

Q. Despite the visibility being restricted to the point it was?

A. Yes.

Q. You were driving your truck in a safe way?

A. Yes.

Q. Would you drive it the same way now if you had an opportunity?

A. Yes.

Q. Under the same circumstances?

A. Yes." (R. 452).

Van Patten stated that the point of impact was 15 feet east of the center line and that he proceeded off the highway on about a 45 degree angle prior to the impact (R. 455). He stated that his truck and trailer were 60 feet long and assuming that the rear wheels of the trailer had left the paved portion of the highway, he had to go at least 60 feet on a 45 degree angle before the point of impact, yet that the center line of the highway was just 15 feet from the point of impact. He admitted that that didn't add up and that the highway was about 19½ feet all the way across the paved portion; that he must have been mistaken about the angle he was traveling, and that he must also have been mistaken as to whether or not his entire trailer had left the highway prior to the impact

(R. 456) That at the time he was about to pass the said car, he was pretty well over in the east lane of traffic over on the east side of said highway, and that he didn't have to go very far before he got off the highway. He said that he saw the car 100 yards ahead coming in his direction from the center of the road and that he, Van Patten, was going approximately 20 miles an hour. He testified that being already practically off the pavement, he arrived at the point of impact at the same time the plaintiff's car did coming from the center and that the plaintiff's car was 100 yards away from him. He stated that he may have told Sheriff Smith, when he first saw the other car that it was 20 or 25 feet away (R. 457).

Counsel for the defendant made a desperate attempt to rescue the witness Van Patten, from his dilemma, with respect to the distances involved in his testimony. We desire to quote from the record beginning at page 458:

“Q. And when counsel has asked you certain distances by yards and feet, have you been paying attention as to whether he has asked you how many yards or how many feet?

A. I believe I have.

Q. When you first saw this Mitchell truck, just to be clear on it, do you know how many feet that truck was away from you, by number of feet or by number of yards, either one?

A. When I first saw the Mitchell car, you mean?

Q. Yes.

A. Not accurately, no.

Q. And if you were to now state your best approximation taking into consideration your best estimate of that distance based on what you saw at that time and what your deductions have been since as to where the accident happened, how far would you say in feet that distance was across from you to the Mitchell truck, when you first saw it?

A. I couldn't say exactly in feet. It would only be an estimate on it at all. I am not a judge of distances.

Q. Well, approximately in feet, if you can state?

A. Approximately 100 or 200 feet maybe. (R. 458).

Q. Now, counsel asked you, when you saw that truck, if it wasn't 100 yards down the highway?

A. No.

Q. Did you so understand him when he asked you that question?

A. I believe that is the way it was, in yards.

Q. In yards?

A. No, I don't believe it was in yards.

Q. You don't believe it would be 100 yards?

A. No.

Q. If you answered counsel's question to that effect, you mistook yards for feet, did you not?

A. Yes, sir.

Q. Now, when you pulled out around this trailer you say you could see down the highway for approximately 200 yards?

A. Yes, sir.

Q. You had your eyes down that highway, did you not?

A. Yes, sir.

Q. Were there any cars coming towards you on the east side of the highway?

A. No, sir.

Q. Did you see any coming towards you on the west side of the highway?

A. No, sir.

Q. Did you expect there would be any cars coming towards you on the east side of the highway?

A. No, sir." (R. 459).

On further re-cross-examination with respect to his change in testimony relative to distances from yards to feet, the witness testified (R. 461-4) as follows:

"Q. Now, you say you were mistaken in answering my question when you were testifying about yards and now you want to correct that to feet; is that right?

A. Yes.

Q. So that now the Mitchell truck, identified by position No. 4, was now just 100 feet away when you first saw it?

A. Yes, sir.

Q. And it was straddle the center line?

A. Yes, sir.

Q. And as you were attempting to pass this other car you were watching the whole road ahead, weren't you?

A. Yes, sir.

Q. And you could see 200 yards, could you not?

A. Yes, sir.

Q. Or did you mean feet?

A. I meant yards on that.

Q. You could see 200 yards?

A. Yes, sir.

Q. And yet you didn't see the Mitchell car until it came within 100 feet?

A. That is right.

Q. Why, on account of the dust?

A. Well, it was on the opposite side of the road.

Q. I thought you said it was in the center of the road?

A. Yes, I wasn't looking for one there. I was looking more or less down the east side.

Q. Weren't you looking in the center of the road?

A. Yes, sir.

Q. Weren't you looking in the other spaces

of the road?

A. I wasn't looking for any on that side.

Q. Did you think it was safe to pass this car, if there might be another car in front of it going in the same direction?

A. Yes, sir.

Q. If there were a string of cars going in the same direction you could have passed in that dust storm?

A. No.

Q. Then it was important for you to know whether the highway on the other side was clear or covered with cars?

A. If they were going in the same direction?

Q. No matter what direction they were going in; wasn't it?

A. Yes, sir.

Q. If you were looking to see if there was another car, you would have to pass the one so you could see if there was, by looking on the other side of the road, wouldn't you?

A. Yes.

Q. And you say you were not looking at the other side of the road when you were passing; is that right?

A. No.

Q. How do you account for the fact you didn't see the Mitchell car until it was 100 feet away?

A. I can't.

Q. It just came out of nowhere?

A. Yes, sir.

Q. And you were looking all the time and would have seen it, but it just came out of nowhere?

A. That is right.

Q. You testified you may have told Sheriff Smith that car was only 20 or 25 feet away when you first saw it?

A. Yes.

Q. When you may have told him, that may have been the truth?

A. It may have been.

Q. If it may have been true that the Mitchell car was only 20 or 25 feet away when you first saw it, why are you testifying here today that it was 100 feet away?

A. That is what I say, I don't remember what I told Sheriff Smith.

Q. You said it may have been true?

A. I said it may have been true.

Q. Did you tell him it was 20 feet away?

A. I may have told him 20; I may have told him more. I can't remember.

Q. *And it may have been true that that is all the farther away it was; isn't that correct?*

A. Yes.

Q. Otherwise you would not have told him that; isn't that correct?

A. Yes.

Q. Now, I want you to tell me why here today before this jury under oath you are willing to testify it was 100 feet away when you first saw it?

A. It may have been 100 feet.

Q. There is a vast difference between 20 and 100 feet?

A. Yes, there is.

Q. Or between 100 feet and 100 yards?

A. Yes, sir. (R. 464).

Q. How could it possibly have been 100 feet and also possibly 20 feet at the same time?

A. It couldn't.

Q. *So you don't know how far away it was, do you; is that right?*

A. That is right.

Q. *And you are not going to testify here today it was more than 20 feet away, are you?*

A. *It could have been.*

Q. *You are not going to say it was, are you?*

A. *I couldn't be accurate on it, no. (R. 465).*

It is significant that Van Patten did not observe, whether or not the Pace car, with the boat trailer, which he was attempting to pass, did anything with respect to changing its course or slackening its speed, after Van Patten saw Mitchell's car, as he claims, in the center of the highway (R. 468).

SOME OF THE SELF-CONTRADICTIONS OF VAN PATTEN

1. That the point of impact was 10 or 15 feet off the highway. (R. 429); That the point of impact was 15 feet east of the center line. (R. 454-5).

2. That his vehicle with trailer attached was about 60 feet long (R. 436-7), yet he left the highway at a 45-degree angle and arrived at the point of impact 15 feet east of the center line. (R. 455).

3. That all of his vehicle was off the highway at the time of impact. (R. 430; R. 454). That all of his vehicle was not off the highway at the time of impact. (R. 456).

4. That he could see 200 yards up the highway as he attempted to pass the Pace car and he was watching both sides of the highway all the time. (R. 446). In his sworn deposition he stated he could see just 100 yards ahead. (R. 442). That he wasn't looking for a car on the opposite side of the road. (R. 462-463). That he was looking all the time and would have seen the Mitchell car but it just came out of nowhere. (R. 463).

5. That the Mitchell car was 100 yards away straddle the center line when he first saw it. (R. 447). That the Mitchell car was 100 feet away and on the opposite side of the highway when he first saw it. (R. 462). That the Mitchell car was 20 to 25 feet ahead of him when he first saw it. (R. 463-4-5). That he doesn't know how far away it was. (R. 465).

6. That he had no idea how fast Mitchell was going. (R. 447). That he knows Mitchell

was moving more than 5 miles per hour. (R. 439).

7. That Mitchell was on the wrong side of the road and suddenly cut across in the path of Van Patten's truck. (R. 447). That Mitchell was not to blame. (R. 451).

The defendants claim that the self contradicted evidence of Van Patten was corroborated by the witness Pace. Pace testified that he was operating the car with boat trailer attached behind in a southerly direction on the highway, in the dust storm area; that he could see the center line sometimes and that he was as near the middle lane of his traffic as he could get ,R. 470-471).

(R. 471).

“Q. And while you were so traveling were you aware of a truck behind you?

A. I was not.

Q. When was the first time you saw the pick-up truck which was driven by Mr. Mitchell, that was involved in the accident?

A. Well, it just seemed to come up out of nowhere. Visibility was bad, and it just came up all of a sudden.

Q. Which direction was the truck traveling?

A. It was traveling north.

Q. In the opposite direction to which you were traveling?

A. Yes sir.

Q. And how far ahead of your car was that truck when you first saw it, that pick-up truck?

A. I could only give the distance approximately. It was a short distance, I would say anywhere from twenty-five to fifty yards, approximately.

Q. Where was that truck with respect to the center line of the highway?

A. It was about in the center of the highway, probably straddle of the center of the yellow line in the highway, when I saw it.

Q. And you were about twenty-five to fifty yards from that truck at that time?

A. Approximately, yes.

Q. Had you seen that pick-up truck prior to that time?

A. No sir.

Q. On which side of you did the pick-up truck pass?

A. It passed on the east side, in his own lane of traffic.

Q. And did you see the collision between that truck and the Arrowhead truck?

A. I didn't actually see the collision. They hit just back of me. I heard the crash, but I didn't actually see them hit." (R. 472).

On cross-examination, the witness described the dust storm as very dense. He stated that there were breaks in the dust storm that would permit one to see the pavement in head of the car. Then it would fill in, and you

couldn't see the pavement anywhere. Sometimes the visibility would be reduced almost to the point immediately in front of the car. We quote directly from the witness Pace's testimony, at the top of page 476 in the record:

“Q. In other words, those gusts of wind were bringing dust thickly across the highway practically all the time, and there were some breaks, but they were more or less just momentary breaks, weren't they?

A. There were breaks for a little time, and it closed in.”

Then again commencing at page 477, the witness testified as follows:

“Q. Were you aware, at the time the truck attempted to pass you?

A. No sir. I never knew it was trying to pass at all.

Q. Were you required to alter the course of your automobile by the approach of Mr. Mitchell's car?

A. No sir.

Q. You were able to continue straight on the way you were going?

A. Yes sir.

Q. Undisturbed?

A. Yes sir.

Q. So, if he may have momentarily traveled

on the center line it wasn't sufficiently far to interfere with the movement of your car in the opposite direction?

A. No sir.

Q. Now, it is possible that he may not have been straddle of the center line, is it not, Mr. Pace? . . .

A. As near as I could tell, he was straddle of the center line.

Q. *Could you say about how much of his vehicle was on the west side of the center line?*

A. No sir.

Q. *Would you say he was straddle, his vehicle was as much as a foot to the west of the center line?*

A. *I wouldn't attempt to say.*

Q. *As a matter of fact, he may have been right near the center line?*

A. *As near as I could tell, he was riding very near the center line.*

Q. Did you observe what distance he was traveling in that position?

A. No sir, when I seen the truck, this pick-up, it just come up out of nowheres. He just made a slight turn into his line of traffic, and passed me in the clear.

Q. About how far ahead of you was the pick-up when you first observed it?

A. I stated, as near as my judgment, it was a short distance. I would say between twenty-five and fifty yards. A short distance." (R. 478).

The witness testified that there was no curve in the road, that the highway was a straight-of-way, and that plaintiff's truck came suddenly out of the dust storm at a distance of about twenty-five to fifty yards (R. 479).

The witness Pace could not say how much of plaintiff's vehicle was west of the center line, nor would he attempt to say that it was even as much as a foot to the west of the center line. The witness finally admitted *that* as near as he could tell plaintiff was riding *very near* the center line. This certainly does not constitute substantial evidence that plaintiff was on the wrong side of the road, if the witness would not say that he overlapped it so much as a foot. At most it constituted evidence that plaintiff was very near the center line. What witness Pace, peering thru the dust storm interpreted as a "slight" swerving to the right of plaintiff's car, very likely was the act of the plaintiff as he started to pull off the highway and stop.

On the other end of the dust storm, was the plaintiff, Mitchell, who also entered the dust storm behind another car. He followed that car for some distance but rather than attempting to pass as the defendants had done, the car ahead of him, the plaintiff deemed it advisable to drop behind and pull over to the side of the road and stop for a couple of minutes to permit the car ahead to move on out of the way. Plaintiff testified that things then seemed to clear slightly and he proceeded back onto the highway in low gear at a very low rate of speed,—not much over five miles per hour. Visibility was very

limited—from 25 to 40 feet. Plaintiff was very particular that he knew where he was located on the highway (R. 236). A little ways down the highway, that would be south, plaintiff met a car with its lights on, and in that dust there was quite a glow and it disturbed him a little. He said: “I am going to pull off the highway and stop until this thing clears up a little.” Immediately after he passed that car, he began to do just that thing, sort of pulling to the right with the idea of stopping, and getting off the highway (R. 237). Mitchell testified that very definitely that he was off the paved portion when he was struck by the defendant’s truck, and that at that time he was stopping, his intentions were to stop, and he was either stopped, or moving very slightly, very slowly. That the defendant’s truck could not have been over 25 feet when he first saw it. That the limit of visibility was about 25 feet. (R. 238) When asked what steps he took to avoid colliding with the truck when it first came into view, Mitchell testified that there was not much he could do being practically stopped but that he naturally pulled hard to his right. (R. 239).

It is quite clear from the testimony that the car which Mitchell saw coming toward him ahead of the defendant’s truck, was undoubtedly the Pace car, for it had passed immediately prior to the collision. Pace testified that he saw the plaintiffs truck swerve slightly into plaintiff’s lane of traffic, and that plaintiff passed him in the rear. (R. 478) Pace did not see the collision but heard the crash. They hit just back of him. (R. 472) From all the testimony, Pace was ahead of Van Patten

and yet he was not endangered by the approach of Mitchell's car, assuming against the evidence that it may have been momentarily astraddle the center line. Pace in advance of the Van Patten car, was not required to alter the course of his vehicle to avoid colliding with Mitchell and proceeded along undisturbed, from which the jury were compelled to conclude, that if Van Patten had been in his proper lane of traffic, he would not have been confronted with any emergency. Van Patten cannot reasonably seek to be relieved of the consequences of an emergency situation which was created entirely through his own folly. There could be no possible causal connection between any negligent act of Mitchell's and the collision which resulted from the presence of the Arrowhead truck on Mitchell's side of the road.

Mitchell continued to the right of the center line, well over the shoulder of the road on his right, right up to the time he started pulling off the highway, just prior to the accident. The left wheels were still on the asphalt and his right wheels were on the shoulder. (R. 337-338) There was one car with lights on going south, that he met a short distance ahead of the truck. The meeting of that car made him determine to pull off the road and wait for the dust to clear. Then just ahead of the truck was another car traveling in the same direction as the truck. (R. 338-339) The truck was very close to the other car. The other car was coming past him when the truck appeared back of it on plaintiff's side of the road, when he first saw the truck. (R. 340) Plaintiff denied that he was straddle the center line when the car passed immediately

in front of the truck, but it is certain that he was well east of the center line.

Joan Mitchell testified that she was plaintiff's daughter, age 16, and was a passenger in the truck her father was driving. That as they entered the dust storm, they were following another car, and her father stopped for a couple of minutes to let the car go ahead. And then started forward in low gear, from which gear, he did not shift at all. She was watching the center line most of the time. (R. 360-361) The dust storm was awfully thick and you couldn't see much more than about 20 or 25 feet ahead. Plaintiff did not at any time drive his truck on the left side of the center line. They were just pulling off the highway on their side, when the truck came into view (R. 362). They had practically stopped and were going about 3 or 4 miles per hour, when the Arrowhead truck came into view. (R. 363)

With respect to her position in the seat, Joan testified that her father did not hit her in driving the truck. (R. 367) She recalled that the car passed just in front of the Arrowhead truck (R. 368).

Sheriff Kent G. Smith testified that he investigated the accident. (R. 384) He stated that Exhibits T, and U, and V, represented the appearance of the trucks involved in the collision. (R. 385). That the highway is 19½ feet wide where the accident occurred and is a two-lane highway with a yellow line separating the traffic lanes. (R. 386) He observed quite a bit of debris along the east side of the paved portion of the highway. There was a track

indicating where the pick-up truck had begun to be pushed by the other truck located on the edge of the shoulder. The shoulder was about 3 feet wide. (R. 387) The pick-up truck was pushed approximately 14 feet by the other truck. (R. 388). The defendants' truck had covered a distance of 30 feet from what appeared to be the point of impact before coming to rest. The debris he saw at the supposed point of impact consisted of glass and pieces of chrome and the ordinary things you would see at an accident. (R. 395) Van Patten told the Sheriff that he first noticed danger of collision when the distance between the two trucks on the highway was between 20 to 25 feet. (R. 502).

