

1949

State of Utah v. Joseph Dean Peterson : Brief of Appellant

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.

McCullough, Wilkinson & Boyce; Attorneys for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *State v. Peterson*, No. 7286 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1043

This Brief of Appellant 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**

STATE OF UTAH,

Plaintiff and Respondent,

vs.

JOSEPH DEAN PETERSON,

Defendant and Appellant,

Case No.
7286

BRIEF OF APPELLANT

FILE

MAR 05 1900

APPEAL FROM THE CLERK, SUPREME COURT,
FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY,
STATE OF UTAH

HONORABLE WILLIAM STANLEY DUNFORD

McCULLOUGH, WILKINSON & BOYCE

Attorneys for Defendant and Appellant

INDEX

	Page
STATEMENT OF FACT	1
STATEMENT OF ERRORS	43
ARGUMENT	48
PROPOSITION I	
The court erred in admitting testimony of the revocation of the driver's license of the defendant	48
PROPOSITION II	
The court erred in admitting evidence on the issue as to whether the defendant was under the influence of intoxicating liquor at the time of the alleged crime	64
PROPOSITION III	
The court erred in overruling defendant's motion to dismiss the information and discharge the defendant at the close of the State's case (T. 476-480) and in refusing to grant defen- dant's requested instruction No. 1 (S. 22, T. 728) to direct the jury to return a verdict of not guilty	69
PROPOSITION IV	
The court erred in failing to instruct the jury as to the elements of involuntary man- slaughter and the law pertain- ing thereto, but on the contrary erroneously instructed the jury on these fundamental principles.	70

I N D E X

	Page
STATEMENT OF FACT	1
STATEMENT OF ERRORS	43
ARGUMENT	48
PROPOSITION I	48
PROPOSITION II	64
PROPOSITION III	69
PROPOSITION IV	70
CONCLUSION	72

Authorities

CASES:

State of Utah v. Lingman, 97 Utah 197 to 201	50, 55
People v. Black, (1931, 11 Cal. App. 90, 295 P. 87	56
State v. Long, (1919), (Delaware), 7 Boyce 397, 108 A. 36	56
State v. McIvor, (1920), 31 Del. 123, 111 A. 616	56
Thompson v. State, (1933), 108 Fla. 370, 146 So. 201	56, 57
State v. Gee, (1930), 48 Idaho 688, 284 P. 845	56
Dunnville v. State, (1919), 188 Ind. 373, 123 N.E. 689	56, 57
Blackburn v. State, 1932), 203 Ind. 332, 180 N.E. 180	56, 58
People v. Barnes, (1914), 182 Mich. 179, 148 N.W. 400.....	56, 58
State v. Satterfield, (1930), 198 N. C. 682, 153 S.E. 155	56, 59
State v. Schaeffer, (1917), 96 Ohio St. 215, 117 N.E. 220, LRA 1918B, 945, Ann. Cas. 1918E, 1137	56, 60
Jackson v. State, (1920), 101 Ohio St. 152, 127 N.E. 870	57, 59
Keller v. State, (1927), 155 Tenn. 633, 299 S.W. 803, 59 A.L.R. 685..	57
Hiller v. State, (1932), 164 Tenn. 388, 50 S.W. (2d) 225	57, 61
Norman v. State, (1932), 121 Tex. Crim. Rep. 433, 52 S.W. (2d) 1051	57, 68
Goodman v. Com., (1930), 153 Va. 943, 151 S.E. 168	57, 69
Rex v. Wilmot, (1930), 64 Ont. L. Rep. 605, 52 Can. Crim. Cas. 336 (1930) 1 D.L.R. 778	57

TEXT:

Blashfield Cyclopedia of Automobile Law and Practice, Vol 8, p. 102	69
--	----

In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

JOSEPH DEAN PETERSON,

Defendant and Appellant,

Case No.
7286

BRIEF OF APPELLANT

STATEMENT OF FACT

The errors assigned in this case justify a detailed epitome of the testimony given by the only two witnesses who made any observation of the movement of the truck which was involved in the death of the deceased, James Curwood. These two witnesses are Bert Karen and Lawrence Karen, his brother. The deceased had been riding in the Karen pickup truck just prior to an accident on U. S. Highway 40 about a mile and half east of the little town of Jensen, Utah, and about ten miles east of Vernal. The undisputed evidence shows

Lawrence Karen and the deceased were drunk at the time of the accident and, therefore, the testimony of Lawrence Karen is of little value in the case. His testimony, however, will be carefully noted in this Statement of Fact.