William M. Mitchell testified that he was father of the plaintiff, and a passenger in the pick-up truck at the time of the accident. He was seated on the right hand side of the truck. (R. 396) He kept his eye on the shoulder of the road as they proceeded in the dust in order to see if they were in the road. The truck was right on the edge of the road. He did not observe the truck he was in go west of the center line at any time. (R. 398) He saw the Arrowhead truck before the collision occurred. It was maybe 30 or 40 feet away. Plaintiff's truck was just about stopped when he first saw the Arrowhead truck. Plaintiff had turned out to wait for the dust storm he supposed. They were just about off the paved portion of the highway. (R. 399-400) The driver of the Arrowhead truck called upon the witness William M. Mitchell, at the hospital, and stated to the witness at the hospital, that he, Van Patten, was totally and wholly responsible

for the accident. (R. 505)

Dr. L. V. Broadbent testified that he saw Van Patten on the second floor of the Iron County Hospital in the morning a day or two after the accident. That Van Patten asked the doctor how the victims were and stated: "I am awfully upset, I have to go talk to these people. I have got to talk to them. It was entirely my fault." (R. 255)

Lay Evidence showing permanent injury to plaintiff and permanent impairment of his earning capacity.

The defendants' summary of the evidence, both lay and medical, as it pertained to the injuries suffered by the plaintiff and to the permanent impairment of his earning capacity is unfair and incomplete.

With respect to the permanency of his injury and with respect to the permanent impairment of his earning capacity, the plaintiff, Mr. Mitchell, at page 245 of the record, testified as follows:

"Q. Now did you state whether or not you experience any pain or discomfort in the vicinity of your—the back of your neck?

A. Always from the beginning, that was the very painful part.

Q. What effect did that have upon your movement of your head?

A. Well, the movement has been quite restricted ever since the accident.

Q. Does that condition persist to the present time?

A. Yes, not as intense as it was at the beginning, though, and few months now, I have noticed no improvement.

Q. The past few months there has been no improvement in the condition of your neck?

A. I think that's right."

Again at page 246 of the record:

Q. Well state whether or not you suffer any pain or discomfort in the movement of your head at the present time?

A. I do; I can move my head to an extent, and beyond that, it is very painful, and, if I persist, it just feels like I am in a blackout.

Q. How far can you move your head without pain; will you demonstrate to the jury?

A. I can move it that far (indicates).

Q. Can you move it in either direction?

A. Yes.

Q. About the same extent?

A. I think so, maybe a little better to the left than I can to the right.

Q. Will you demonstrate that again, so that I can have the record indicate about the extent to which you can move your head without pain?

MR WHITE: May the record show that the center of the chin, on the movement of the head to the right at the present time, is a matter of about an inch and a half or two inches from the center line of the neck.

MR CANNON: I am not the record stater of distances.

MR WHITE: If you have any dispute, express it now, or would you like to state it differently, Mr. Cannon?

MR. CANNON: Oh, I think we are willing to take your statement, Mr. White, as long as we don't get into any misunderstandings later about it.

Q. Now, will you describe again the pain that you suffer when you move your head beyond that point?

A. Well, there is always pain in the back of my head, the base of my head, and that pain, of course, goes up, it feels like it is right in the top of my head part of the time. If I try to turn my head, seems right here in the neck stops me. Its just—its quite painful and just makes me feel like I am going to go right off.

Q. Now, are you able to drive your automobile at the present time?

A. Yes, I can drive it under certain conditions.

Q. What conditions do you refer to?

A. Oh, I can drive the automobile pretty good shape, of—as long as I am going down the highway, why everything is all right.

Q. Well, are there any driving conditions that you can't do?

A. Well, it is extremely difficult for me to do any reversing; I can't see what is happening from the back. Backed into a ditch a few times.

Q. Now, while we are on this, Mr. Mitchell, I understand that at the present time you are engaged in farming?

A. That's right.

Q. Are you restricted at all, in your physical activities with reference to performing your farm duties?

A. I am quite definitely restricted; there is a good many things I can't do on a farm. (R. 247)

Q. Will you state to what extent that you are so restricted; what are some of the things you cannot do?

A. Well, when it comes to strenuous physical work, I don't do that well. I can drive my tractor, but it isn't very satisfactory to try to plow a field, or anything of the kind, when you can't watch to see what is happening to the plow. It is just guesswork. Drilling grain, or something like that, I don't try to do.

MR. CANNON: What is that?

A. Drilling grain, driving tractor, pulling the drill.

Q. Now in connection with your farm operations, do you run any sheep or cattle?

A. Yes. I have a few sheep and some cattle.

Q. And, in connection with that type of work, is it necessary for you to frequently ride horseback?

A. Oh, yes.

Q. Now, do you suffer any disability or discomfort when you are riding horseback?

A. Well— (R. 248)

A. Yes, I suffer discomfort riding horses, and I let them walk around mostly, now. (R. 249)

Q. Well, now, you describe to what extent you suffer inconvenience or discomfort when you are riding a horse?

A. Well, anybody that has ridden a horse, of course knows that there is more or less jarring up there, and that affects the head. That's all there is to that.

Q. Now, to what extent are you able to ride horses at all?

A. I can ride horses, trusty horses, all right, if I take it easy.

Q. State is there any particular gait of the horse you can't ride without discomfort?

A. Well, I don't usually get them off the walk. I presume I could by taking the punishment, that I don't try.

Q. Now, do you have any feeling of pain, or discomfort when you attempt to lift any heavy object?

A. Well, very difinitely. It bothers me in the back of the neck and head, it just seems to kind of pull.

Q. Do you have any.—in connection with your ranching activities, do you raise feed for your cattle?

A. That's right, that—

Q. Do you have any discomfort in connec-

tion with the harvesting of your feed crops for the cattle?

A. Well, that, of course, always involves lifting, and the pitching of hay, and things like that; those all—

A. No.

Q. Are you able to pitch hay at the present time, without pain?

Q. Now, Mr. Mitchell, do you suffer any discomfort at the present time in any other area than in the back of your neck?

A. Yes, in a good many areas.

Q. Will you just state where you suffer discomfort at the present time?

A. Well—

Q. Let's start from the top down.

A. In the nose area, there seems to be some pressure here yet, which is annoying, affects my breathing to an extent; the ear feels—oh, like there is a string tied around the base of it, and it is quite tender, and, at the same time, it feels stiff to me, like might rub it off if you were not careful, and the jaw is extremely miserable.

Q. Will you describe a little more, with a little more particularity, the misery you suffer in the use of your jaw?

A. That's pretty hard thing to describe, but in the region close to the one ear here, there's some pain.

Q. May the record—

A. Always.

MR. WHITE: May the record show the witness has reference to the upper portion of the left jaw in the vicinity of the ear?

Q. Now, when do you suffer that pain? Under what conditions of the movement of your jaw does that give you pain?

A. Well, there is an ugly sensation there practically all of the time; lot in this area when I try to use the jaw in talking or eating, and feels like it's just sort of artificial, and it's quite a difficult thing for me to use it. As you notice, I use it, but—

Q. I observe that you give some appearance of talking through your teeth, or with your mouth partly open; how far can you—

MR. CANNON: Now, just a minute, we object to counsel's questions in that form, and suggesting matters as to what he notices; seems to me—

MR WHITE: Haven't you observed that, Mr. Cannon?

MR. CANNON: I have observed—

Q. Ask you this, Mr. Mitchell, how far can you open your mouth at the present time without pain? (R. 251)

A. Well—

Q. You demonstrate it for the jury.

A. I don't know how far.

Q. How far can you open your mouth at all, either with or without pain?

A. Well, that is about it. I never been able to open it too wide.

Q. Will you just demonstrate that again, then I can indicate it on the record.

MR. CANNON: We will say for the purpose of the record that the witness didn't open his mouth all the way. (R. 252)

Mr. Mitchell gave further testimony touching upon permanent injury and impairment of his earning capacity commencing at page 316 of the record:

Q. Now, Mr. Mitchell, you've testified formerly that you continued to suffer from stiffness of the neck and pain on motion of the head, and also some restriction of motion in the use of your jaw, and some pain in your jaw, is that correct.

A. That is correct.

Q. Have you suffered from any other continuing conditions up to this time?

A. Well, yes, my, my breathing is considerably impaired.

Q. Now, just describe how that's affected you.

A. Well, there is, seems to be a little pressure on my nose there as though it were being pressed down from above, of course.

Q. Now, is your breathing impaired through your mouth or through your nose?

A. Through the nose.

Q. I see; now, do you suffer from any other conditions, in addition to that?

A. Well, I think perhaps you asked me about it here once. That's condition there that's quite

difficult; it's painful, miserable, feels like it is tied up, and it is annoying because of the aperture into the ear is small, considerably smaller than the other one.

Q. Now. Mr. Mitchell, how is your condition

A. Well, I have extreme difficulty getting any rest. I—when I get real tired, I can lie down with respect to your ability to sleep at night? and sleep maybe an hour and a half and two hours, and then I sleep very little. I just cat nap after that. I haven't had a night's rest for a long time.

Q. State whether or not that condition has continued since the date of the accident.

A. That's entirely right. The condition, of course, I think was worse immediately after the accident, worse than it is now. I had difficulty sleeping at all lying down. I think I still can sleep better sitting up than lying down.

Q. Are there any positions that—that is, reclining positions that it is uncomfortable for you to sleep in or lie in?

A. Yes, definitely; on my back or my left side, not able to lie on my left side.

Q. What is the experience you have when you attempt to lie on your left side.

A. Well, there is considerable pain in the ear area, and I just don't try.

Q. What is your experience when you attempt to lie on your back?

A. Well, this head situation seems to increase; the pain in the head is increased; just can't do it and sleep.

Q. Now, aside from the pain in the head that you have described, which results from the movement of your head, do you suffer any other headaches or things of that kind?

A. Well, there is a continual ache in the back across the base of my head.

Q. How severe is that at the present time?

A. Well, it's present all the time. There are some times, of course, when I get real interested in something else, that I am not entirely aware of it, but the moment I relax at all, I am always conscious of the pain in my head.

Q. Is that pain more severe or less severe than it was soon after the accident, say?

A. It's less severe than it was right after.

Q. I see; but at any rate it continues?

A. That's right.

Q. Now, Mr. Mitchell, do you have any difficulty in eating your food?

A. Yes, I do.

Q. Will you just describe to what extent you have difficulty and in eating particular types of food?

A. Well, I simply don't get my mouth open wide enough to eat some types of food. If I ever try to eat a sandwich, I nibble one part of it at a time, and anything like steak, I don't try, usually.

Q. Now, have you had any difficulty in the use of your hands since the accident?

A. Yes, considerable difficulty. They were quite useless at first, but they have improved

some; the left hand has made more improvement than the right.

Q. What was the nature of the injury, if you know, that you suffered to your left hand?

A. Well, of course, I don't know, except that it was terribly swollen and sore, and later on an ex-ray indicated that the hand was broken in the area here on the back.

Q. Do you know who took that particular x-ray?

A. Dr. Paul Richards of the Bingham Canyon Clinic.

Q. Was that the information he gave you?

A. That's right.

Q. Now, with respect to your right hand, you say you also suffered some pain in your right hand?

A. It was swollen for a long time, and it has continued sorer than the other one; seems to have been sprained in this little finger area, and also on the bone continuing up from the little finger.

Q. Does that discomfort continue up to the present time in your hands?

A. It does.

Q. Is it severe or less severe than it was formerly?

A. It's less severe, very definitely. (R. 319)

Mr. Mitchell testified that prior to the accident, his general health had always been good. That for 24 years of teaching, except for one week when he had an appen-

dectomy, he had never missed a day of school on account of his health. (R. 323)

With reference to his present inability to teach school, the plaintiff testified as follows:

Q. Would you be able, from a physical standpoint, to carry on your vocation as a school teacher or school superintendent at the present time?

A. I wouldn't want to try to continue my school work at the present time.

Q. And why not?

A. I just simply feel like I couldn't handle it this year.

Q. Why wouldn't you be able to handle it?

A. Well, in the first place, I would simply give out. It tires me terrible to sit here in the courtroom. I don't think I could do that, and the neck and jaw handicap I think, would make it quite impossible for me to do a reasonable good job in a school." (R. 331-332)

On cross-examination, the plaintiff testified that although his headaches had diminished quite considerably, they were still with him. That they were quite constant; that he gets to doing something sometime and becomes unconscious of the presence of the headache, but the very moment he relaxes the least bit, he is always conscious that the headache is there. (R. 344) The witness further testified, on cross-examination, that he could drive a tractor and ride his horse on a walk but he could not sow his

crops. (R. 353)

Mr. Mitchell testified, that he had always had in mind that if the right kind of opportunity came to continue his school work and managed the property at Parowan. That he had intended to come to Parowan, where his farm property was, and ranch property, and to first of all get that in condition so that it would operate properly, and then if conditions arose whereby he could continue his school work, he had always expected to do that. (R. 359-360)

MEDICAL EVIDENCE OF PERMANENT INJURY AND OF INJURY PERMANENTLY IMPAIRING PLAINTIFF'S EARNING CAPACITY.

DOCTOR KENNETH LEWIS DEDEKIND testified that he was a specialist in oral surgery, as a Dentist. Dr. Dedekind testified that the upper right lateral incisor tooth had been fractured off and also the upper right first bicuspid. That there was also a shadow appearing on the films that indicated possibly one of the teeth was knocked completely out, which would indicate a second bicuspid. The x-ray films taken were rather limited in their scope. They did not show the entire jaw, but that portion of the jaw which supports the teeth. (R. 171-2) 16 teeth are normally present in the upper jaw. At the time of the x-ray, there were 12 teeth in place in the upper jaw. Of those 12 teeth there were possibly 9 that showed no evidence of any harm. (R. 172) A visual inspection of plaintiff's mouth disclosed that the particular teeth men-

tioned before had been fractured and broken off probably by some severe blow, and the visual examination was confirmed by the x-ray. It would not have been useful or practicable to attempt to repair the teeth, other than by the removal of those that were remaining, and the use of a plate. There would have been no use in trying to save him anything inasmuch as the only teeth practically that would have been left would be his upper back teeth, which would not support a denture very well from a mechanical standpoint. And so it was decided in conjunction with Dr. Warburton, who subsequently made Mr. Mitchell's denture, that it would probably be best to remove all remaining upper teeth and those two on the lower jaw that were affected as well, and make him a restoration. The doctor stated that the fact that the nerves had been exposed by virtue of the crowns having been sheared off, would cause the patient to suffer considerable pain. On July 23, 1947, three of the teeth were removed, and on September 12, 1947, 11 more were removed making a total of 14. (R. 174) That included all of the teeth in the upper jaw and two teeth in the lower jaw (R. 175) We quote from Dr. Dedekind's testimony at the bottom of page 185 and the top of page 186:

Q. But so far as his use of the jaws were concerned, what would you say?

A. His jaws were solid, and, if he was able to wear a denture, of course, he would have the inconvenience of eating without his own teeth, but he would be able to take nourishment all right.

Q. And talk all right, would he?

A. Yes, he could talk.

A. Let me say this, at the time these x-rays were taken, I noticed quite a bit of limitation in the ability of Mr. Mitchell to open his mouth so that we could get the films in, and whether that has improved since then or not, or since his denture was made, I don't know." (R. 186)

Again on page 187, Dr. Dedekind testified as follows:

Q. Dr. Dedekind, you say that at the time you attempted to insert the paraphernalia for the x-ray pictures, you observed some restriction in the mobility of Mr. Mitchell's jaw?

A. I did.

Q. It seemed to be difficult for him to open his mouth at that time?

A. That is correct.

DR. L. V. BROADBENT testified that he was physician and surgeon practicing at Cedar City, Utah. (R. 189) That he is a partner in operating the Southern Utah Clinic (R. 190) That he first saw the plaintiff on April 3, 1947, when he was brought to the hospital, where he had been admitted in a semi-conscious condition, suffering from shock, and it was apparent that he had some severe damage to his lower jaw. (R. 191) He wasn't clear enough so that he could be questioned until the following morning. There was apparently some cerebral or brain depression, lessening consciousness, from the doctor's observation. (R. 192) He was suffering from a moderate brain depression. There was some beginning

swelling over his eyes and about the prominences of the cheeks, and he had numerous cuts and lacerations of the face. (R. 193) The most marked laceration was the region of the left ear, and that ear was cut from below, that is at a point where attached on to the head and below, upwards to above the canal cutting directly through the ear canal, leaving approximately one-fifth of the tissue still attached to the skull, to the head. And there was an area roughly triangular in shape behind the ear over what we call the mastoid area or, bony prominence behind the ear, about an inch and a half in size from which the skin was almost entirely gone, with the exception of a small pedicle. (R. 194) Except for the upper one-fifth of the ear, it was completely detached from the head. (R. 195) The part of the ear that was detached from the head would have necessarily severed some of those nerve connection and there would undoubtedly be some altered sensation there, unless the nerve was regenerated. Dr. Broadbent would expect that injury to the nerves in the ear to be a permanent condition. (R. 196) The x-ray pictures disclosed three fractures of the jaw. (R. 199) There was a fracture on the left side just in front of the angle of the jaw. That was a compound fracture. A compound fracture is a fracture in which either the skin or mucous membrane or lining of the mouth and jaws is broken and the bone protrudes through. In this case, it was compounded on the inside and not externally, that is, compounded on the inside of the mouth. There was a ragged break of bone there. The fracture was described as compounded, comminuted

because of the segmented little fragments in the bone. It was a severe fracture. There was a simple fracture of the lower jaw on the left side of the point of the chin. (R. 202) There was a compound fracture also on the right side of the lower jaw. It was a severe fracture. A double fracture of the jaw was naturally more serious than a single. (R. 203) During the 13 days that the Dr. Broadbent treated the plaintiff there was a great deal of swelling about his nose and over around his left eye, with a great deal of discoloration around the eye. The left eye was swollen almost completely shut. (R. 211) He had had some hemorrhage around the eyeball itself which would indicate a severe damage to the blood vessels due to an external force, an external violence. (R. 212) Clinically it was Dr. Broadbent's opinion and the opinion of his associates that the plaintiff had a skull fracture. The clinical symptoms which were present, which indicated the possibility of skull fracture, consisted of the swelling about the nose, and the eyes, and the hemorrhage into the tissue about the eye. (R. 214) Dr. Broadbent was unable to demonstrate to his satisfaction any fracture of the cervical vertebrae, but the plaintiff complained of severe pain about the level of the fourth cervical vertebra and the witness was looking particularly for fracture in that area. (R. 217) Witness was unable to diagnose a definite skull fracture from the X-rays. The witness suspected a fracture of the cervical vertebrae by reason of the persistent pain of a definitely localized spot in the neck which did not improve with the passing of time (R. 225) We quote

from page 230 of the record for some direct testimony from Dr. Broadbent:

“Q. A further question in that connection, Dr. Broadbent: You said that there may have been injury to the ligaments in the neck, which would create a result similar to a fracture of the bone; is that correct?

A. Purely hypothetical. Yes, it could have happened.

Q. Now, Doctor, there are times when the injuries to the ligaments and the muscles in the soft tissue in the vicinity of the neck may persist indefinitely, and even for a longer period than the symptoms from bone fracture, is not that correct?

A. I am not prepared to say how long they could last.

Q. But what I am asking is this, Doctor. May not the damage to the ligaments or muscles of the neck be even more severe and cause more limitation of motion and things of that character than an actual fracture of the bone?

A. It could be equal to. I don't feel, personally, that it should be excessive. It could be equal to.

Q. And, as far as you know, that condition may or may not continue for an indefinite period of time after the injury, depending upon the severity of the injury?

A. It would be indefinite period—definitely an indefinite period.”

DR. F. W. BUTLER testified that he was a physician

and surgeon practicing at Safford, Arizona. That in addition to his M.D. degree, he had had two refresher courses at the Mayo Clinic at Rochester, and one European post-graduate clinical course in 1937. That he began his practice July 1, 1926, and had practiced continuously since that time. (R. 259) That between 5 and 10 per cent of his practice is industrial work. That he has served as a referee on the industrial commission of Arizona, for two years. He has had numerous occasions to treat many types of bone injuries and cases involving surgery. Five per cent of his daily practice would be referable to accident industrial work. (R. 260) Dr. Butler saw and treated the plaintiff commencing April 22, 1947: (R. 261)

“Q. What did his condition appear to be, so far as you could observe at that time, when you first called upon him?

A. Well, he was obviously in a great deal of pain. He had a fracture of the lower jaw, or mandible. The jaws were wired together at that time. He had a very deep cut in around his left ear, with numerous sutures in his ear that had not been removed, and he had extensive multiple cuts involving the left ear and the left side of his neck.

Q. Did you observe any other cuts on any other portion of his body at that time?

A. He had other cuts, but I don't have a too descriptive location of them. His face was swollen; his left eye was swollen and discolored; his neck was stiff and painful upon attempting to move his head; he could not open his mouth

because his teeth were fastened together.

Q. Were the teeth fastened together by this wire arrangement for the jaw?

A. Yes."

Dr. Butler testified that the plaintiff's whole face and neck was swollen rather extensively and that the soft tissue around his left eye was swollen too. (R. 262) From April 22, until about May 9, Dr. Butler saw the plaintiff approximately every other day. The plaintiff came to his office on May 9, for x-ray study of his head and neck and jaw. The doctor took x-ray pictures on the 9th of May, 1947, which were marked plaintiff's exhibits A, B, and C. (R. 263-264) Dr. Butler stated that he had owned his own x-ray machine for 16 years and had interpreted his own pictures to the satisfaction of the industrial commission for 16 years. He had daily occasion to interpret x-ray pictures in his practice of medicine and surgery, with an average interpretation of not less than one dozen films a day probably. He testified that Exhibit A disclosed a fracture of the mandible in two different places, a comminuted fracture—that means a fracture that is through and a piece of bone broken off. (R. 267) The doctor testified that the plaintiff had a fracture of the upper jaw or the maxilla involving the dental processes in and around the first and second molars upper left with a comminuted fracture of the dental processes. (R. 268) We quote directly from the doctor's testimony commencing at the battom of page 268 of the record:

“Q. Now, doctor, I hand you Exhibit C, and I will ask you to show what Exhibit C represents.

A. Exhibit C confirms the above statement relative to fracture of the lower jaw and of the upper jaw.

Q. Let me ask you, Doctor, what view Exhibit C represents.

A. That is a lateral view of the face, neck and base of the skull. It confirms the above statement and brings out other evidence that was not visible in the previous x-ray, that is a fracture in the body of the first cervical vertebra; a comminuted chip about one-fifth the size of the body of the first cervical vertebra. There is some evidence of an injury to the orbit and involving the frontal sinuses; that is referable to the sockets of the eye. It is indicated to me that there has been a fracture of the front part of the skull involving the left orbit and extending up to the frontal sinus, left side. There is some evidence of a change in the consistency of the tissue in and around involving the first and second cervical vertebra.

Q. What does that change indicate, Doctor?

A. They indicate trauma, or bony changes as the result of trauma.

Q. What do you mean by “trauma”?

A. Injury.

Q. State whether or not that condition of fracture and the subsequent changes that you have just testified to would have any effect upon the movement of the neck?

A. Very definite limited motion.

Q. State how that occurs.

A. Because the first two vertebra of the neck support the atlas and axis. It is just like a pool ball with a hole in it sitting on an axis or a pin that rotates back and forth.

Q. In connection with the condition of Mr. Mitchell's neck at that time in the vicinity of the first cervical vertebra, did you make any external observation of the patient aside from the x-ray pictures?

A. He had pain on deep pressure in and around his neck. He complained of some pain in his upper extremities.

Q. Did you apply pressure to the neck in the vicinity of the first cervical vertebra at that time?

A. Yes.

Q. Now, Doctor, I will ask you, in view of your experience in the diagnosis and treatment of conditions of this type, if you have an opinion as to the length of time which would be required for the patient to recover from an injury to the neck as indicated by the x-ray pictures and by your observations at that time? You may indicate "yes" or "no" if you have such an opinion.

A. Yes.

Q. What is that opinion?

A. My opinion is that an injury of the neck of this nature naturally will result in some disability.

Q. What I mean, Doctor, is do you have an opinion as to whether such an injury will be per-

manent or heal completely? (R. 270)

A. It will be of a permanent nature. (R. 271)

Q. Doctor, do you have an opinion as to whether or not the patient's use of his neck, the movement of his head, will be restricted permanently?

A. Yes, I am sure there will be some limitation of motion there.

Q. Have you as a physician and surgeon had occasion to treat injuries involving fracture of the cervical vertebra?

A. Yes, I have had several in my experience.

Q. Now, Doctor, I will ask you whether in view of your experience you have an opinion as to whether or not an injury to the first cervical vertebra as shown by Exhibit C will be permanent or temporary?

A. There will be a certain per cent of permanent disability.

Q. I will ask you again, Doctor, if you have an opinion as to whether or not the patient will suffer a permanent restriction of the mobility of the head and neck?

A. There will be a permanent limitation of the motion in all spheres.

Q. What do you mean by "all spheres"?

A. Side, lateral, up, down, back—all spheres of motion.

Q. Doctor, do you have an opinion as to whether or not this process of calcification or deposit of bone in the vicinity of the first cervical

vertebra would continue into the future, or will cease?

A. Yes.

Q. Doctor, what is that opinion?

A. My observation has been with similar cases that severe injury involving a joint of a vertebra very frequently results in a condition called traumatic arthritis, or an arthritic condition of the intervertebral joint or articulation. (R. 272)

Q. Now, Doctor, do you have an opinion as to whether or not an injury to the neck of the type indicated by Plaintiff's Exhibit C would have a tendency to produce pain upon the movement of the head?

A. It would.

Q. Now, Doctor, do you have an opinion as to whether or not injuries to the neck and jaw and orbit, as you have testified to with respect to these exhibits, could result from natural causes or would be due to a traumatic injury?

A. It would of necessity be due to a severe injury or blow; it could not result from natural causes." (R. 273)

We again quote Dr. Butler's testimony from page 275 of the record:

"Q. Doctor, do you have an opinion as to whether or not the plaintiff has suffered a permanent partial loss of bodily function by reason of the injuries that he was suffering from at the time you examined and treated him?

A. Yes.

Q. What is that opinion?

A. The opinion is based on the severity and the degree of the injury, that there will be some permanent impairment of bodily functions, probably early fatigue; a tendency toward traumatic neurosis and possibly a tendency to develop post-traumatic esthenia. That is on the basis of observation where the vital organs were injured, or severe head injuries or severe crushing injuries of the chest were suffered. A big per cent of individuals that have experienced that type of injuries have more or less phlegmatic attitude toward attacking problems of any magnitude.” (R. 275)

Dr. Butler further testified on page 282 of the record as follows:

“Q. None of Mr. Mitchell’s bones were broken in any joints, were they?

A. Yes, the cervical vertebra there involves the joint. The first cervical vertebra is fractured into the joint.” (R. 282)

Again from page 283 of the record:

“Q. There could not be any arthritis from any of the breaks that you saw, with the possible exception of the cervical vertebra?

A. Well, there is a possibility that he will develop arthritis in the articulation of the jaw on both sides.” (R. 283)

Counsel at page 17, of their brief, in reviewing Dr. Butler’s testimony, call attention to Dr. Butler’s state-

ment to the effect that the plaintiff had made a wonderful recovery. He would not say a complete recovery but that he had made a remarkable comeback. Dr. Butler explained that the statement on re-direct examination as follows:

“Q. Doctor, when you stated on cross-examination that the patient had made a remarkable come-back but not a complete recovery, what did you mean by that?”

A. Well, I had still in my mind that the last time I saw him he had this limitation of motion in his neck and he had pain in his jaw and quite a lot of nervousness.’ (R. 287)

Counsel either with a deliberate or in an inadvertent attempt to mislead the court, quoted the last portion of Dr. Butler’s testimony as an indication of the way he summed up his testimony as a whole, rather than as an explanation of the statement he had made on cross-examination with respect to the extent of recovery. (See defendant’s brief, p. 17)

DR. REED SMOOT CLEGG, testifying on behalf of plaintiff, stated that he was a graduate of Northwestern University and was resident and surgical interne at Saint Luke’s hospital in Chicago, the orthopedic section, Mayo Clinic, Rochester, Minnesota, for three years, and in the Army for three and a half years. (R. 288) That while he was in the army, he was engaged in orthopedic surgery, and that he has established a specialization in the field of orthopedic surgery, which special practice, he

has followed for 11 years. That he first examined the plaintiff on January 15, 1948. (R. 289) The doctor testified with respect to this first examination as follows:

“Q. Doctor, while the clerk is marking the x-rays, what did your examination, aside from the x-ray findings, disclose at that time?

A. I found several things wrong; I will refer to my notes, and—

Q. Are those notes which you made at that time?

A. Yes, sir, these are my office notes. No. 1 is a healed fracture of the left mandible; No. 2 absence partial teeth; No. 3, healed scar of the left ear; No. 4, area of anesthesia about the left ear and left side of the chin.

Q. What is meant by that term, Doctor?

A. That's loss of sensation in that area. No. 5, healed rib fracture, seventh on the left side; No. 6, anklyosis or limitation of motion, partial fibrous of the cervical spine or neck; No. 7—

Q. Doctor, at that point, may I inquire as to what extent the anklyosis of the neck appeared to be at that time?

A. Moderate limitation of motion in all directions.” (R. 290)

Q. Now, you have testified that was in all directions, movement of the head in all directions?

A. There was some limitation of motion in all directions.

Q. What other observations did you make, Doctor?

A. No. 7, has apparent healed fracture of the nasal bone, with deviation of nasal septum to the left. That is the nose bone. No. 8, is ankylosis, partial fibrous slight of left thumb in the opponens direction; and, No. 9, is ankylosis partial fibrous temporal mandibular.

A. Temporal mandibular.

Q. Will you explain—

A. Or jaw joint.

Q. You mean, then, which jaw, Doctor?

A. Well, we speak—there is only motion in the lower jaw.

Q. I see; at that time, you then observed a restriction of motion in the lower jaw?

A. Yes, sir.

Q. Did you make any other observations, Doctor?

A. I believe that's all." (R. 291)

With respect to the x-rays taken by Dr. F. W. Butler, of Safford, Arizona, Dr. Clegg testified as follows: (R. 296)

"Q. Now, Doctor, I will show you Exhibit C in this case, which, under the testimony in this record, represents an x-ray picture taken on the 9th day of May, 1947, by Dr. F. W. Butler in Safford, Arizona, and I will ask you if, calling your attention to the cervical vertebra indicated on this x-ray, I will ask you if you observed any abnormalities on the x-ray?

A. I do.

Q. What abnormalities do you observe?

A. There is an area of roughness in front, or anterior to the first cervical vertebra.

Q. Just what do you mean, Doctor, by that?

A. There is an abnormal bony prominence in this area.

Q. Doctor, state whether or not there is any evidence of bone chip in that area.

A. Yes, sir, this deformity may be the result of a chip fracture. (R. 297)

Q. Now doctor, have you had occasion to examine Mr. Mitchell subsequent to this first examination?

A. Yes, sir.

Q. When did you next examine him?

A. Well, last examination was the—I believe, it was the 20th of April, 1948.

Q. And did you observe any changes in his condition at that time?

A. Yes.

Q. What changes did you observe?

A. Well, there had been some improvement in the motion of the left hand—let's see—I believe that is the only significant change.

Q. So that, except for that change, the present diagnosis—at any rate, the one you made on the 20th of April of this year—would be identical with the one made at your first examination?

A. Yes, sir.

Q. Now, Doctor, assuming that the plaintiff,

Mr. Mitchell, was injured, sustained these injuries to his neck and jaw on the first day—on the third day of April, 1947, and, in view of your experience as an orthopedic surgeon, and, in view of the information you have at hand that you have testified to in court relative to your examination of Mr. Mitchell, do you have an opinion as to whether or not the ankylosis of the jaw, which you have testified to, will be permanent in any extent? (R. 297)

Q. You have such an opinion?

A. Yes, sir.

Q. What is that opinion?

A. I believe there will be some permanent limitation of the motion, or ankylosis. (R. 398)

Q. Now, Doctor, relative to the condition which you observed of Mr. Mitchell in connection with the ankylosis of the cervical vertebra and the restriction of the motion of his head, in view of the examination which you have made of Mr. Mitchell, and, in view of the x-ray finding indicated by Exhibit C, and, in view of your experience as an orthopedic surgeon, do you have an opinion as to whether or not this ankylosis or restriction of motion in the neck will be a permanent condition, to any extent?

Q. You have such an opinion?

A. I do.

Q. What is that opinion?

A. I would expect there would be some limitation of motion.

Q. My question was, Doctor, whether or not

you would expect such limitation to be permanent?

A. Yes, sir, I would. (R. 299)

Q. Doctor, I will show you an Exhibit G, which Dr. Broadbent has testified to was an x-ray picture taken by—under his supervision—at the Iron County Hospital of Mr. Mitchell, either the day after, or period immediately following the injuries which Mr. Mitchell suffered to his jaw, and I will ask you if you observe any fractures indicated in the jaw on this picture?

A. I do.

Q. Will you point those fractures out, and describe them, if you can?

A. This side of the jaw is labelled “L”, probably referring to “left.” There is a line of fracture with smaller pieces of bone knocked off in this area, which is a comminuted or multiple fracture of the jaw on the left side.

Q. You observe any other fractures. (R. 300)

On the right side, we have a similar type of fracture in the jaw, which is evident here.

Q. When you say, “similar type,” you mean that also was a compound comminuted fracture, I take it?

A. It is a comminuted fracture.

Q. I will ask you, Doctor, if Exhibit F discloses any fractures of the jaw?

A. Yes, sir.

Q. And where are those indicated?

A. Fracture line evident through here, and not very clear, probably in this area there.

Q. I think you may take the stand. Now, Doctor, do you have an opinion, in view of your training and experience, and, in view of the facts disclosed by your examinations of Mr. Mitchell, as to whether or not this area of anesthesia in the vicinity of the lip will be a permanent injury or not?

Q. You have such an opinion Doctor? (R. 301)

A. I do.

Q. What is your opinion?

A. I believe that it will be permanent.

Q. Now, Doctor, in view of your experience as an orthopedic specialist, and, in view of the findings—x-ray and otherwise—you have made through the examinations of Mr. Mitchell, do you have an opinion as to whether this condition of anklyosis of the neck and the jaw would have a tendency to produce pain?

A. I do.

Q. What is that opinion?

A. It might.

Q. Now, what do you mean by that, Doctor?

A. In attempts to turn the neck more than the limiting tissues allow, there might be pain.”
(R. 302)

Dr. Clegg then testified that there was a slight limitation of motion due to some partial fibrous irregularity

in the left thumb. (R. 305) On cross-examination, Dr. Clegg stated that he couldn't see any other fracture in the vertebra itself, except the chip fracture and that was indicated by Exhibit C, where there is an area of bony roughness with a line through it that may possibly be a chip fracture. He stated that a healed chip fracture ordinarily would not result in any stiffness or limitation of motion from the bony changes. (R. 306) The doctor then testified as follows, at the bottom of page 307:

“Q. And how, Doctor, then, do you conclude that—how can you determine whether there is or is not anything wrong with the fibrous tissue in the neck?

A. The fact that there is limitation of motion in the neck infers that there is something wrong or pathological of the soft tissue, which includes the fibrous tissues about the neck.

Q. But, you wouldn't know, from your examination as to specifically, anything specific, which would be wrong in the neck?

A. Well, yes, I think you could say you could.

Q. What would that be?

A. When there is limitation of motion, it is usually due to what we call contracture or scarring of the soft tissues which prevents the motion.

Q. But, just where and what tissue are damaged, you wouldn't know that?

A. That's right.

Q. And in basing any opinion as to what might or might not be damaged in there, you have to be governed pretty largely by what Mr. Mitchell tells you how he feels and how he can turn his neck and so on?