On the afternoon of Saturday, September 6, 1947, Lawrence Karen and the deceased, James Curwood, were in the Collier Beer Parlor drinking beer. They had been there practically all afternoon. (T. 15, 32). On Saturday evening, September 6, 1947, Bert Karen met his brother and Curwood at the beer parlor and they all had some more beers there. (T. 32). The three of them then decided to go over to Artesia, Colorado, for a social trip. Artesia is a little border town in Colorado where hard liquors are sold by the drink. They bought a half dozen bottles of beer to drink on the way over to Artesia. They got over to Artesia between 8:00 and 9:00 P. M. (T. 33). They went to a liquor tavern known as "The Well". They stayed in this place until a quarter of 2:00 Sunday morning. (T. 34-5). They spent their time drinking whiskey and beer. Bert Karen testified that he didn't keep track of how much beer he drank, but he knew he had had at least one drink of whiskey and four bottles of beer. (T. 62-3). Bert Karen testified that the deceased, James Curwood, and his brother, Lawrence Karen, had an argument with the patrons of the tavern which caused considerable disturbance and the Colorado officers were about to throw the two of them in jail for drunkenness when Bert Karen interceded for them, stating that he would take them

home in his truck. (T. 17, 36). There is no question at that time the deceased and Lawrence Karen were thoroughly intoxicated. They left Artesia about a quarter of 2:00, although neither witness could fix the time except by the fact that Sammy Hatch, a highway patrolman, told them the accident occurred around 3:00 o'clock in the morning. (T. 38). As they travelled toward Vernal, Utah, Bert Karen stopped the truck on Highway 40 about a mile or mile and half east of the Jensen Bridge and about 300 yards east of the Escalante Monument for the purpose of urinating. The following testimony is pertinent:

“Q. And as a matter of fact, you heard the officer say your brother and this man Curwood were drunk, didn't you?

A. Well, they felt pretty doggone good.

Q. By that you mean they were drunk, weren't they?

A. Well, I am not sure, I guess that is what you would call it, I don't know.

Q. Isn't that what you told us in the preliminary hearing, that the both of them were drunk, not only there but when you got out to the place where you got out to urinate, that they were drunk then; didn't you testify to that at the preliminary hearing?

A. That's right.

Q. And I ask you this: 'You knew those two fellows, your brother and the other man, were drunk, didn't you, at the time you stopped to get out to urinate?' And your answer was:

'Yes'. That was your testimony, wasn't it?

A. That's right.

Q. And when you got up to the Au Miller store your brother was so drunk he sat out there by the pumps and was so sick he didn't go back even to the scene of the accident, wasn't he?

A. Well, I didn't ask him to go back.

Q. I know, but as a matter of fact he was so sick and drunk he didn't even go back?

A. Well, I don't know whether he was sick or not.

Q. Well he was drunk anyway, wasn't he?

A. He was full." (T. 36-37).

At the place where they stopped, Highway 40 was a hard surfaced road approximately twenty feet wide, split down the middle with a yellow line, making two ten-foot lanes for east and west travel. On the right hand side of the road as you travel toward Vernal, or what is known as the south side of the highway, there was a two-foot shoulder and immediately to the south a rather precipitous or steep bank which sloped into a borrow pit; that Bert Karen parked his truck on a bias pointing in a southeasterly direction; that the front wheels of his truck were on the right shoulder but a substantial portion of the truck remained on the south traffic lane; that the truck was approximately eighteen or twenty feet long; that he could not run the car down into the borrow pit and, therefore, a substantial part of the truck was out on the hard surfaced area on the right side. The following testimony is important:

“Q. Anyway, it is how far east of the Escalante Monument, we will call that?

A. Well, I could say about three hundred yards.

Q. Three hundred yards?

A. I am just guessing at it. though.

Q. Some distance east?

A. Yes.

Q. And it is down in the bottom of a swale there, isn't it?

A. That's right.

Q. And over on the right hand side, that is the right hand side as you go into Vernal, is a rather steep borrow pit, isn't there?

A. Yes, it is kind of sloped off.

Q. But the bank is rather precipitous or steep, isn't it?

A. Yes, sir.

Q. And the shoulder of the hard surfaced area is about two feet wide, isn't it?

A. Well I would be guessing if I said yes on that.

Q. Is that what you testified to in the preliminary hearing?

A. It is about like that.

Q. What is your best judgment?

A. Well I would say two feet.

Q. Then it goes abruptly down into a borrow pit, which of course you couldn't run your car into the borrow pit, could you?

A. No, sir.

Q. So that you had approximately two feet of shoulder on the righthand side of your car onto which you stopped your car as you have indicated.

A. Yes, sir.

Q. And your car was a Ford pickup truck, wasn't it?

A. That's right.

Q. And approximately somewhere in the neighborhood of eighteen or twenty feet long?

A. That is about right.

Q. This hard surfaced area is a two lane highway, isn't it?

A. Yes, sir.

Q. It is split down the middle with a yellow line?

A. Yes, sir.

Q. And both the two sides are about somewhere in the neighborhood of ten feet wide, are they not, ten foot lanes, about and a twenty foot highway going up there?

A. I never measured it, but that is about right.

Q. So that your car when you parked onto this two foot shoulder, a substantial part of your car was out on the hard surfaced area on the righthand side, wasn't it?

A. Yes, sir.

Q. So that when you got out you got out of the car on the left hand side where the hard sur-

faced area was, and you walked around to the front of the car, didn't you?

A. Yes, sir.

Q. Where the other fellows got out, you don't know, do you?

A. No sir, I didn't pay no attention to them.

Q. Didn't pay any attention. You knew at that time they were both drunk, didn't you.

A. Yes.

Q. And whether they got out on the lefthand side or got out on the righthand side, you didn't see them get out, did you.

A. No, didn't pay any attention.

Q. And you didn't see Mr. Curwood, the man that was killed, or assuming he was killed, you didn't see him at all until you saw his body lying on the pavement over about fourteen inches to the right of the lefthand edge of the road, did you?

A. No, sir.'' (T. 40-1-2).

Bert Karen got out of the truck, went around the lefthand side to the front of the car to urinate. He glanced back over his shoulder and saw the lights of a car coming from the east and traveling toward Vernal. He watched the lights come down a rather long grade to the bottom of the swale, where the Karen truck was parked as aforesaid. The following testimony is extremely important and we quote from the record:

“Q. When you got out of the car you walked out to the front of the car?

A. Yes, sir.

Q. And where the other two gentlemen went to that were with you, you don't know?

A. No, sir.

Q. Whether they got out on the righthand side as you come toward Vernal, righthand side of your car, you don't know?

A. I never paid no attention to them.

Q. And you got in the front of the car you happened to look over our shoulder, kind of glanced back over your shoulder, didn't you?

A. That is about right.

Q. And you saw the lights of a car coming from the east, we will call the general direction east, coming from Artesia, the same direction you were going, coming down a rather long grade that comes down to the bottom of that swale?

A. Yes, sir.

Q. And there was nothing about the movement of those lights that attracted your attention, was there?

A. No, there wasn't that I noticed.

Q. And when the lights approached your car, the car with the lights, turned over to the left-hand side?

A. That's right.

Q. Of the road, to go around you so that there would be no collision with your car?

A. It sure did.

Q. And that was the normal thing for the car to do, wasn't it?

A. That's right.

Q. Because if he had kept coming down the righthand side of the road he would have hit right in the back of your car, wouldn't he?

A. That's right.

Q. So that the lights turned over, and assuming the lights were attached to the car, turned over to the righthand side of the road?

A. Yes, sir.

Q. To the lefthand side as we come toward Vernal, your lefthand side?

A. Yes.

Q. Then as the car passed you heard a bump?

A. That's right.

Q. And that is the only thing that attracted your attention to the movement of that particular car that was out of the ordinary, wasn't it?