A. As to the amount of pain, we depend on the patient's subjective statement.

Q. Your opinion is pretty largely based upon subjective statements of the patient as to what he says is troubling him?

A. Only partially.

Q. Partially?

A. Yes, sir.

Q. What else could your opinion be based upon?

A. The fact that there is limitation of motion is an objective or definite finding.

Q. How do you determine objectively, Doctor, that there is limitation of motion?

A. We do the test which is to evaluate or show the amount of motion of the neck, and this showed limitation of motion.

Q. How do you do that, or what do you do, if anything?

A. First, have the patient turn his head each way, and then forward and backward while we hold the soft tissues in our hands; then we actively, or we passively rather, turn the head ourselves while we feel the neck.

Q. Can you determine, while you are doing that, whether the patient is moving the head to the full extent he can, or—

A. I think so.

Q. That is pretty largely subjective again, however, is it not?

A. Not necessarily.

Q. And tissues and fibrous tissue in the neck, Doctor, tends to repair itself, does it not?

A. There is general improvement, but there may be permanent limitation.

Q. There may be?

A. Yes, sir.

Q. Whether there is going to be permanent limitation is a particular case is a matter of speculation, is it not, Doctor?

A. Yes, sir; yes, sir.

Q. Just pure quesswork?

A. Well, we don't term it that." (R. 309)

Q. Now, assuming that the injuries to the jaw are of the extent indicated by the x-ray which you examined, taken by Dr. Broadbent, and—

Q. —and, assuming that the patient, more than a year after the occurrence of the accident, still suffers from this ankylosis of the jaw that you had yourself observed, would you expect him to be among the group of those many people who made a full recovery from an injury of this kind?

A. Answer is no, he would not be in the group that would make a full recovery.

Q. Now, Doctor, assuming that Mr. Mitchell, more than a year after the injury occurred, continues to suffer from the limitation of motion in

the neck and the movement of the head that you have observed and tested at this time, the injury having occurred on the third of April, 1947, would you expect him to be in that group of people who would make a complete recovery from the injury to the soft tissues of the neck that you testified in your cross examination?

A. No. (R. 314)

* * * *

Q. Doctor, in response to counsel's question that your appraisal of the condition of Mr. Mitchell may be speculative, did you mean by that that it was pure guesswork, or whether or not your appraisal is based upon facts which you have observed?

A. It is based on experience.

Q. And by "speculation," did you intend to convey the impression that it was pure guesswork as to what the prognosis would be?

A. I don't think it is guesswork, no, sir."
(R. 315)

We again quote the doctor's testimony from page 311 at the bottom:

"Q. And whether or not there be any—you couldn't state for any certainty as to whether or not—well, I believe you stated, Doctor, there might be some permanent loss of motion there, that there might be?

A. If I said, "might," I should have said stronger; I don't think there is much question about it, there will be some limitation; you can't

say a hundred per cent sure, but I don't think there is much question about it.

Q. And the extent of that disability would be a matter of pure speculation, however, wouldn't it?

A. Yes, there is always variations.

Q. And sometimes with an injury of that kind, or usually, the patient is restored to the substantial use of his jaws, is he not, and mouth?

A. Sometimes, yes.

Q. For all practical purposes?

A. I'd put it it's possibility, but very remote in this case.

Q. Would it be your opinion, Doctor, man of Mr. Mitchell's condition would be able to sing?

A. I don't know if he could sing before, or not.

Q. Well, assuming that he could; assuming that he could.

A. Well, I can't say if you need full range of his jaw to sing or not." (R. 312)

Q. Dr. Clegg, you have testified that in many instances persons who suffer fractures to the jaw make a full and a complete recovery, is that correct?

A. Yes, sir.

Q. Now, normally, what period of time is required for that complete recovery to be indicated?

A. The length of recovery period depends

on the extensiveness of the injury, the patient's general condition, the age, and other influencing factors. It is very variable.

DR. WILSON, the radiologist who testified on behalf of the defendants and who was unable to discover a fracture in the plaintiff's cervical vertebrae, nevertheless admitted that there was a possibility that there might be a fracture there (R. 492); and he further admitted that even radiologists or roentgenologists disagree in the interpretation of x-ray films and that some will see fractures where others will not see them, and that in his own experience he has had occasion where he has disagreed with other radiologists in the interpretation of x-ray pictures. (R. 493)

DR. RICHARDS, who testified on behalf of the defendants admitted that there may be a permanent injury in plaintiff's neck. (R. 525) He testified that the union of the jaw was a poor union as disclosed by the x-rays he had taken July 1, 1947 after the wires had been removed from plaintiff's jaw.

“Q. Will you state what fractures of the jaw are indicated and what the type of fracture is that the x-ray pictures discloses?

A. It was merely a small linear fracture at that point. I think most of you can see this small line through the right side of the jaw, and back in the back part of the jaw on the left side there is a complete fracture line which is represented by this dark line running through at this point.

Q. What do you mean by complete fracture?

A. Well, I mean it is complete in so far as the bones themselves, completely broken through and apparently somewhat separated.

Q. Would you refer to that as a comminuted fracture?

A. Yes.

Q. State whether or not there has been a satisfactory union of the jaw at that point.

A. Well, in this x-ray there is definitely not a satisfactory union, in my interpretation.

Q. Your interpretation is that the union of the jaw at that point is a poor union?

A. Yes, sir.

Q. And this x-ray was taken after the wires, of course, were removed from the jaw?

A. Yes.

Q. What date in July, doctor?

A. The date there is just obscure. It was taken on the first day of July, 1947. (R. 527-8)

The witness was then shown Plaintiff's Exhibit Z and testified with respect to that exhibit as follows, commencing at page 528 of the record:

“Q. Will you state what deformities this exhibit shows with respect to the jaw?

A. Well, this x-ray shows the same fracture through the left side of the jaw at the so-called angle, or at this point. This x-ray shows that there is some beginning union in the posterior

portion which would produce a reasonable stability of the jaw.

Q. But where the shadow is it discloses a poor union?

A. Yes, sir.

Dr. Richards diagnosed a fracture of the metacarpal bones of plaintiff's left hand (R. 531) Then with respect to the injury to plaintiff's nose, Dr. Richards testified as follows, beginning on page 532:

“Q. Now, doctor, at that time you also made an examination of the plaintiff's nose, did you not?

A. Yes, sir.

Q. Did you discover any abnormalities about his nose?

A. Yes, he had a fractured nose.

Q. What was the extent of that fracture and the details with respect to it, doctor?

A. As I recall he had definite external evidence of a fracture as well as internal evidence of a fracture, with somewhat of an encroachment of one of his nasal passages.

Q. Was it then what we call a deviation of the nasal septum?

A. Yes.

Q. Is that the cartilaginous structure in the nose, or bony structure?

A. The cartilage follows the bony structure. It may have a fracture of its own, but as a rule

it follows the bony structure which supports it.

Q. Did you determine a fracture in the bony structure of the nose which resulted in external and internal deformity?

A. That was my opinion, yes.

Q. You observed there was some intrusion into the nasal passage which would obstruct breathing to a certain extent?

A. Yes, sir; I have so stated, that there was obstruction, some obstruction."

At the time of his examination of the plaintiff, Dr. Richards also observed that there was a point of an-esthesia in the vicinity of the left lip and that plaintiff was in a highly nervous condition as a result of the injuries he had sustained (R. 534)

DR. W. LES WARBURTON, a dentist, testified on behalf of plaintiff that he examined plaintiff's mouth on July 22 and referred him for some extractions. In describing the condition of plaintiff's mouth at that time the doctor testified as follows, beginning at page 370:

A. Well, his mouth had pretty well healed from the injury at the time I saw him. There were still two broken roots imbedded in the mouth and which the crowns had been broken off, and one of them had almost completely healed over, but the mouth was, in general, was in the healing process, almost complete, and, at that time, we felt it was most urgent, in order to get his mouth healthy, to refer him for some immediate extractions, and, later on, come back and have all the balance of the upper teeth extracted, because

be impossible to build on the remaining teeth for any restoration.

Q. Now, what number of teeth, if any, had the appearance of having been shattered in the upper jaw?

A. Well, that is hard for me to remember right now. We can refer to the x-rays and tell you more definitely because that's the record of the mouth. I have got a cast here of his front teeth; we could not get his mouth open wide enough to make a cast of his mouth at the time, and we couldn't make an impression of his mouth at any time until all the upper teeth were extracted except just the anterior teeth.

Q. I hand you Exhibit D, which purports to be the x-ray pictures to which you have referred.

A. And from these pictures, there was one tooth that was completely knocked out of the mouth at the time of the accident; you can see it because the bone is so injured.

Q. Which tooth was that?

A. That would be the upper right second bicuspid. The first bicuspid, the whole crown is completely broken off, the root retained. The cuspid was splintered, and I have got a record of that tooth here on this cast where it was broken off and chipped there around the crown and in different directions; then—

Q. At this point, doctor, were those fractures such as to expose the nerve?

A. Not on the cuspid, but on the other two teeth, on the lateral and the first bicuspid.

Q. In your experience, would that condition have a tendency to produce a great deal of pain until the situation was remedied?

A. Definitely, until you get denture relief.

Q. Now, proceed, doctor.

A. Right lateral, which is the one next to the cuspid, was completely broken off, and that is the one I saw was imbedded and healed over, and only by the x-ray, we could see definitely there was a root, although I remember having suspicions of being some infection or inflammation there.

Q. Doctor, you have reference to this imbedding and of the roots remaining; is it necessary in the proper treatment of the mouth to extract those roots?

A. Oh, definitely; all roots have to be removed to make certain you remove infection.

Q. Now, proceed, doctor.

A. In that case, then—now, I can't remember how far the molars were involved in the balance of the mouth, I remember one tooth on the left side was splintered, but with the locking of the jaw, he had lack of opening, a semi-ankylosis there was at the time I was treating him, be impossible to get an impression to make a bridge; if there were any remaining teeth, it was only by removing enough teeth, we were able to make him a restoration to get into his mouth to make any impression."

With respect to the injury to teeth in the lower jaw, Dr. Warburton testified as follows, on page 373:

A. The lower right. We sent him home allowing that part of his mouth to heal up. He was coming back for complete upper extractions and the removal of lower left second molar, which was badly splintered from the accident; that was so splintered down the side of the tooth, and the whole buckle surface destroyed, that had to come out. That was right in line of the fracture of the jaw, too, so x-rays will show that was involved in the line of fracture, and was possibly retarding the healing of the fracture.

Q. That particular fracture there would have a tendency to produce a great deal of pain until it was corrected, wouldn't it, doctor?

A. Oh, definitely, especially when the tooth is right in the line of fracture.

Q. Then thereafter what treatment did you apply?

A. On September 12, he had all the remaining upper teeth out, and that lower molar kept him in town for a few days to check the preliminary healing, and sent him home, and I didn't see him again until October 7, and I proceeded to make him his first denture, which is more or less a temporary denture, in my estimation, and it was only at that time we were able to get an impression tray in his mouth to get an impression, and it was at that time I started my examination of the lower teeth, clean them out; we find out we have got another tooth on the lower that is badly splintered, the lower right cuspid.

Q. That in addition to the one that is in the fracture area?

A. Yes, lower right cuspid back of the

mouth that is badly splintered and will need restoring in some way.

He then testified to the future treatment that would be necessary in order to repair the injured teeth in the lower jaw and in order to install another denture in the upper jaw. (R. 376-377) The doctor testified that the gums in the lower jaw were very healthy. (R. 378) Dr. Warburton agreed with Dr. Dedekind that there was pyorrhea on the right lower molar, but did not see how pyorrhea could be demonstrated on the left molar in the lower jaw because it was right in the line of fracture. (R. 379) On cross examination Dr. Warburton testified as follows on page 382:

“Q. Now, let’s—if you assume, doctor, that Mr. Mitchell had not been injured in an accident, would you have any opinion as to whether, later on, during his lifetime, he would in all probability have to have substantial work done?

A. I couldn’t make a complete examination of those upper teeth, and those are the teeth that are a loss. We can’t prove anything on that question; go back to the lower teeth, if I can keep him as a patient, I would almost guarantee he could keep his lower teeth the rest of his life, remaining lower teeth.

Q. After he expends this amount of money here that you mentioned, you would expect to put his mouth and teeth in pretty good condition?

A. Pretty good condition.

Q. He would have the substantial use of his mouth?

A. The only handicap that he has got is that he can't open his mouth wide enough to really get what you call a substantial use because he can't take large mouthful of anything.

Then on redirect examination at page 383 the doctor testified as follows:

“Q. Of course, doctor, whatever remedial steps are taken by way of substitution of a plate, they never are as satisfactory as the original teeth, are they?

A. Well, never. They consider a denture is about twenty per cent efficient, as far as masticatory pressure, and people can learn to use those dentures and get by and do the job, but, if they have their own natural teeth, they ought to be able to do about five times better.

Dr. Warburton then testified on page 375, as follows:

Q. Did the teeth, except for the shattered appearance, appear to be sound?

A. Hardly know how to answer that, because there was so much displacement on some of the teeth there in his mouth, due to fracture that he had a misplacement, when he was through, the injured teeth were loosened and in changed and new position; they would heal in that position. I don't think I would say they were in a natural position, any tooth in the upper jaw, although I won't say positively.

Q. What I mean, did the teeth appear to have caries or cavities, or other conditions which rendered them unsound except for the condition caused by the injury?

A. He had some restorative work in his upper teeth, but I would say they were sound with that.

Q. Now, doctor, you say that you later, after the extractions had been completed, made an impression for the purpose of making a complete upper plate?

A. Yes.

Q. And, thereafter, did you perform that work?

A. I inserted a full upper denture on October 14.

Q. Now, have you made an examination since to determine whether or not it will be necessary to make any further alterations in that upper denture?

A. Well, that upper denture, in my estimation, is a temporary denture. I would like to have him in and make a denture, now that his mouth is completely healed; we can't ever say a mouth is completely healed.

Q. Why was it necessary to make a temporary denture?

A. Wouldn't want him to go six months without teeth.

Q. So that denture which was made, you considered to be a temporary one?

A. Yes, I made it—well, on the basis that we would, after he got more of an opening, we could do a better job by getting in his mouth and making proper impressions.

BRIEF OF ARGUMENT

Point 1. The trial court did not err in admitting in evidence the Annuity Table (Exhibit X) and in its instructions thereon.

(a) There was ample evidence of permanent injury and of permanent impairment of earning capacity.

(b) The annuity table was in proper form.

(c) The court's instructions on the Annuity Table were in all respects proper and if defendants desired amplification of the court's charge, they should have requested it.

Point 2. The court did not err in its other instructions to the jury, except to the prejudice of the plaintiff.

(a) Evidence of defendants' negligence was clear, convincing and uncontradicted.

(b) There was no substantial evidence of contributory negligence which warranted submission of that defense to the jury.

(c) Assuming the sufficiency of the evidence of contributory negligence, the court nevertheless fully submitted and over-emphasized such defense to the jury.

Point 3. The defendants did not properly except to the instructions they now complain of and cannot urge such exceptions on appeal.

Point 4. The court did not err in its failure to give defendants' requested instructions.

Point 5. The court did not err in denying defendants' motion for a new trial.

Point 1. The trial court did not err in admitting in evidence the Annuity Table (Exhibit

X) and in its instructions thereon.

(a) There was ample evidence of permanent injury and of permanent impairment of earning capacity.

Defendants' exceptions to the use of the annuity table (Exhibit X) is based upon their unwarranted assumption that the plaintiff failed to show permanent injury impairing his earning capacity. It is for this reason that plaintiff has set out with admitted fullness the medical and lay testimony showing that defendants' position in that respect is not justified by the evidence.

To summarize briefly, the plaintiff at the time of the trial (more than a year after the accident) still complained of a restriction in the movement of the neck in all spheres of motion; that he could move it to the extent he demonstrated to the jury but beyond that it was very painful. It is obvious that this injury would seriously hamper plaintiff in the performance of his work as a rancher, farmer, and teacher. He stated that there were a good many things he couldn't do on the farm. He couldn't do strenuous physical work well (and it cannot be denied that a farmer's work is strenuous); that he was unable to pitch hay without pain; that he has a definite feeling of pain when he attempts to lift any heavy object; that he can't sow his crops; that he can't plow a field satisfactorily, drill grain or things like that, because he can't watch to see what is happening; that in connection with his ranching activities it is necessary for him to ride horseback, but he rides trusty horses usually at a walk, because of the pain caused by the

jarring; that he has backed his automobile into a ditch a few times because he had difficulty in reversing the car; that for the past few months there has been no improvement in the condition of his neck.

In addition to the neck condition with its continuing symptoms, plaintiff testified that he was restricted in the movement of his jaw; that in the region of the upper jaw close to his left ear there was always some pain; that there was an ugly sensation in the movement of the jaw so that when he tries to use it in talking or eating, it feels sort of artificial and it's quite difficult for him to use it.

We earnestly urge that the persisting restriction in the use of the jaw adversely limits plaintiff's ability to perform his work as a teacher. How defendants find it possible to arrive at any other conclusion escapes us. Defendants' position might be more tenable if plaintiff was a librarian with the duty of furnishing books to readers in silence, but it goes without saying that unimpaired speaking powers are essential to the school teacher.

Moreover, plaintiff testified that he still has extreme difficulty in getting rest and that he can only sleep in certain positions; that his breathing through the nose gives him difficulty; that his head aches continually across the base of his head; that he suffers considerable pain in the area of his injured ear; that his ear feels like it is tied up; that the discomfort which resulted from the spraining and fracturing of his hands still

continues.

The permanency of plaintiff's injuries were confirmed by the medical testimony, particularly that of Dr. Butler and Dr. Clegg.

Dr. Butler diagnosed a skull fracture and a fracture on the body of the first cervical vertebrae and a change in the consistency of the tissue involving the first and second cervical vertebrae; that such conditions would very definitely limit motion of the neck because the first two vertebrae of the neck support the atlas and axis; that there were external indications of pain on deep pressure in and around the neck. That the injury to the neck would naturally result in some disability which would be of permanent nature, and the patient's use of his neck and movement of his head would be restricted permanently in all spheres of motion; that the process of calcification or deposit of bone in the vicinity of the first cervical vertebrae in similar cases of severe injury involving a joint of the vertebrae very frequently result in traumatic arthritis or an arthritic condition of the intervertebral joint or articulation; that the injury to the neck would have a tendency to cause pain upon a movement of the head. That the condition of the neck would of necessity be due to a severe injury or blow and could not result from natural causes; that plaintiff has suffered a permanent partial loss of bodily function; that there will probably be early fatigue and a tendency toward traumatic neurosis and possibly post traumatic esthenia. That the first cervical vertebra is fractured into the joint.

With respect to the jaw injury, Dr. Butler testified that there was a possibility that plaintiff would develop arthritis in the articulation of the jaw on both sides.

Dr. Reed Clegg testified that his examination of the plaintiff on January 15, 1948, disclosed moderate limitation of the motion of the head and neck in all directions, and further a fracture of the nose with deviation of the nasal septum to the left and ankylosis, partial fibrous slight of the left thumb and lastly ankylosis partial fibrous of the jaw joint or a restriction of motion in the lower jaw. Dr. Clegg upon being shown exhibit "C" diagnosed an abnormal bony prominence in the area of the first cervical vertebrae which may be the result of a chip fracture. The only significant change which Dr. Clegg observed on the second examination of plaintiff was some improvement in the motion of the left hand. Otherwise, plaintiff's condition remained the same. Dr. Clegg testified that there would be some permanent limitation of motion of plaintiff's jaw and neck. Dr. Clegg was able to determine by the movement of the patient's head with his hands that there was limitation of motion; that there were indications of something wrong with the soft tissues including the fibrous tissues about the neck; that condition usually is due to contracture or scarring of the soft tissues which prevents motion; that he could not say 100% sure, but he did not think that there was much question but what there would be some permanent loss of motion in plaintiff's neck.

Both of the dentists who treated plaintiff observed

a restriction in the plaintiff's ability to open his mouth. Dr. Warburton testified that this was of sufficient extent to make it impossible for him to take an impression of plaintiff's mouth until all the upper teeth were extracted except the anterior teeth. (R. 372, 374) Dr. Dedekind experienced difficulty in inserting the x-ray plates. (R. 186-7) Of course, both dentists established the necessity of complete removal of all of plaintiff's upper teeth as a result of the accident, and Dr. Warburton indicated need for considerable further treatment including the preparation of a more permanent upper plate and the repair of teeth in the lower jaw damaged by the accident. Dr. Warburton testified that artificial teeth are only one fifth as efficient for masticatory purposes as natural teeth. (R. 224)

It is true that Dr. Wilson, the radiologist called on behalf of the defendants was unable to discover a fracture in the plaintiff's neck, but he, nevertheless, admitted that there was a possibility that a fracture might be there, and he further admitted that even radiologists disagree in the interpretation of x-ray film and that some will see fractures where some will not see them and that has been true in his own experience.

Dr. Richards testified to a poor bony union with respect to the compound fracture of the jaw as indicated by x-ray taken July 1, 1947. He further testified that he had diagnosed a fracture of the bones of plaintiff's left hand and fracture of plaintiff's nose with encroachment of one of his nasal passages. He further observed plain-

tiff's highly nervous condition as a result of the injuries he had sustained.

From the foregoing medical testimony we deem the conclusion irresistible that plaintiff suffered permanent disabling injuries to his neck and jaw which would of necessity impair his ability to earn his livelihood either as a teacher, rancher or farmer.

Plaintiff was 51 years of age (R. 316) and had 20 and 20/100 years of life expectancy. (Exhibit X) That his previous year's income from the school district as principal in 1924 was approximately \$5100.00. (R. 329) and for the year prior it was slightly less than \$4800.00 (R. 330) and his salary in 1942 was around \$3500.00. (R. 331)

When asked why he would not be able to handle his school work at the present time the plaintiff stated:

“Answer: Well, in the first place, I would simply give out. It tires me terribly to sit here in the court room. I do not think I would do that, and the neck and jaw handicap I think would make it quite impossible for me to do a reasonably good job in the school.”

Although plaintiff had terminated his connections with the schools in Arizona, he stated that he intended to come to Parowan where his farm and ranch property is and to get that into condition so that it would operate properly, and then if conditions arose permitting he expected to continue his school work. (R. 360)

In describing his ranch and farm property, the plaintiff stated that he had about 98 acres of land which he irrigated, that he had pastures in the valley and privately owned winter grazing in the north end of the valley and approximately 1400 acres of summer grazing mountain land near Parowan, that in connection with those lands, he ran sheep and cattle. (R. 333)

We submit that plaintiff's evidence is altogether sufficient to place this case squarely under the rule established by this court in the case of Pauley v. McCarthy, 109 Utah 431, 184 Pac. 2d. 123, wherein the court made the following declaration:

"We wish to make it clear that we do not hold that in every case where permanent injuries are alleged and evidence in support thereof is introduced that the mortality and annuity tables are admissible. We go only so far as to hold that where the injury alleged and proved is permanent and is of such a nature as to indicate a permanent material impairment of a substantial nature in the earning capacity of the plaintiff, the mortality and annuity tables are admissible."

This rule was reasserted by this court in the very recent case of George G. Schlatter vs. Wilson McCarthy, 196 Pac. 2nd 968, from which opinion we quote quite extensively as follows:

"There can be no doubt in this case that plaintiff sustained very serious personal injuries, and that such injuries will to some extent be permanent in nature. The real question is

whether the evidence adduced at the trial would support a finding that the injuries were 'of such nature as to indicate a permanent material impairment of a substantial nature in the earning capacity of the plaintiff.' The question is not without difficulty. The medical testimony, standing alone, probably would not support the finding. But after a careful consideration of the entire record, we have reached the conclusion that a jury, from the medical testimony taken together with the other evidence in the case, and particularly the testimony of plaintiff, and viewing it in the light of their knowledge and experience in life, could justifiably have found that plaintiff suffered a permanent and substantial impairment of earning capacity. And since the evidence would authorize that finding, the trial court did not err in admitting exhibit D in evidence.

"The accident occurred on October 9, 1945, and the trial of this action took place some thirteen months later.

"Plaintiff's right leg was fractured in two places between the knee and the ankle. For about the first seven months after the injury plaintiff was treated by doctors retained by defendants and during this period little progress was made in the healing of the injury. Thereafter, plaintiff was treated by Dr. Clegg, an orthopedist of his own choosing.

"Dr. Clegg testified that when plaintiff came to him the upper fracture had healed with a bony union, but with mal-alignment; the lower fracture showed no evidence of bony union and osteomyelitis and pus drainage were present in that area. An operation was performed in which the infection was cleaned out and the bones were prop-

erly aligned and set in position. At the time of trial the osteomyelitis was quiescent, and apparently healed, but bony union was incomplete. The doctor planned to graft bone chips from plaintiff's pelvic region across the fracture site. Physiotherapy treatments would also be required.

“The doctor anticipated that the proposed operation would be successful, but even if the best possible results were achieved, plaintiff would have *at least* a ten per cent permanent disability to his right leg, including muscle weakness, limitation of movements of the joints in the right knee and ankle, and poor postural balance. Plaintiff would not be able to return to work as a locomotive engineer until about two and a half years after trial, or three and a half years after the accident. There was a possibility that recovery might be delayed and be substantially less complete if the osteomyelitis recurred, or if there was other infection. And because of plaintiff's age, recovery might be slow and less complete than the doctor hoped.

“The doctor was familiar only in a general way with the duties of a locomotive engineer, but assuming a successful recovery, he anticipated respondent would be able to handle moderate work, to walk reasonable distances up to two-thirds of a mile, to walk up and down stairs, and if he exercised care, to perform the various duties of an engineer suggested to him by counsel. . .

“The evidence of plaintiff's ten per cent permanent disability to his left leg, when taken together with the fact that plaintiff would be nearly 65 years of age before he would be able to return to work, and the generally recognized reluctance of employers' and especially railroads to engage

the services of men of advanced years, particularly when physically handicapped, would justify a jury in finding that plaintiff might never again be gainfully employed as an engineer or in railroad work for which he was trained. It should be noted here that plaintiff was not trained or qualified to engage in any other gainful occupation. And even if plaintiff were able to return to railroad work, it is fairly inferable that he would not be able to work so many hours as before, due to his weakened condition. It is also inferable that even if plaintiff would be able to return to his railroad work, that he would not be able to continue in employment for as many years as if he had not been injured.

“Although the evidence is not as clear and satisfactory as it might be, we think it is sufficient to support a finding of permanent impairment of earning capacity. It was, therefore, in error to admit in evidence plaintiff’s exhibit D, the combined tables.”

See also *Lovins vs. City of St. Louis (Mo.)*, 90 So. W. 2d 430. *Borland vs. Pacific Meat and Packing Company*, (Washington) 279 Pac. 94. The Washington case applies the rule that the annuity tables are admissible under the same rules and limitations as mortality tables. See also *Gotsch vs. Market Street Railway*, (Calif.) 265 Pac. 268. *Groat vs. Walkup Drayage, et al* (California) 58 Pac. 2d. 200. *Woodward vs. Wilbur*, (R. I.) 169 Atl. 486. *Penley vs. Teague & Harlow Company* (Maine) 140 Atl. 374.

B. *The Annuity Table Was in Proper Form.*

The form of annuity tables received in evidence as

plaintiff's exhibit X was in all respects proper and the annuity table was fully explained by the witness, Mr. Wood, the certified public accountant who prepared it. Mr. Wood explained how the life expectancy was arrived at. (R. 406) He explained the computation of the Exhibit X (R. 411-412) On cross examination the defense counsel developed testimony qualifying the mortality and annuity tables.

The tables were supplemented by expert testimony on the part of the witness Myrick, who testified with respect to the interest rates available to investors without special skill and training in financial matters that might be expected on reasonably safe investments. (R. 414-420)

Counsel points out at page 37 of their brief that the total verdict was \$21,594.22 and they assume that in arriving at such verdict the jury arbitrarily selected the figure \$16,591.71 from the 4% column in the 5th line of Exhibit X providing for \$100.00 per month for the full life expectancy. Of course, defendants rely upon the affidavits of the jurors for their breakdown of the items constituting the general verdict. This court has repeatedly held that the affidavits of the jury are not available for that purpose. But in any event the defendants can not complain that the jury used the annuity tables as it did in arriving at its verdict. Indeed, that is precisely the reason for the introduction of the exhibit into evidence. As was pointed out in the case of Schlatter vs. Wilson McCarthy, *supra*, the annuity tables:

“When properly used by the jury may be of great value in assisting the jury for fixing the damages for loss of income. The calculation of the present value of the monthly income over a period of a life expectancy is no simple mathematical problem. We are not aware of any device other than these tables which will accurately inform the jury as to the matters therein contained. The jury should not be deprived of the aid and assistance of these tables merely because they are susceptible of mis-use.”

In that case the general verdict was in the exact amount of \$41,212.44 which corresponded to the figures on the table opposite the monthly income of \$300.00 discounted at $2\frac{1}{2}\%$. The Exhibit X was in the same form as the exhibit approved in the Schlatter case. On petition for rehearing the court filed an opinion on October 20, 1948, in the Schlatter case from which we quote as follows:

“Appellant’s petition for rehearing on the grounds that this court failed to decide the contention principally advanced by appellant, that the verdict was contrary to law because the jury found that plaintiff was permanently and totally disabled. Appellants assert that since the general verdict was in the sum of \$41,212.44, which was the present value of \$300.00 per month discounted at $2\frac{1}{2}\%$ for plaintiff’s full life expectancy of 13.47 years, that it must be regarded as an award for *total* and permanent disability, and that such an award is unsupported by the evidence and contrary to the instructions of the court, and hence cannot be permitted to stand.

“Although we did not expressly treat this contention in our opinion, we thought that it was implicit therein, that the proposition now relied upon by petitioners was not meritorious. Upon re-examining our opinion, we find that the implications are not as broad as we assumed them to be, and so that counsel and the bench and bar may be more fully apprised of our reasons for holding petitioner’s position to be without merit, we set forth here the reasons for so ruling.

“The fallacy of their argument is that petitioners assume that the entire amount of the verdict was for loss of earning capacity, and that the jury made no award for pain and suffering. There is no basis for such an assumption in view of the extensive and uncontradicted evidence as to the pain and suffering endured by plaintiff over a long period of time. We cannot know, and we are not at liberty to speculate as to what reasoning prompted the jury to use the base figure of \$300.00 per month in determining what the award for general damages should be. We most certainly cannot presume that the jury ignored completely the extensive evidence of pain and suffering, and that it made an award for loss in earning capacity far in excess of what the evidence showed the loss in earning capacity to be. We must presume, in the absence of any clear showing to the contrary, that the jury acted in accordance with its sworn duty, and that a substantial portion of the general verdict must be allocated to pain and suffering.”

For further answer to defendants’ contention that the annuity tables were improperly constituted, we desire to quote from the federal case of Southern Pacific

Company vs. Klinge, (C.C.A. 10) 65 Fed. 2d 85 at page 87:

“Objection is made to the testimony of an actuary who presented annuity tables for the assistance of the jury. These were computed for the expectancy of the plaintiff, and the figure \$2,400 was used as a base. The table gave the present sum necessary to return \$2,400 a year for the expectancy, at various percentages ranging from two to eight per cent. After the jury found the annual impairment of earning power resulting from the loss of the arm, and the rate of interest which could reasonably be expected from safe investments, a simple computation applied to the table would bring them to a correct verdict. Complaint is made because \$2,400 was used as a base figure, the contention being that the loss of the arm did not impair the earnings to that extent. Some figure had to be used; whether it was \$100, or \$1,000, or \$10,000 does not affect the correctness of the table. Whatever figure was used, the jury must first find the loss of earning power and then use the table. The same objection could be made to any tables of interest or annuity calculations, unless perchance the base used by the table happened to be the amount in suit. The size of the verdict indicates the jury was not misled. Figured on a four per cent return, which a jury might fairly find to be all that could reasonably be expected from safe investments, the verdict is based on a loss of earning power of about \$1,500 a year. This assignment is entirely without merit.”

C. *The court's instructions on the Annuity Table*

were in all respects proper and if defendants desired amplification of the court's charge, they should have requested it.

The defendants complain of the court's giving its instruction No. 22 in which the jury were told that the total loss of future earnings if any must be reduced or discounted on the basis of a fair rate of interest or return. If the court had failed to give such instruction, the defendants would have some cause of complaint. It represented a proper charge and furnished the jury with the necessary guide for the computation of their verdict. The instruction would naturally have the effect of reducing rather than increasing the verdict.

The defendants further complain that the court gave no qualifying instructions to the jury relative to the use of plaintiff's life expectancy as indicated by the evidence. In its instruction No. 17 the court told the jury that the plaintiff is entitled to compensation for the actual loss of past earnings, if any, and for any impairment of earning capacity, if any, which will diminish his capacity to earn money in the future, and considering that matter the jury may take into consideration the degree and character of the loss or impairment of earning capacity, if any, resulting from plaintiff's injuries and the length of time it would continue. Moreover instruction No. 22 imposes the qualification heretofore indicated again in instruction No. 22-A given at the request of the defendants and representing a restatement of their requested instruction No. 20, the court set forth

the conditions under which the plaintiff would be entitled to use the annuity tables. In that instruction the jury were told that the annuity tables were no evidence or indication in or of themselves that the plaintiff has sustained any permanent loss of earning capacity, nor are such tables evidence that plaintiff has sustained any particular amount of permanent loss to his earning capacity, nor is evidence that plaintiff may have sustained some permanent injury sufficient to prove that he has sustained any permanent partial impairment of a substantial nature to his earning capacity, and the jury were told that unless the plaintiff has proven by preponderance, or greater weight of the evidence, that plaintiff has sustained a permanent material impairment of a substantial nature to his earning capacity, then they were instructed to entirely disregard the annuity tables. Furthermore, counsel went into the matter fully on cross-examination and placed before the jury, testimony to the effect that all people do not live to their full expectancy, but some die much earlier and that there is no guarantee that a person is going to have good health, and there is a possibility that he might meet with future accident. (R. 412) Counsel at the trial were apparently satisfied with the state of the evidence with respect to the limitations to be placed on the annuity table, for they requested no instructions relating to the use of annuity tables except in their request No. 20 which was given in full in instruction No. 22-A.

It will be noted that the only request made by the defendants on the subject of the life expectancy and an-

nuity tables was their request No. 20 which was granted in toto. It is elementary that a party may not complain of the failure of the court to amplify its charge when the complaining party made no request at the trial for such amplification. In that connection we call the court's attention to the case of *James vs. Chicago, St. Paul, and M & O Railroad Company*, (Minn.) 16 N.W. 2d. 188 at page 192 from which we quote as follows:

“There were some inaccuracies in the trial court's instructions of which defendant also complains. These were not specifically called to the court's attention after the charge was given, and in our opinion could not have affected the result. They will therefore be disregarded. *Merit v. Stuve*, 815 Minn. 44, Northwest 2nd, 329.

“In this category is an instruction by which the court told the jury: . . . Estimated future damages. . . . you have to give its present value of the future earnings. . . . in other words money earned in the future would not be worth as much at the present time, but that is a matter of interest.

“Counsel was apparently satisfied with the instruction as given, he asked no further elaboration, and took no further exception. Defendant was therefore held to be in no position to complain.”

To the same effect is the case of *Ralph vs. MacMarr Stores*, (Montana) 62 Pac. 2d. 1285:

“The next question raised has to do with the admission, over defendants' objection, of a mor-

tality table to show the expectancy of plaintiff's life. In admitting it the court said: 'This is a matter that is generally taken up in connection with instructions.' The court also stated that 'the preferred table is admitted in evidence, subject to instructions to be given to the jury, the expectancy of life of a female of the age of 34 years is 32.42 years.' Defendants now complain that no instructions regarding this matter were later given to the jury. They contend that the court, after admitting the table in evidence, should have instructed the jury as to the applicability of the annuity tables; and that where, as in this case, the evidence is conflicting as to whether the plaintiff's injuries are permanent the court should have instructed the jury that such tables were not to be used unless the injuries were found to be permanent, citing *Cornell vs. Great Northern Ry. Co.*, 57 Mont. 177, 187 P. 902, and *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 P. 837. Thus defendants contend that the admission of the mortality tables in evidence was error in view of the fact that the necessary qualifying instructions with reference thereto were not subsequently given.