A. Yes, it was; it startled me a little there.

Q. Now after the car passed on up the road, you saw some clearance lights?

A. Yes, sir.

Q. And you presumed by the fact that it had clearance lights that it was a truck?

A. Yes, sir.

Q. And after it had gone up the road, you looked up the road and saw Curwood lying on the pavement, didn't you?

A. That's right.

Q. And that is the first time that you saw Karen—

A. I didn't—

Q. Not Karen, but Curwood, I mean Jimmy Curwood, lying on the pavement. And that is the first time you saw him after you had stopped your car and got out of the truck and went to the front?

A. That's right.

Q. How he got in that position you don't know, do you?

A. I don't know.

Q. Now you ran up the road to where the body was, didn't you.

A. Yes, sir.

Q. And where was the body with reference to the lefthand side, lefthand side of the hard surfaced area, that is, your lefthand side as you traveled toward Vernal?

A. He was, oh, about a foot and a half to the edge of the pavement, just like that is the edge of the pavement here (indicating).

Q. You mean a foot and a half toward the center?

A. On the lefthand side.

Q. That would be a foot and a half from the lefthand edge of the hard surfaced area as you move toward the center of the street?

A. Yes, sir.

Q. About in that position when you saw him?

A. That's right.

Q. And was he lying on his belly, as you stated a minute ago, or on his stomach?

A. That's right.

Q. Then you told us about putting your hand on him, and so on. You were there for some appreciable time before your brother came up, weren't you?

A. Well I don't know whether it was just—I imagine maybe split seconds or something like that.

Q. You don't know, don't have any independent memory how long it was before your brother came up?

A. I wouldn't say because I don't know.

Q. And can you give the jury any idea how this man Curwood got over on the opposite side of the road from where your car was parked? You don't know, I suppose?

A. Well I don't know how he got over there.

Q. And the fact that both he and your brother were drunk never entered into your head about watching their movements after you got out of the car?

A. No, I didn't.

Q. Now when these lights came down the highway that were on the truck or whatever it was that passed and you heard a thump, there wasn't any movement of those lights, or the car upon which the lights were situated, that attracted your attention as far as being out of the ordinary movement, was there?

A. No, not that I could say.

Q. When the car passed you and continued on up the street, isn't it a fact that the car was going about the same rate of speed as the ordinary car goes on that highway?

A. That is about right.

Q. It wasn't going fast and it wasn't going slow, was it?

A. No. it was just—

Q. Going about medium?

A. About an ordinary speed.

Q. Going about medium, is what you testified to at the preliminary hearing.

A. That's right.

Q. So that the speed of the car was not out of the ordinary and was about the same speed as the ordinary careful driver would drive on that road?

A. That is what I would say.

Q. And the only other movement of the car excepting its forward movement that you observed was the fact that when it approached the back end of your car the car moved over to the lefthand side of the highway, went around your car? (T. 42-3-4-5-6-7)

.....

Q. After the truck passed you did you see it turn back over on to the right side of the road?

A. Well, about all I could see it was going down the road.

Q. Didn't it turn back over onto the righthand side of the road?

A. I don't recall it did.

Q. It just went straight on up the road as far as you remember it?

A. As far as I know.

Q. There wasn't anything disturbing at all in the manner in which it went up the road, was there?

A. There didn't seem to be.

Q. Apparently just normal movement of the car as it went on up the street?

A. That is the way it seemed to me. (T. 48)

Bert Karen did not move Curwood but left him on the road, lying on his stomach. He and his brother Lawrence then drove to Harry AuMiller's store at Jensen where Sammy Hatch, State Highway Patrolman, was notified by telephone of the accident. About forty minutes later Hatch met them at the store and Bert Karen and Hatch returned to the scene of the accident. Lawrence Karen was left at the service station in a drunken condition. When they got back to the scene of the accident a Burlington bus had stopped with its lights shining on the body and the driver had put out flares to keep traffic away from the area, (T. 50). On redirect examination by Mr. Colton, Bert Karen testified that he did not show Mr. Hatch the approximate location of where his truck was stopped the night of the accident.

"A. You mean take him out there and show him?

Q. No, the night of the accident did you—strike that. You stated to Mr. McCullough that this was the general location but the exact spot, you don't know?

A. No, I don't know if this was the exact spot or not.

Q. Now, I ask you a question, did you show Mr. Hatch the night of the accident the approximate location where you parked your car when you stopped?