"Under the authority of the case of *Stephens v. Elliott*, 36 Mont. 92, 92P. 45, the mortality table in question was properly admitted in evidence. It may be true, as defendants contend, that the instructions should have been given qualifying the extent of consideration to be given to that table. However, this court has held that a district court may not be put in error for failure to instruct the jury on a given point on its own motion; that if appellant desired an instruction on a subject not covered by the instructions given (such as limiting the effect of evidence admitted

over objection to a certain purpose), it was his duty to tender it. *State v. Miller*, 97 Mont. 434, 34 P. (2d) 979; *Bourke v. Butte, etc. Power Co.*, 33 Mont. 267, 83 P. 470. It was defendants' duty to offer the instructions which they claim should have been given. Having neglected to do so, they cannot now put the court in error for failure to give such instructions."

We also quote from *Newman vs. Campbell*, (Cal.) 73 Pac. 2d. 1265, 1266 as follows:

"As stated, the court instructed as to plaintiff's life expectancy, and that the jury might take this into consideration in determining her damage, if any. It is urged that she was not in normal health at the time of her injury, and that consequently the instruction was improper. On this question also the evidence was conflicting, and the jury might have found that the plaintiff was for a person of her age in ordinary health. The mortality table was admissible, and, although not conclusive, was evidence of the probable duration of her life. Under the evidence she was entitled to an instruction based upon her theory of the case. *Groat v. Walkup Drayage, etc. Co.*, 14 Cal. App. 2d. 350, 58 P. 2d 200; *Morrow v. Mendleson*, 15 Cal. App. 2d 15, 58 P. 2d 1302. If the appellant desired an instruction explaining in more detail the weight to be given the elements fixing her life expectancy, as was the case in *Groat v. Walkup Drayage, etc. Co.*, supra, such an instruction should have been offered. This was not done, and in the circumstances appellant has no ground for complaint. *Murphy v. National Ice Cream Co.*, 114 Cal. App. 482, 300 P. 91.

Point 2. *The court did not err in its other instructions to the jury, except to the prejudice of the plaintiff.*

(a) *Evidence of defendants' negligence was clear, convincing and uncontradicted.*

As appears from the rather full resume of the evidence under the statement of facts, the evidence was undisputed that the defendants attempted to pass another vehicle in a dust storm under circumstances which rendered visibility poor, and that for that purpose defendants operated their truck and trailer on the plaintiff's side of the road, without assuring themselves sufficient time within which to complete the passage and return to their right hand side of the road. They attempted such passage when plaintiff was approaching from the opposite direction without seeing plaintiff's vehicle in time to avoid the collision which occurred on the extreme east side of the road. In attempting to pass the defendants achieved a speed of approximately 20 miles per hour, while other vehicles in the dust storm were holding speed to a lesser amount or in the act of stopping. They attempted to pass another vehicle which was lengthened by the presence of a boat trailer on the back and the defendant's vehicle was itself about 60 feet long.

The conduct of the defendants was grossly negligent and reckless and in direct violation of Section 57-7-124 Utah Code Annotated 1943, which provides as follows:

“No vehicle shall be driven to the left side of the center of the roadway in overtaking and

passing another vehicle proceeding the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction of any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within 100 feet of any vehicle approaching from the opposite direction."

It is undisputed in the evidence that the defendants failed to maintain a proper and sufficient look-out as they attempted to pass the Pace car. Defendant claimed that he could see 200 yards up the highway despite the dust storm, but that he wasn't looking for a car on the opposite side of the road; that the Mitchell car may have been 20 to 25 feet ahead when he first saw it and was straddle the center line; that although he was watching both sides of the highway all the time, he didn't see the Mitchell car until it "just came out of nowhere."

Defendants claim an emergency; they should have anticipated the emergency which was created by their own folly and they cannot avoid the necessary consequences of their recklessness by their inability to extricate themselves from it. The evidence of excessive speed under the circumstances proceeded from the mouth of the defendant Van Patten.

We sincerely contend that under the evidence plaintiff was entitled to a directed verdict on the liability of the defendants, though none was requested.

(b) There was no substantial evidence of contributory negligence which warranted the submission of that defense to the jury.

The defendants rely upon the witness Pace and the defendant Van Patten for their evidence of contributory negligence, and very little comfort is available to them from the testimony of either. The numerous inconsistencies of Van Patten's alibi have been previously pointed out. Although Van Patten insisted Mitchell was astraddle the center line, he is most indefinite about the approach of the Mitchell car, on more than one occasion repeating that plaintiff just came out of nowhere. The most significant thing Van Patten said in regard to the manner in which plaintiff was driving his car was that he did not think Mr. Mitchell was to blame (R. 451).

The witness Pace provided defendants with no substantial help in the discharge of their burden to prove contributory negligence. It is true that he stated that plaintiff's truck was "probably" straddle of the center line when he saw it (R.472), but he testified that he was not required to alter the course of his automobile by the approach of the Mitchell car and was able to continue straight on his way undisturbed, and that if the plaintiff may have momentarily traveled on the center line it wasn't sufficiently far to interfere with the movement of Pace's car in the opposite direction (R. 477), and all this in view of the fact that Pace was as near to the middle of his lane of traffic as he could get (R. 471).

Moreover, the witness Pace could only say that as

near as he could tell plaintiff was straddle of the center line (R. 478), but he could not say about how much of plaintiff's vehicle was on the west of the center line and he would not attempt to say that plaintiff's vehicle was as much as a foot to the west of the center line, but that as near as he could tell, plaintiff was riding very near the center line (R. 478).

We deem it altogether fair to say that Pace did not furnish any evidence which aided the defendants in their defense of contributory negligence. It must be remembered that Pace was in advance of the defendant's truck and ordinarily his position would be more likely to be imperiled by the approach of a car on the wrong side in the opposite direction than the defendants, yet he was not endangered to the slightest extent. We cannot perceive in what possible manner the location of plaintiff's car very near the center line before the impact could have had any causal relationship with the collision which occurred on the extreme east side of the highway. It is inescapably clear that the cause of the collision was the presence of the Arrowhead truck on the wrong side of the road, making an unsuccessful attempt to pass another vehicle in a dust storm in violation of the laws of the road and in reckless disregard of plaintiff's bodily safety.

We earnestly invite the court to consider in connection with the flimsy evidence of the defendants, the positive testimony of Mr. Mitchell, his father and his daughter, where plaintiff's operation of his car was shown to be without fault and the testimony of Dr. Broadbent to

the effect that Van Patten admitted his responsibility for the accident, stating that "it was entirely my fault." (R. 255)

Finally, the physical facts corroborate the plaintiff's position and refute that of the defendants. The defendants can never escape the fact that they collided with the left front corner of plaintiff's truck on the extreme east side of the highway.

At the time of the trial the defendants amended their answer to set forth an additional affirmative defense, to-wit: that the plaintiff drove his 1946 Chevrolet truck while the truck was overloaded with 4 people in the front seat, in violation of Section 57-7-170 Utah Code Annotated, 1943, which interfered with his control of the mechanism of the truck and thereby affected his ability to readily maneuver said truck and avoid a collision. There was not one word of evidence in the record that showed that four people overloaded plaintiff's truck, or that the presence of the four passengers in the front seat interfered with plaintiff's driving; and if it was negligence to have four people in the truck under the circumstances of this case, it was negligence in the air without any causal connection whatever with the collision. It was, therefore, error for the court to give its instruction No. 16, which permitted the jury to consider this unestablished defense and to deny recovery to plaintiff in the event they should believe the plaintiff's driving was interfered with by the overloading of his car. With respect

to the overloading of his truck, the plaintiff testified as follows:

“Q. Now in driving the car up at the scene of the accident with your daughter sitting beside you, did your arm rub against her to any extent?

A. I wasn't crowded.

Q. You were not crowded?

A. No, sir.

Q. If you went to move the wheel rapidly do you think—you know whether or not your arm interfered with her in any way when you, just before that accident up at—?

A. I would say it didn't.” (R. 352)
Joan Mitchell in this connection testified as follows:

“Q. You say you were sitting in the middle of the seat, Joan, between two other people?

A. Yes.

Q. How close were you to your father's arm?

A. I don't think he would have hit me if anything had happened.

Q. Do you know whether he did or not?

A. No, he didn't.” (R. 367)

(c) *Assuming the sufficiency of the evidence of contributory negligence the court, nevertheless, fully submitted and overemphasized such defense to the jury.*

Except for the statement of plaintiff's claims in in-

struction No. 1 (R. 55) the court only gave two instructions submitting to the jury plaintiff's theory of recovery, instructions 7 and 8; and the court conditioned recovery in instruction No. 8 upon the jury finding "that plaintiff was operating his vehicle in a lawful manner upon his side of the highway immediately prior to and at the time of the collision." (R. 65). Yet in addition to the statement of defendants' claims in instruction No. 2 (R. 58), the court gave the following instructions on defendants' theory of contributory negligence: Nos. 10, 11, 12, 13, 14 15 and 16. Plaintiff excepted to the giving of each of these instruction as being against the evidence and plaintiff further excepted to all of the instructions numbered 9 to 16 inclusive for the special reason that the said instructions placed undue emphasis upon the theory of the defendants and were contrary to the evidence taken together. (R. 543) The number of instructions given by the court in view of the paucity of the evidence in the record in support of defendant's theory was far out of proportion and constituted an overemphasis of the unestablished defense of contributory negligence. See 1 Blashfield's Instructions Juries, Section 152, page 351:

"It is improper for the court to place too prominently before the jury any principle of law involved in the case as by frequent repetition for where a number of instructions announces in varying language a single rule of law the effect is to unduly impress the single principle announced upon the jury's minds to the exclusion perhaps of other equally important principles."

The defendants in their brief object to the courts instruction No. 6 and 7 on the ground that the two instructions eliminated contributory negligence as a defense. They cite numerous cases, the one most nearly in point being the case of *Beyerle v. Clift*, (Cal) 209 Pac. 1015 from which they quote at some length in their brief. That case lays down a principle that it is error for the trial court to fail to condition recovery in a so-called formula instruction upon the absence of contributory negligence assuming that the issue of contributory negligence was properly before the court. The effect of the *Beyerle v. Clift* case has been avoided in several subsequent California decisions to which we shall subsequently refer. Be that as it may, the Supreme Court of Utah has adopted a contrary rule.

The case of *Olsen v. Oregon S. L. R. R. Co.*, 24 Utah 460, 68 Pac. 148 involved an action for the wrongful death of a person who was struck by defendant's train at a crossing. The plaintiff's decedent was attempting to cross the tracks in a wagon when the defendant's train at a high speed and without giving warning of its approach struck the wagon, killing the deceased. We quote from the decision commencing at page 152 of Pacific Reports:

“Exception is taken to instruction No. 19, wherein the court told the jury: ‘If you find from the evidence that the crossing upon which the deceased was killed was a public highway, and had been used as such for a long number of years prior to the accident, and if you further find that

a large number of teams and persons passed over said crossing each day, and at all hours of the day, then I charge you that it was the duty of the engineer of the train, when approaching the crossing, to have been on the lookout for teams and persons on the crossing, or in such close proximity thereto as to be in danger of colliding with the train, then to use all reasonable care and diligence and make use of all the appliances at his command to have the train under control, and stop if necessary to avoid a collision with and injury to such team or persons; and if you further find that the engineer was negligent in not keeping such lookout, and in not discovering the peril of the deceased in time to have avoided the accident, and that he did or could have discovered him, and the peril he was in, in time to avoid the collision, if he had been on the lookout, then I charge you that the defendant is liable for the killing of Olson, and the plaintiffs are entitled to recover in this action.' This instruction should be considered and construed in connection with the other instructions bearing upon the whole subject. The seventh instruction reads as follows: 'You are charged that it was the duty of the deceased, as he approached the said crossing just before the time of the accident which resulted in his death, to both listen for and look in the direction from which the train approached, to ascertain if any train was approaching, and it was his duty to continue to so listen and look until he had crossed said railroad. The failure of the company, if it did, to ring the bell, sound its whistle, or give any alarm of its approach, did not relieve the deceased from the obligation to perform the said duty of listening and looking, and if the said deceased, as he approached

said crossing, by the use of his senses of sight and hearing in looking and listening for the approach of the said train, could have discovered that it was approaching, and have avoided said collision, then the plaintiffs cannot recover in this case.' The eighth instruction is as follows: 'If, without so looking and listening for an approaching train, a person attempts to cross a railroad track, and is injured by a passing train, his own careless conduct is deemed, in law, to have assisted in bring about the injury, and he cannot complain of the other party concerned in the transaction, even though such other party may have also been negligent.' It is contended that the tenth instruction omits the subject of contributory negligence. The charge, taken as a whole, fully covered the question of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff. It is not always possible to cover all the questions arising in a case in one sentence or paragraph. It is sufficient if the whole charge, when taken and construed together, states the law fairly and correctly. As said in *Hamer v. Bank*, 9 Utah, 220, 33 Pac. 941: 'The mere omission in one part of the charge by the court of certain elements, though material, when they are substantially given in another part, will not be ground for reversing the judgment. On this point, Thompson, in his work on Trials (Volume 2, Section 2407), states the law as follows: 'The charge is entitled to a reasonable interpretation. It is construed as a whole, in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so although it consist of clauses originating with different counsel, and applicable to

different phases of the evidence. If, when so construed, it presents the law fairly and correctly to the jury, in a manner not calculated to mislead them, it will afford no ground for reversing the judgment, although some of its expressions, if standing alone, might be regarded as erroneous, or because there may be an apparent conflict between isolated sentences, or because its parts may be in some respects slightly repugnant to each other, or because some of them, taken abstractedly, may have been erroneous." ' Anderson v. Mining Co., 16 Utah 38, 50 Pac. 815; State vs. McCoy, 15 Utah 141, 49 Pac. 420; Reese vs. Mining Co., 17 Utah 496, 54 Pac. 759."

If instruction No. 7 and instructions No. 10, 11, 12, 13, 14, 15 and 16 were consolidated into one instruction and given by the trial court, there could be no error. There is no conflict of the law in the different instructions and if taken together or considered as a series, they present the law much more favorably to the defendants than they were entitled. They, therefore, have no just complaint.

Another Utah case directly in point in this respect is the case of Morgan v. Mammoth Mining Co., 1903, 72 Pac. 88, which involved an instruction that directed a verdict for the plaintiff if the jury among other things found that certain chairs which struck plaintiff were out of repair or out of working order. The instruction did not contain a qualification that the chairs must have been out of repair a sufficient length of time to enable the defendant by the exercise of ordinary care, to discover and remedy the defect, a formula instruction with a

necessary element missing. The court said, at page 689:

“This criticism might be regarded as having some force if the matter of knowledge of the defective condition of the chairs or notice thereof were explained nowhere else in the charge. In paragraph 5, however, the law respecting this subject is clearly stated . . . when, therefore, the two paragraphs are read together, and are considered in connection with the evidence to the effect that the defects had existed for a period of about 2 months prior to the time of the accident, there appears to be no reason for assuming or holding that the jury were misled, under these circumstances. It being conceded that paragraph 6, abstractly considered, does not state the law with absolute precision, still it does not amount to reversible error. Where, as here, a charge considered as a whole states the law applicable to the case fairly and correctly, it is sufficient. Olsen vs. OSLRR, 24 Utah 460, 68 Pac. 148.”

The holding in the Beyerle v. Clift case also flies in the face of our statute, Section 104-39-3, Utah Code Annotated, 1943, which provides: No exception shall be raised unless the decision excepted to is material and prejudicial to the substantial rights of the parties excepting.”

The case of State v. McCoy, 15 Utah 141, 49 Pac. 421, holds as follows:

“ Instructions must be considered together and omission to fully state the law in one part of the instruction, where the omission is fully and accurately supplied in the instructions which

follow, does not constitute reversible error, unless when from the whole charge it is reasonably apparent the jury were misled, citing cases.”

To the same effect is the case of *Roth v. Chatlos*, 97 Conn. 282, 116 Atlantic, 332. In that case the court gave the following instructions, appearing at page 333:

“If you find that the defendants’ driver, by simply continuing on the right hand side of the highway, could have avoided the accident, then your verdict must necessarily be for the plaintiff. He must prove one of the grounds of negligence, but he need not prove all of them; and if you find that said automobile was being driven at a dangerous rate of speed and that said accident could not have been avoided had said automobile been driven at a lower speed, then your verdict must necessarily be for the plaintiff.

“This request was erroneously received since it left out of consideration the plaintiff’s contributory negligence and left to the jury the determination of the defendant’s conduct as the sole issue of the jury’s verdict, when the plaintiff’s conduct, as well as the defendant’s was upon the claims of the parties and the evidence before the jury, essential to a proper verdict.

“This request was read to the jury in the early part of the charge, and thereafter with great fullness and sufficient accuracy, the trial court properly presented to the jury both of these issues:—the negligence of the defendant, and the contributory negligence of the plaintiff. This was done in such a way, that we think it quite impossible that the jury should have failed to have

understood that their finding that the plaintiff was guilty of contributory negligence would bar his recovery, and so too, we think the jury must have understood in what the plaintiff's contributory negligence was claimed to have consisted."

The principle is also recognized in 14 Ruling Case Law, 813:

"And also instructions given ignoring facts tending to establish a defense, the defendant cannot complain if such defense is covered in other instructions given at his request."

To the same effect is *St. Louis Southeast Railway Co. v. Graham, Arkansas*, 102 Southwest 700 at 702:

"Criticisms are made of some of the instructions in that they seem to permit a recovery if the jury finds the defendant guilty of negligence, without qualification, and unless they find the deceased not guilty of contributory negligence. Taking these instructions as a whole, the court thinks that they make it clear to the jury that contributory negligence on the part of the deceased would defeat a recovery, even should they find the defendant guilty of negligence. It is generally impossible to state all the law of the case in one instruction, and if the various instructions separately present every phase of its as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others, citing cases."

See also *Meadows v. Pacific Mutual Life Insurance Co.*, Missouri, 1895, 31 Southwest 578.

In the California case of *Brower v. Arnstein*, 14 Pac. 2d 863, the court attempts to distinguish the facts of that case from the earlier case of *Beyerle v. Clift*, *supra*, but nevertheless holds that the giving of formula instructions acknowledged to lack essential elements of recovery was not reversible error where otherwise instructed upon. We quote from that case beginning at page 865:

“Appellant also urges various and sundry claims of error against instructions given and refused by the trial court. The most vigorously pressed of these claims relate to the alleged failure of certain so-called ‘formula’ instructions to individually contain a recital of all the elements essential to recovery by plaintiff. If these instructions are by a process of dislocation from the general charge, so separated from each other as to then be viewed with over-technical nicety, they would unquestionably be subject to the objections urged by appellant. But the very method of the giving of these so-called ‘formula’ instructions indicates plainly that they were not intended to so operate or to have such effect. They were merely intended in the first instance to advise the jury how their verdict should go in the event the respective matters set forth in the pleadings were either established or failed of establishment one way or the other. In other words, the instructions were not intended to, nor did they purport to state the several elements essential to a verdict as such in detail, but, instead, those matters were made the subject of separate specific instructions; the court’s intention being merely to supply by reference to the pleadings a statement as to how the verdict of the jury should go in the event plaintiff did or did not establish negligence as

charged in his pleadings, or in the event he did so establish negligence as charged in his pleadings, or in the event he did so establish such negligence, how in such event the verdict should then go if contributory negligence was or was not established. They were not 'formula' instructions of the type condemned in *Beyerle v. Clift*, 59 Cal. App. 7, 9, 209 P. 1015, where the pleaded element of contributory negligence was entirely omitted from an instruction directing a verdict. However, the particular omission in the instructions upon which appellant places the most stress is their serious failure to at any time define or express in direct terms the principle of 'proximate cause.' This is indeed a most serious omission, and we are not unmindful that in reversing the case of *Long v. Barbieri* (Cal.) App. 7 P. (2d) 1082, 1087, because of certain instructions of a more obviously erroneous character, we indicated the added weight that had been given the errors in question because of the similar failure of the trial court to define 'proximate cause,' by declaring: 'It should be further noted that the trial court omitted to give any instruction whatsoever defining 'proximate cause,' and the jury were thus left to their own varying conceptions, if any, as to what might constitute this always related and ever essential principle of the doctrines of negligence and contributory negligence.'

"It must therefore be conceded that in failing to directly define and present to the jury for their consideration, the legal principle embraced within the term 'proximate cause' the trial court committed an error of no inconsiderable magnitude. Its effect, however, is substantially weakened and mitigated in the present case by and through the effect of the very numerous and de-

tailed instructions given by the court at the request of defendant, in which almost every conceivable element of the multitude of defensive principles of law open to and urged by him were specifically presented to the jury. These directly set forth the many and numerous circumstances upon which, in the event their existence was established by the evidence, the verdict of the jury may just be for defendant, or plaintiff could not recover; and among these in connection with the terms 'negligence' or 'negligent' the word 'proximately' is frequently used.

"The jury was also instructed: ' * * * Where negligence is charged, it devolves upon the person charging it, if he would prevail as to that charge, to establish * * * it by a preponderance of evidence.' The court also, and as a part of its general charge, repeatedly instruct the jury in the utmost detail upon numerous matters that would constitute negligence on the part of plaintiff, and thus defeat recovery. At no time did the appellant now urging the error of its omission, tender to the court an instruction defining 'proximate cause,' or request that qualifying instructions to those of which he complains be given.

"The cumulative effect of these considerations leads us to place our determination of the merit of appellant's contention (that the failure of these instructions to define 'proximate cause' is reversible error) fairly within the scope of the expression of a similar determination arrived at by our Supreme Court, in *Wirthman v. Isensein*, 182 Cal. 108, 110, 111, 187 P. 12, 13, where it is declared: ' * * * where, as here, the court instructs that, to entitle respondent to recover, appellants must be guilty of negligence 'as alleged in the complaint', and that respondent himself

must be blameless and free from any contributory negligence, it must have been made perfectly clear to the jury that a finding by them that appellants were guilty of the negligence so described, the respondent himself being blameless, would of necessity amount to a finding that such negligence was the proximate cause of the injury. *Weaver vs. Carter*, 28 Cal. App. 241, 152 P. 323. Furthermore, the court's instructions, so far as they went, correctly stated the law, and if appellants desired a qualifying instruction to the effect that, to entitle respondent to recover, appellants' negligence must be the proximate cause of the injury, it was incumbent upon their counsel to either ask the court to give such qualifying instruction, which it undoubtedly would have done, or have presented an instruction embodying it. Having failed to do either, appellants are in no position to complain of the instructions given. *Weaver vs. Carter*, *supra*; *Townsend vs. Butterfield*, 168 Cal. 564, 143 P. 760; *O'Connor vs. United Railroads*, 168 Cal. 43, 141 P. 809.' "

Abbot v. Goodyear Tire & Rubber Co. (California) 3 Pac. 2d 56, 57, is a very good case. It states:

"Appellant first complains of instruction No. 12, which informs the jury as to the amount of recovery to which respondents are entitled if the jury finds certain facts to be true. The criticism of the instruction is that it is a 'formula' instruction which fails to include the essential element of knowledge of the falsity of the representations on the part of the appellant. There are several answers to the criticism. It will suffice to say that in instructions 1 to 11 the jury had been advised of the allegations of the complaint charging fraud; that instruction No. 3

particularly dealt with the allegations respecting Daum's knowledge of the falsity of the representations complained of; and that instruction No. 12 directed a verdict for respondents if the jury found that all these representations were made and that respondents had been deceived 'as alleged'. The complaint fully alleged every essential element for recovery in a case of this kind and the instruction complained of took all these allegations into consideration. This is not a case of a directed verdict on a single issue or upon a limited number of the issues involved. All the instructions must be read together and, in so reading them, we find no conflict between No. 12 and those preceding, but a general summary telling for a verdict. The case is somewhat similar to the jury of every element which must be found in *Robinet v. Hawks*, 200 Cal. 265, 273, 252, P. 1045, where the trial court used the expression 'under the instructions as I have given them to you.' See also *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 394, 264 P. 237, where the Supreme Court holds in effect that where, as here, the instruction complained of does not purport to be a complete statement of the law upon which plaintiff's might recover and the other instructions are amplifications of and not in conflict with that instruction the objection of 'formula' instruction is not sound. Putting it in other words, *when the tone of the instructions as a whole denotes that no single instruction was intended to be a complete statement in itself but that all the instructions are to be taken together and, when these instructions fully and correctly state the law without conflict, then no one instruction may be singled out for criticism because it does not completely state all the elements necessary for recovery.'*

In its instructions 1 and 2, the court set out a summarized statement of the issue, No. 1 containing the claims of the plaintiff and No. 2 containing the claims of the defendant as raised by the pleadings. Then the court gave the following instruction No. 3:

“You are instructed that, before the plaintiff can recover on his first cause of action, that said plaintiff must prove by a preponderance of the evidence one or more of the acts of negligence alleged by him in his complaint, his injury and damage, and that said alleged negligence upon the part of the defendants was the proximate cause of his injury and damage; and, in this connection, you are instructed that, unless the plaintiff meets this burden, that he is not entitled to recover, and you are instructed that you should find the issues in favor of the defendants and against the plaintiff. You are likewise instructed that, if the evidence on these issues is equally balanced between the plaintiff and the defendants, or preponderates in favor of the defendants, that you should find the issues in favor of the defendants and against the plaintiff. If, however, the plaintiff does prove one or more of the acts acts of negligence on the part of the defendants, his damage and injury, and that said negligence was the proximate cause thereof by preponderance of the evidence, then the plaintiff is entitled to have the issue of liability decided in his favor, and against the defendants, and you are to assess damages therefor in accordance with the instructions hereinafter given you upon the measure of damages, unless you find by a preponderance of the evidence that the plaintiff was guilty of one or more of the acts of negligence alleged by the defendants which

proximately caused, or proximately contributed to, the plaintiff's injury and damage, the burden of which is upon the defendants to prove by a preponderance of the evidence."

Here, immediately following the statement of the claims of the parties the court instructed that plaintiff could not recover if he was guilty of one or more of the acts of contributory negligence charged by the defendant. The case seems to fit perfectly into the exception to the rule of *Beyerle v. Clift*, *supra*, laid down by the more recent California case of *Abbot v. Goodyer Tire & Rubber Company*, *supra*.

Further indication that the tone of the instructions was to the effect that they must be considered as a whole is found in the court's instruction No. 14 wherein the court stated: . . . "and that said collision was solely caused, or proximately contributed to by the carelessness and negligence of plaintiff, J. Harold Mitchell, if any you find, *as outlined in these instructions*, then plaintiff cannot recover and your verdict should be in favor of defendants and against plaintiff, no cause of action."

Moreover instruction No. 5 defines the various terms that appear in the various instructions.

Again in its Instruction No. 9 the court stated:

"Therefor, if for any reason you find there is no liability in this case on the part of the defendant, Marvin C. Van Patten, *as defined in these instructions*, then you will find there is no liability on the part of both defendants."

That instruction directs the attention of the jury to the instructions as a whole.

In its Instruction 25 the court told the jury:

“You should weigh the evidence carefully and consider all of it together . . .

“You should consider all the evidence impartially, fairly and without prejudice of any kind, and from such consideration, *in connection with the instructions given you by the court*, you should reach such a verdict as will do justice between the parties.”

That instruction in effect told the jury that the instructions should be considered together in connection with the evidence.

Certainly, it is fair to state that the “tone of the instructions as a whole” denoted “that no single instruction was intended to be a complete statement in itself, but that the instructions were to be taken together.”

Also holding that the instructions must be considered as a whole is the case of *Nell v. Smith*, Iowa, 147 N. W. 183.

Counsel refer to the case of *Saltas v. Affleck*, '99 Utah 381, 105 P. 2d 176, on page 47 of their brief, and state that the court held that the imposition of a greater duty upon the defendant than the law requires was prejudicial error. That case was reversed upon the ground of prejudicial conduct on the part of plaintiff's counsel, in questioning the jury panel in regard to liability insurance. There was further error

on the part of the trial court in giving an instruction to the effect that it was the duty of the defendant to drive his automobile on the highway, using reasonable care and prudence so that he could avoid injuring anyone, or colliding with any person on the highway. "The court held that the instruction failed to take into account the right of the defendant to assume that all other persons on the highway would use ordinary care and reasonable precautions for their own safety. The opinion does not state that the error was prejudicial and the case was apparently reversed on the ground of misconduct of counsel. In his special concurring opinion, concurred in by Mr. Justice Wolfe, Mr. Justice McDonough stated that while the instruction taken alone, was erroneous, the instructions read as a whole could not have misled the jury, and consequently, the giving of the instruction was not reversible error.

The recent case of *Martin v. Sheffield*, 189 Pac. 2d. 127, does not support defendant's position. In that case there was evidence which would have justified a finding of contributory negligence on the part of the plaintiff yet the court gave no instructions submitting this theory of defense to the jury, except two stock instructions, one defining contributory negligence, but telling the jury nothing with respect to its legal effect, the other relating to the burden of proof. In that case Chief Justice McDonough states:

"Such instruction, unelucidated in any other part of the charge, might well be construed by the

jury to mean that though the jury found negligence on the part of the plaintiff which proximately contributed to the accident, nevertheless, plaintiff was entitled to a verdict.

“Viewing the instructions as a whole, we conclude that the court failed although requested by the defendant to do so, to advise the jury as to the effect of alleged negligence on the part of the plaintiff, should it find that such negligence proximately contributed to her own injury. This was prejudicial error.

“ . . . We are mindful of the rule that an instruction must be read in the light of the whole charge in determining whether it was calculated to mislead the jury. A careful examination of the whole charge convinces us that the misleading effect of instruction No. 9 was not erased by the import of the instructions as a whole.”

In eliminating the words, “such instruction, unelucidated in any other part of the charge” from their quotation of the Chief Justice’s statement, counsel imparted an effect to it quite foreign to the import of the statement as a whole. Fully quoting the expression confirms our position and renders defendants’ untenable. We feel constrained to remind counsel for the defendants, that to partially quote is to misquote, and the opinions of this court, like the instructions to the jury, must be construed as a whole, or they may be misconstrued.

In the Sheffield case, there was no other instruction, submitting the theory of contributory negligence to the jury. In this case, the theory was presented in each of the following instructions: Nos. 2, 3, 10, 11, 12, 13, 14,

15 and 16. It would be flying in the face of the record to say that the failure of the court to condition recovery upon the absence of contributory negligence in its instruction No. 7, was not otherwise elucidated by the charge.

The court amplified its instruction No. 6 setting forth the master's responsibility for the negligent act or omissions of its servants by Instruction No. 9. In Instruction No. 9 (R. 66) the court instructed the jury as follows:

“You are instructed that in this case, there is no claim of any careless or negligent act on the part of the defendant, Arrowhead Freight Lines, Ltd., a corporation and there is no evidence of negligence on the part of said defendant. The only negligence claimed is on account of the acts or conduct of the defendant, Marvin C. Van Patten, in driving and operating the truck and trailer he was driving at the time of the accident. Therefore, if there is any liability upon the part of the defendant, Arrowhead Freight Lines, Ltd., it must be based upon the liability of the defendant, Marvin C. Van Patten, for his act or acts in the operation of said truck and not because of any misconduct on the part of the defendant, Arrowhead Freight Lines, Ltd., by reason of the law which makes an employer responsible for the acts of its employees performed within the course and scope of their employment.

“Therefore, if for any reason you find there is no liability in this case on the part of the defendant, Marvil C. Van Patten, as defined in these instructions, then you will find there is no liability on the part of both defendants.”

Moreover, as was heretofore pointed out, there was no substantial evidence of contributory negligence in this case. So that such defense was not properly before the court and should not have been submitted to the jury. Therefore, the trial court was not authorized or required to qualify its Instruction No. 7 with a condition that the jury must find plaintiff free from contributory negligence.

Again Instruction No. 7 represented a proper statement of the law. There was no improper language or mis-statement of principle in the instruction. It was not, therefore, contrary to or in conflict with any other instruction given by the court. An inconsistent instruction would be one, for instance, where the court would state to the jury that the burden of proof was on the plaintiff and then subsequently charging that the burden of proof of the same matter was on the defendants. There was no statement made in any part of the court's charge which was inconsistent with any statement contained in Instruction No. 7.

The court's Instruction No. 6 was not a formula instruction. It merely presented to the jury the legal principle of respondeat superior so that the jury would know that the master is liable for the negligent acts and omissions of his servant. The jury could not have been misled by that instruction, and it contained an altogether proper statement of a legal principle which was applicable to the evidence in the case.

To summarize, the defendants' objections to instruc-

tions Nos. 6 and 7 are without merit for the following reasons.

1. The instruction No. 6 was not a formula instruction but contained a proper statement of the law applicable to the evidence.

2. The court qualified instruction No. 6 by its instruction No. 9, which is a further indication that the instructions were to be construed together.

3. Instruction No. 7 was a proper instruction on one of the plaintiff's theories of recovery which was legally accurate and sufficient and fully supported by the evidence.

4. Although the defendants' negligence was so glaring as to constitute negligence as a matter of law, the court, nevertheless, in the instructions objected to permitted the jury to determine whether the defendants were negligent or not. So that under the evidence the instructions objected to were more favorable to the defendants than the record justifies.

5. It was clear from the tenor of the instructions given by the court that the jury was to consider all of the instructions as a whole, and considering all of the instructions as a whole the court not only submitted defendants' theories to the jury, but overemphasized them.

6. There was no substantial evidence of contributory negligence and the court should not have submitted that defense to the jury at all.

7. The defendants' exceptions, as will be argued in the next point, were inadequate and were not calculated to inform the court of the defendants' claimed defects in the court's charge.

Point 3. The defendants did not properly except to the instructions they now complain of and cannot urge such exceptions on appeal.

Defendants now complain that the court failed to condition recovery, in giving its Instructions 6, 7, and 10, upon the absence of contributory negligence. They made no such claim before the trial court at the time they took their exceptions. It is true that the defendants excepted to the whole of each instruction and also to stated parts of each instruction, but there was nothing in the exceptions calculated to direct the attention of the trial court to the error claimed.

We are mindful of the provisions of Section 104-24-18 Utah Code Annotated 1943, which contains the same language as Revised Statutes 1898, Sec. 3151, to the effect that "No reasons need be given for such exceptions, but the exceptions shall be noted upon the minutes of the court . . ." This statutory provision, however, was construed by the Supreme Court of Utah in the case of *Nebeker v. Harvey*, 21 Utah 363, from which we quote as follows, beginning at 374:

"Numerous other errors relating to the charge of the court were assigned but in the absence of proper exceptions, we cannot consider

them. The exceptions are too general, simply referring to whole paragraphs of the charge. To be of avail in the appellate court, they must specify the particular objectionable matter so as to give the trial judge an opportunity to make a correction, notwithstanding that it is provided in Section 3151, Revised Statutes that: 'No reason need be given for such exceptions.' That section does not authorize the making of wholesale exceptions without reference to the specific matter which is claimed to be objectionable. The reason of the rule which requires the specific objectionable matter to be pointed out in the presence of the jury, is obvious. If the objection to the matter be well taken, the court may then make the correction called for and thus, not only save the expense of another trial, but also the time of the court. The rule has been firmly established in this state, *Poole v. Southern Pacific Co.*, 20 Utah 210, 58 Pac. 326, 333. *Brigham City v. Crawford*, 20 Utah 130, 57 Pac. 842; *Wilson v. Sioux Consolidated Mining Co.*, 16 Utah 91, 99; *People v. Hart*, 10 Utah 204; *Lowe v. Salt Lake City*, 13 Utah 91, 99."