A. I don't believe I did." (T. 56).

On recross examination by Mr. McCullough the witness testified as follows:

"Q. And you didn't show Mr. Hatch at any time where you parked the car on the road, did you?

A. No, sir.

Q. You couldn't tell the make of the truck, if it was a truck that passed, as you have indicated, you couldn't tell the make of the truck?

A. No, sir.

Q. Couldn't tell the color of the truck?

A. No, I couldn't say that I could.

Q. And you watched those clearance lights for some time as it went up the road, didn't you?

A. Yes, I would say I thought it was a long time, but seconds anyway.

Q. Well, as it went up the road you could see those clearance lights for at least a quarter or a half mile, couldn't you?

A. Well, see them for quite a long ways up the road." (T. 60-1).

At this point in the testimony the court took the noon recess. After the noon recess the witness was recalled to the stand and on redirect examination stated that he had made a mistake in his previous testimony and that he had shown Sammy Hatch where he had parked his pickup truck on the night of the accident and that Sammy Hatch had made a cross on the edge of the road right where the Karen truck had been parked. (T. 71). On recross examination he reluctantly admitted that he had talked to the prosecuting officials about this testimony during the noon recess. (T. 78). The change in this witness' testimony was necessary for the admission of pictures offered by the State of the exact location of the accident and particularly State's Exhibits A, J and O.

Bert Karen testified that he did not know where Mr. Curwood was struck, or the position he was in on the road when he was struck, or whether he was lying down, or whether he was standing up, or what his position may have been at the time he was struck. As far as he knew Curwood could have been lying right on the road when he was struck by the car. (T. 53).

The meager testimony of Lawrence Karen, the brother of Bert Karen, is of little value in determining what happened at the scene of the accident. This witness admitted that he was in a drunken condition. He classified his state of intoxication as being "medium drunk." (R. 90-1-2). This witness testified that besides the beer which he consumed, he drank from six to eight glasses of whis-

key before he left Artesia to return to Vernal at about 2:00 o'clock in the morning. He testified he was riding with his brother Bert and the deceased Curwood in a pickup truck; that his brother Bert was driving the truck; that he was on the righthand side and Curwood was in the center; that they stopped the truck someplace east of the river at Jensen and "we all got out for a little relief." (T. 82) He got out on the righthand side. He doesn't know what side the deceased got out of the truck as he did not see him until after the accident occurred. (T. 83). After getting out of the truck the witness went down into the borrow pit to take care of the wants of nature, saw some lights coming down the road and turned his back to them because of the act he was performing at the time in relieving himself. (T. 96-7). The next thing he heard was a thump. Then he heard a "pitty pat" down the pavement and saw someone running down the pavement. He climbed out of the borrow pit and ran down the road. He saw Jimmy Curwood on the lefthand side of the pavement and his brother was standing over him. Curwood's head was down and my brother said "my God, he is dead" and said well don't touch him, let's get the law. In a moment or so they ran back to the truck and went to Jensen to call the law. (T. 84) He testified that three or four minutes elapsed from the time they stopped the truck until he heard the bump. (T. 85). The witness further testified as follows:

"Q. In other words, Sammy Hatch told you that the accident happened around about three o'clock?

A. He said that was about the time he got there, or got the call.

Q. And upon what he told you, you concluded you must have left Artesia around two o'clock in the morning?

A. Approximately about that.

Q. And that is the only way you can place the time, by what Sammy Hatch told you?

A. Yes, sir, that's all the time I had.

Q. And if Sammy Hatch hadn't told you that you wouldn't have known when you left Artesia, would you?

A. No, sir.

Q. When you stopped down at the place somewhere east of the river, or down at Jensen, you say you got out the righthand side of the truck?