To the same effect is *Boyd v. San Pedro, L. A. & S. L. R. R. Company*, 45 Utah 449, 146 Pac. 282; *State v. Riley*, 41 Utah 225, 126 Pac. 294; *Goldberg v. Gintoff (Vt.)* 20 Atl. 2d 114; *Connelly v. Felsway Motor Mart Inc. (Mass.)* 170 N. E. 467, 469; *Sacramento Suburban Fruitlands Co. v. Loucks (CCA 9)* 36 Fed. 2d 921.

In the case at bar the trial court might well have assumed that the defendants had in mind in their exception to the last six lines of Instruction No. 7 that the court erred in permitting the jury to determine

from a preponderance of the evidence that the negligence of the defendants was the proximate cause of the collision; and the court was fully justified in disregarding the exception as made, for the legal principle stated in the instruction were in all respects correctly stated. If there was any error in the instruction it was in the omission in that particular instruction to condition recovery upon the absence of contributory negligence. There was no error in the language or principle as stated. The only way that defendants could have possibly directed the attention of the trial court to the error of omission would be by excepting to the failure of the court to condition recovery in its instruction No. 7 upon the plaintiff's freedom from contributory negligence. That would not be necessarily the assignment of a reason for the exception. Defendants would not have to say the court erred in failing to condition recovery upon the plaintiff's freedom from contributory negligence for the reason, for instance, that there was evidence in the record to support it. They would, however, be required to call the court's attention to the necessity for amplifying the charge.

In *Wilson vs. Sioux Consolidated Mining Co.*, 16 Utah 392, 398, Justice Bartch stated that an exception to be of avail in an appellate court should, in a case where any portion of the charge is correct, be strictly confined to the objectionable matter, and the judge's attention called thereto at the time of the delivery of the charge, so that an opportunity may be afforded him to make correction.

In the recent case of *Fowler vs. Medical Arts Building Company, et al.*, 188 Pac. 2d 711, (Utah), the Supreme Court of Utah criticized the taking of general exceptions which were not calculated to advise the trial court of the reasons for the exceptions.

An Oregon case in point is that of *Davis vs. Puckett Co.*, 144 Oregon 332, 23 Pac. 2d. 909, from which we quote (page 334 of the Oregon report):

“ These exceptions fail to show any grounds for defendants’ alleged assignments of error. These exceptions do not disclose wherein the instructions were alleged to be incorrect or insufficient, and did not give the trial court an opportunity to correct the error, if any, by amplifying the instructions or eliminating objectionable matter. For these reasons we do not feel warranted in considering the objections now urged thereto. (citing cases)”

To the same effect is *Cook vs. Retzlaff*, (Oregon) 99 P. 2d. 22, 23.

Defendants may claim that their exceptions were specific in that they excepted to certain lines of the instructions, etc. Enlightening in this connection is the case of *Senita vs. Marcy*, 324 Pa. 109, 188 A. 153, at page 201 Pennsylvania reports:

“While appellants’ counsel excepted particularly to this portion of the charge quoting merely what the court said. He did not state the reason for the exception nor call the court’s attention to the mistake in his recital of the evidence. When

a trial judge errs in his comments upon testimony, counsel must call his attention to the real testimony in the case, if he does not, he cannot take advantage of it on appeal."

Again in the case of *Shortino vs. Salt Lake & Utah Railroad Company*, 52 Utah 476, 174 Pac. 869, 866, the court made the following statement:

"Counsel for defendant excepted to 20 of the 35 paragraphs. The exception invariably reads as follows: 'Defendant excepts to instruction No.,' stating the number of the paragraph excepted to. We have repeatedly held—indeed, we have so often decided it that it has become elementary—that unless the entire paragraph is vulnerable such an exception presents nothing for review. As before stated, each paragraph of the court's charge, with perhaps one or two exceptions, contained more than one legal proposition. A general exception to the whole paragraph, therefore, may refer to any one of several propositions contained in the paragraph. The purpose of taking an exception to an instruction is to direct the trial court's attention to the legal proposition which it is contended is faulty. The fault may lie in an omission, or in a word, a phrase, or sentence, or in several sentences. While no reason need be assigned for the exception, yet if an alleged faulty statement of law consists in a word, phrase, or sentence, or in a series of sentences, the exception should be limited to such word, phrase, sentence, or sentences, so that the trial court may examine them, and, if possible, correct the error. If, therefore, an exception is to the whole paragraph, it is a matter of mere conjecture what portion of the same is intended to be ex-

cepted to. Nor does such a general exception present anything to this court for review unless the whole paragraph excepted to is faulty, which is seldom the case. In view, therefore, of the general nature of the exceptions, we cannot review the many errors assigned relating to the instruction.”

In conclusion, on this point we will quote from 1 Blashfield's Instructions Juries, Second Edition, Page 937:

“Inasmuch as only errors will be considered on appeal as are called to the attention of the trial court, it follows that exceptions must specify particularly the alleged error complained of. A party excepting must make his exceptions so specific that the matter relied on as error will be apparent to his adversary, and to the primary court. For his adversary having his attention directed to the special matter relied on as erroneous has the right and privilege of waiving such matter, rather than, by insisting on it, incur the hazard and delay of an appeal to a superior tribunal. The court having its attention directed to the erroneous matter, might be satisfied with the error into which it may have fallen through inadvertence and could voluntarily correct it by a reversal of its rulings and thus protect the party excepting from all injury.

“The exceptions should not be less definite and specific than when made in the appellate court, and exceptions which do not clearly and specifically point out the objectionable part of the instructions can not be sustained. It should also be noted that upon obvious principles only

those grounds of exceptions will be considered on appeal which were stated to the trial court.”

It is clear from the foregoing authorities that the purpose of exceptions is not to permit a defendant to cagily conceal the purpose of the exception and the basis of it from the trial court in order to lay the foundation for a reversal on appeal. But the purpose of the exception is to apprise the trial court of the particular error complained of in order to enable the trial court to re-examine his instruction and if possible correct the error by amplifying his charge or by deleting from his charge the objectionable material. We think it fair to say that none of the defendants’ exceptions to the instructions given by the court met with these standards, and that none of the exceptions taken in the trial were calculated to direct the court’s attention to the errors complained of.

Point 4. The court did not err in its failure to give defendants’ requested instructions.

The defendants object to the failure of the court to give the second half of their requested instruction No. 6. They assert that the court erred in not including the following language in its instruction No. 13:

“And if you find from the evidence that the plaintiff, J. Harold Mitchell, was guilty of any negligence in approaching on his wrong side of the highway when there was traffic approaching from the opposite direction, and that by reason

thereof, the defendant, Marvin C. Van Patten was prevented from seeing said pick-up truck driven by plaintiff as soon as he could or would otherwise have seen it had it been upon its proper side of the highway, or that the plaintiff, J. Harold Mitchell, was thereby prevented from seeing the truck as soon as he could or would otherwise have seen it, and that such negligence on the part of plaintiff proximately contributed in any degree to cause the collision, then plaintiff cannot recover, and your verdict should be in favor of defendants and against the plaintiff, no cause of action, even if you should find there was also negligence on the part of the defendant, Marvin C. Van Patten.” (R. 90-91).

The defendants’ position in this respect is without merit. The defendants while operating their truck were required to watch both sides of the highway, particularly while passing another vehicle going in the same direction. As was pointed out in the cross examination of Van Patten, the defendant Van Patten could not know whether it was safe to attempt to pass the Pace car until he had surveyed the right side of the highway to determine, for instance, if there was any car ahead of Pace. He would have to know that in order to form a proper judgment as to whether he had sufficient time in view of the restricted visibility to get his sixty foot long truck and trailer safely ahead of the truck proceeding in his direction before any other vehicle approached within 100 feet from the opposite direction. (57-7-124, U.C.A. 1943)

Furthermore, defendants overlooked the fact that they claim to have been continually watching both sides

of the highway as they were attempting to pass the Pace vehicle. (R. 446). Combining the duty of watching both sides of the highway, with Van Patten's assertion that he was performing that duty, the defendants were not entitled to be surprised by the presence of the plaintiff near or straddle the center line. Again if Van Patten could see 200 yards ahead of him as he claimed, Van Patten regarding the highway with watchful eyes could have observed the plaintiff in ample time to remain in or get back into his proper lane and thus avoid the accident, traveling as he was at the speed of approximately twenty miles per hour.

In their assignment No. 12 the defendants claim the court erred in refusing to give defendants' requested Instruction No. 9, in which, in effect, the court was requested to instruct the jury that it was the duty of the plaintiff to avoid creating an emergency, and to avoid the collision by pulling over on the west shoulder or passing in between the Pace vehicle and defendants' truck and trailer. Again counsel overlooked the evidence in the case from which the conclusion is compelling that whatever emergency existed was created by the reckless folly of Van Patten, and the defendants had no right to ask the court to tell the jury that Mitchell should place his car in the path of the innocent Pace vehicle rather than in their own where the plaintiff rightfully belonged. Nor did they have the right to have the court tell the jury that they may find that plaintiff was negligent in failing to pass between the Pace vehicle and defendants' truck. There was nothing in the record to indicate that

plaintiff had any opportunity to take that alternative nor is there anything in the record to indicate that there was sufficient room between the Pace automobile and the defendants' truck for plaintiff to pass through unscathed. We shudder at the contemplation of the result which would have necessarily ensued if plaintiff had attempted to sandwich himself between the two vehicles in order to avoid the accident, assuming that he had the opportunity to do so; and counsel have the effrontery to urge this amazing proposition despite the court's Instruction No. 14 which permitted the jury to find from the evidence that plaintiff was responsible for the emergency created by plaintiff's unlawful attempt to pass another vehicle in a dust storm. (R. 71)

In their assignment of error No. 14 the defendants complained of the court's failure to give their requested instruction to the effect that the jury might find that the plaintiff was negligent in driving at all in the dust storm. Defendants' position here approaches the testimony of Van Patten in achieving the ultimate of inconsistency. At a time when defendant claimed to be able to see 200 yards ahead and at a time that Van Patten was on the wrong side of the road flamboyantly passing another vehicle defendants now urge that plaintiff was required to take his vehicle into the field. They make this assertion in spite of the uncontradicted testimony of Mitchell, corroborated by the other passengers in the Mitchell car, that Mitchell was actually in the process of pulling his car off the road when the impact occurred. The defendants also make this assertion at the same

time acknowledging that the court in its instruction No. 10 told the jury that if conditions of visibility were such that plaintiff or defendant Van Patten could not ascertain or determine his position on the highway or could not see approaching traffic, then it became the duty of each to pull off onto the shoulder on his right hand side of the highway.

In their assignment of error No. 10 the defendants complain of the language in the last line of the instruction. The strained interpretation placed upon the instruction by the defendants is unwarranted. Counsel directs the court's attention to the last paragraph of the instruction, we direct the court's attention to the instruction in its entirety, which is as follows:

“You are instructed that while plaintiff claims that the defendant, Marvin C. Van Patten, was under a duty to drive and operate the truck he was driving at a reasonable speed, having due regard for the conditions then and there existing, it was also the duty of the plaintiff to likewise drive at a reasonable and prudent speed, having due regard to such conditions.

“You are further instructed that if conditions of visibility were such that plaintiff or defendant Van Patten could not ascertain or determine his position on the highway, or such that they could not see approaching traffic, then it became the duty of each to pull off onto the shoulder on his right hand side of the highway, if necessary, to avoid a collision in the exercise of reasonable and ordinary care.

“Therefore, if you find from the evidence that plaintiff or defendant Van Patten was unable to see his true position on the highway and continued to drive at a speed which was not reasonable and prudent under the conditions then and there existing, then the one violating this duty was negligent.”

Obviously, if the highway conditions required one car to stop, it required them both and the jury could not possibly have been misled by the last line as counsel would have us believe.

Point 5. The court did not err in denying defendants' motion for a new trial.

After the verdict was returned, counsel for the defendants contacted the jurors and obtained affidavits from seven of them including the affidavit of the foreman (R. 122) which they set forth in their brief at page 63. Each of the seven jurors that furnished affidavits at the instance of the defendants furnished another affidavit to a contrary effect. Representative of the counter-davits is the one obtained from the foreman Stirling E. Tanner, which we quote as follows:

“Stirling E. Tanner, being first duly sworn on oath, deposes and says: That he is one of the jurors and foreman on the trial of the above entitled case, wherein a verdict was returned on Monday, April 26, 1958; that the amount of the verdict was determined in the following manner:

“We first agreed to return a verdict for the plaintiff. We then allowed the special damages

of \$1638.50 on the first cause of action and \$1264.00 on the second cause of action. We then added \$16,591.72 from the annuity table, plus \$900.00 for wages to plaintiff's brother during 1947. We differed as to the amount to be paid for pain and suffering, and after discussion we had difficulty in coming to an agreement. It was proposed that we submit an amount on a slip of paper for the purpose of determining how widely we were apart, and for the purpose of totaling the various sums together to arrive at an average. If the average was a fair one, and if everyone accepted that average, then that was to constitute the amount to be allowed for pain and suffering. The figures submitted on the slips of paper were handed to me and I had the figures divided by eight, which gave a result of \$1190—(approximately \$1200). The jurors discussed this figure and decided that it was a fair one, and it was accepted as a fair and proper award for pain and suffering, and incorporated into the verdict. There was no understanding or agreement among the jurors before the ballot was submitted and the average taken that they would be bound by the result, and after the average was taken there was discussion among the jurors as to whether or not such average was reasonable,—to which all of the jurors agreed.

“The former affidavit which I signed in this matter was prepared by Mr. Edwin B. Cannon in his own words, and since making said affidavit my attention has been called thereto, and especially to the following language; “We also agreed to adopt the average as our verdict, after including the amounts hereinabove mentioned. We each submitted a figure by secret ballot and they were then handed to me and I added the figures and

divided by eight, which gave a result of \$1200, which governed our final verdict without further deliberation. Adding all of the figures was checked by some of the jurors, but there was no further deliberation after we computed the average of \$1200 as to pain and suffering. On my slip I put nothing for pain and suffering but consented to the result because of our previous agreement.”

“At the time I made said affidavit I did not observe the language quoted above, or notice the effect of it, and especially the words ‘which figure governed our final verdict without further deliberation,’ and ‘there was no further deliberation after we computed the average,’ and ‘consented to the result because of our previous agreement.’” for it is not true that before said average was computed there was any agreement or understanding that the jury, or any member of the jury, would be bound by said average as and for the verdict of the jury; but I, as well as every other member of the jury, was at liberty to accept or reject the average, and, after the average was taken, there was a further deliberation in the sense that the jurors discussed the average figure, determined it to be fair, and expressed a willingness to accept it as each man’s estimate, and I concurred in the verdict because I deemed the amount to be fair.” (R. 137-138)

It will appear from the above affidavit of the foreman that nothing irregular occurred in the jury room which could provide defendants with a basis for a new trial. The only juror who did not provide both parties with an affidavit furnished one at the instance of the plaintiff, the affidavit being in his own language and as follows:

“B. F. Lofgren, being first duly sworn on oath, deposes and says: That he is one of the jurors on the trial of the above entitled cause, wherein a verdict was returned Monday, April 26, 1948.

“My recollection is that the amount of the verdict in the above entitled case was arrived at in the following manner:

“We first agreed to return a verdict for the plaintiff. Special damages were then discussed and we agreed to allow \$1638.50. On the second cause of action we allowed \$1264.00. The question of loss of earning power was discussed, and it was agreed to allow an amount which would provide approximately \$100.00 per month for the plaintiff's expected life,—the exact amount was taken from the annuity table to be \$16,591.72. The amount of \$900.00 was allowed for wages paid plaintiff's brother, due to plaintiff's past loss of earning power.

“On the question of damage for pain and suffering there was little basis for arriving at an amount. It was agreed that each juror should submit his estimate to the foreman to find how widely these separate estimates varied. The foreman found the average of the separate estimates to be approximately \$1200.00, and the separate estimates varied from zero to about \$2,000.00. The foreman announced the average and the jurors discussed whether that amount could be considered a fair allowance. The amount of \$1200.00 was adopted and the total verdict was then added and adopted by the jurors.” (R. 239-140)

In view of the explanations furnished by the seven in their second affidavits and in view of the affidavit of

the eighth juror, Mr. Lofgren, there can be no question but what the defendants have altogether failed to discharge their burden of proving the irregular calculation of the verdict in this case. Defendants are in no position to complain that the jurors from whom they obtained the affidavits altered and explained their position in a subsequent affidavit. If counsel was dissatisfied with the state of the record, we would have welcomed an examination of the jurors before the court upon the hearing of the motion for new trial. The only juror who did not furnish two affidavits in this case established the regularity of the proceeding in the jury room. It is significant that each of the seven jurors asserted in his second affidavit that the first affidavit was not prepared by the affiant and was not given in his own words. Some of the affiants directly asserted that the language of the affidavit was the language of Mr. Cannon. (R. 135-149)

It follows that the court properly overruled the defendants' motion for new trial.

CONCLUSION

The record in the case at bar discloses that the defendants were given a full and fair trial and that the verdict of the jury was fully justified by the evidence and was in all respects fair and just. The defendants have not shown any error on the part of the trial court material and prejudicial to their substantial rights. Indeed, the trial court in its instructions to the jury gave the defendants more consideration than the evidence warranted. We, therefore, earnestly submit that the judgment of the court below should be affirmed.

Respectfully submitted,

CLYDE, MECHAM & WHITE

*Attorneys for Plaintiff and
Respondent.*