A. Yes, sir.

Q. And went down into the borrow pit?

A. Yes, sir, stepped off—

Q. Did you take care of the wants of nature?

A. Yes, sir.

Q. And the lights that were coming down the road, you turned your back to them?

A. Yes, sir.

Q. Because of the act you were performing at the time in relieving yourself?

A. Yes, sir.

Q. And the next thing you heard was a thump?

- A. Yes, sir.
- Q. And after you heard the thump the next thing you heard, you said about three or four seconds or minutes after the thump or bump, you heard someone running down the road?
- A. Yes, sir.
- Q. And did you see where the lights of this car had gone by this time?
- A. No, sir, I didn't pay any attention to the lights of that truck.
- Q. The only time you ever saw any lights of the car that came down the road was when you got out into a thistle patch and the lights were coming down the road and you turned your back, and you never saw the lights after that on the car?
- A. No, sir.
- Q. That's correct, isn't it?
- A. That's right.
- Q. Then when you heard someone running down the road you went down the road too, didn't you?
- A. Yes, sir.
- Q. When you went down the road did you see any blood for a distance of approximately 179 feet leading east from where you saw something lying in the road?
- A. No, sir.
- Q. Did you see any smears of blood for a distance of thirty or forty feet running east of where the person, or whoever it was, that was in the road?

A. No, sir.

Q. Didn't see any blood at that time all?

A. No, sir.

Q. Then when you got down there you stayed only a couple of seconds, didn't you.

A. I would say approximately that, yes, sir.

Q. Then you went back to your truck, you and your brother?

A. Yes, sir.

Q. And the person that you saw in the road was Jimmy Curwood?

A. Yes, sir.

Q. Where was the person of Jimmy Curwood at the time you saw him in the road?

A. It was on the southwest side of the highway.

Q. That would be on the lefthand side as you are coming towards Vernal?

A. Yes, sir.

Q. How far from the lefthand edge of the pavement?

A. I couldn't say as to that, that is, accurately. I would say possibly, from the approximation, maybe two or three feet.

Q. You didn't observe it carefully?

A. No, sir.

Q. Then you went back to your car.

A. Yes, sir.

Q. On your way back to your car did you see any blood from the person of Mr. Curwood stretching out for 179 feet?

A. No, sir.

Q. Did you see any smear of blood running down the road to the east, or toward Artesia, from the person of Mr. Curwood for a distance of thirty or forty feet?

A. No, sir.

Q. Then you drove on into Au Miller's or into Jensen?

A. Yes, sir.

Q. And left Mr. Curwood out there on the road?

A. Yes, sir." (T. 96-7-8-9).

S. D. HATCH, State Highway Patrolman, testified that he received a call at his home at 3:18 a.m. that there had been an accident on Highway 40; that he immediately dressed and went out on the road; that he observed a large red Federal truck coming into Vernal on Highway 40 and about 3rd East Street; that he waived the truck down between 4th and 5th East Street; that the truck pulled over to the side of the road and he walked around to the door on the driver's side and recognized the defendant, Dean Peterson, as the driver. He had a conversation as follows:

"Q. Will you state to us in substance or effect the conversation then had between you and Mr. Peterson?

A. I asked him if he had been—as near as I

recall my exact words were, 'How far east have you been, Dean?' To which he replied, 'I have been out to Wileys. ' I said, 'Did you just come in from Wileys?' 'Yes,' that was his answer, 'yes.' And at that time I asked him to step out of the truck.

Q. And did he?

A. He stepped out, yes." (T. 116).

He testified that the defendant had an odor of intoxicating liquor on his breath and from his observation and conversation he concluded that he was under the influence of intoxicating liquor. He found a whiskey flask with some whiskey in it and a full coca-cola bottle in the cab of the truck. The City Marshal, Calvin Jorgenson, came up about that time and Mr. Hatch instructed him to take the defendant to the police station and to hold his truck until he returned. At that time Mr. Hatch testified that there was some damage to the left front headlight and fender of the truck as shown by the pictures, State's Exhibits F and G. The defendant denied having an accident or running over any person. Pursuant to the instructions of Mr. Hatch, Calvin Jorgenson, the night marshal, told the defendant to drive the truck to the police station, which he did. Mr. Hatch testified that the examination of the truck and the conversation with Mr. Peterson occupied approximately five minutes. (T. 271). That he stopped Peterson at 3:25 a.m.; about 3:30 he started toward Jensen and when he got just beyond the Gateway Cafe, which is on about 8th East Street, he stopped another truck, a water tank

truck of F. R. Finley which was being driven by a party by the name of John Gibbs. He took Mr. Gibb's chauffeur's license and told him to drive the truck up to the police station. He watched to see if they were complying with his instructions and when they turned off Highway 40 toward the police station he concluded that they would comply with his orders. He went on to Jensen where he picked up Bert Karen at the Au Miller store but left Lawrence Karen sitting on the pump standard. They then drove to the scene of the accident. There was an apparently lifeless man lying on the road; a Burlington bus heading east had its headlights shining on the body and the bus driver Spike Hayworth, had put flares around the area to keep traffic away. (T. 130-2). The body was lying face down; the head east and the feet to the west; the head was about fourteen or fifteen inches from the edge of the pavement and one leg was stretched out partly on the paved surface and partly on the north shoulder. (T. 134). The body was then put on a blanket and lifted to the side of the road. There was a pool of blood about seventeen or eighteen inches in diameter where the man's head had lain. Sheriff H. N. Snyder of Uintah County arrived at the scene of the accident and assisted Mr. Hatch in making certain measurements. That 34 feet east of the pool of blood they found one shoe on the road on one side of the center line and 54 feet east they found another shoe on the other side of the center line. (T. 137). The shoes were offered and received in evidence and later identified as shoes belonging to the deceased, who was in the habit

of wearing shoes without shoe laces. Hatch testified that Bert Karen had told him that he parked as near as he could recall at a place about forty-two steps east of the body that was on the road. (T. 139). Hatch and Sheriff Snyder returned to the police station and questioned the defendant about his movements on Saturday night, the 6th, and Sunday morning, the 7th.

When Mr. Hatch and the sheriff returned to the police station and further questioned the defendant concerning the accident, the defendant again reiterated that he knew nothing about the accident. When asked about the damage to his left headlight, he said he did not know when it occurred; that his sister had driven the truck the day before but he had not noticed the damage until it was called to his attention by Mr. Hatch.

About 6:30 in the morning and shortly after day-break Mr. Hatch again returned to the scene of the accident and made numerous measurements as shown by his testimony. He testified there was a smear of blood about six or seven inches wide running back east of the body along the north side of the highway some forty feet; the blood then thinned out on the pavement to a point 179 feet east of the body. (T. 150-154). The Karen car was parked 126 feet east of the large pool of blood where Curwood was found and the blood was in evidence 179 feet east of the pool. (T. 153). The following excerpts from the witness' testimony are pertinent:

“ ‘Mr. Hatch, you stated you saw a smear of blood. State what you saw there.

‘A. Well, there was, from this patch of blood

which I testified to, that it was approximately eighteen or twenty inches across it, there was a smear of blood that run back up the highway as far as I could track it, down to the drop—just little mere flakes of blood on the rocks, was 179 feet; from the clot of blood back, *I didn't measure it, but about thirty or forty feet this smear was very prominent, and you could stand back and see it very clearly.*

Is that what you testified at the preliminary hearing?

A. That's right.

Q. Now on page 75:

'Then the blood was over on the lefthand side of the road, was it?

A. Right.

Q. How far from the lefthand side of the hard surface of the road area?

A. Well the center of the blood spot, I imagine about twelve inches; the outside edge of the blood spot was over near the edge of the paved surface.

Q. And then leading back from that blood pool, or area about eighteen inches in diameter, you traced blood back about 179 feet?

A. Yes, sir.

Q. And there was a smear of blood on the hard surface area, wasn't there?

A. Yes.

Q. For how long?

A. *There was a smear of blood for about thirty or forty feet.*

Q. *And it was a very pronounced spot, was it not?*

A. Yes, very plain.

Q. Is that what you testified to?

A. Yes, I believe that is my testimony.

Q. And further:

'All right, for thirty or forty feet back this smear of blood was very pronounced and was discernible, was it not?

A. Right.'

Is that your further testimony?

A. That's right.'" (T. 260-261)

On direct examination the witness testified as follows:

"Q. I think your testimony yesterday, or the day before, I think you testified that when you went out there in the morning you could not detect any tire marks in any of the blood areas at all; that is your testimony in this cause?

A. The first trip?

Q. No, the second trip.

A. No, I didn't testify that on the second trip. The first trip I testified we didn't find any tire marks in the blood.

Q. Well, I will have to find it from the reporter. Didn't you testify yesterday that when you

went out there and it came daylight is when you first saw the smear of blood?

A. That's right.

Q. That you couldn't find any tire marks in any of the blood areas?

A. Yes, as far as tread was concerned, yes, I testified to that.

Q. *And in the preliminary hearing you testified the same thing, that there were no tire marks or skid marks or brake marks in the area of the blood or the scene of the accident, didn't you?*

A. That's right." (T. 286).

Notwithstanding this bloody mess that was present at the scene of the accident, not a drop of human blood was ever found on the defendant's truck. A spot of blood was found on a U-bolt which was sawed off and sent to the F.B.I. There was also some hair found on the under carriage of the truck which was sent to the F.B.I. The report showed the spot of blood was not human blood but animal blood and the hair was squirrel hair. (T. 256-257). The following testimony of Mr. Hatch is pertinent:

"Q. *You didn't find a spot of human blood any place upon the truck of Dean Peterson, did you?*

A. *No, sir.*

Q. *And you searched the truck from the front to the back and all under the undercarriage, and all over the entire car, and you didn't find*

one solitary drop of human blood on the car, did you?

A. *That's right.*" (T. 257).

"Q. *Notwithstanding the condition that this body was in, notwithstanding the fact that there was a pool of blood there eighteen or twenty inches in diameter and half an inch deep, and that this blood when it got daylight you could see a very prominent, discernible smear of blood reaching out to the east toward Artesia thirty or forty feet, and evidence of the blood continuing on for another distance, making a total of 179 feet, notwithstanding the mutilated condition you found the body as you have now described, you didn't find a single solitary drop of human blood on the truck, did you?*

A. *I did not.*" (T. 283-284).

In attempting to connect the Peterson truck with the accident, Mr. S. D. Hatch testified that he found a human tooth on the top of the front axle of the Peterson truck, which tooth was later identified by Dr. Stevens, a dentist, as the tooth that was missing from the mouth of the deceased. A careful analysis of this testimony leads to but one conclusion, that the testimony is not worthy of belief. In the first place, Mr. Hatch claimed he found the tooth about 6:30 in the morning just after daybreak, lying on the top of a convexed axle about a foot from the wheel and at a point where the axle was from $1\frac{3}{4}$ to $2\frac{1}{4}$ inches wide. (T. 285). It was lying in some oil or grease at that point. The testimony was offered that the tooth was knocked out of the deceased's

mouth at the time of the accident and lodged on the top of this convexed axle. If the tooth was found on the top of the axle as the State's witness would have us believe, then the head of the deceased had to come in contact with the undercarriage of the truck. The bloody condition of the road as herein set forth and the terrible mutilated condition of the body as testified to by Mr. Hatch (T. 170) clearly demands that the object which caused these situations must have come in contact with a great amount of blood from the person of the deceased, and yet the undisputed evidence in the case from the State's own witness, shows that there was not a single solitary drop of human blood found on the Peterson truck. The Peterson truck is a 3½-ton Federal truck and from the place of the accident would have to travel approximately ten miles over rough roads with a human tooth lying on the top of a convexed axle not exceeding 2¼ inches in width. This is impossible to believe and when we find in the evidence the testimony of Ralph Hatch, a service station operator and relative of S. D. Hatch, that he steam cleaned with live steam with 40 to 60 lbs. pressure the chassis of this truck two days before the accident (T. 568-569) the possibility of the tooth riding on such an axle while the truck was traveling ten miles over comparatively rough roads is wholly fanciful and beyond credence. The inconsistent testimony of S. D. Hatch and Dr. J. W. Stevens lends further force to the incredibility of this evidence. Mr. Hatch testified at the preliminary hearing that he found the tooth about 6:30 in the morning just after daybreak

when he first returned from the scene of the accident and at that time he showed the tooth to Dr. Stevens, who was standing on the sidewalk beside the truck. Dr. Stevens testified that he was not on the sidewalk at 6:30 in the morning; that he did not see the tooth until sometime between 9:00 and 10:00 o'clock in the morning when Mr. Hatch showed it to him after he had been examining the truck. (T. 359). The following testimony is pertinent:

“Q. Mr. Hatch, you were read a couple of sentences out of your testimony at the preliminary hearing found on page 86. So that the jury and the Court will know the entire context of your testimony at that point, I want to ask you, beginning with page 85, if this is not your complete testimony with reference to the time that you found that tooth, and if you didn't testify as follows at the preliminary hearing, beginning up about a third of the way down:

“Q. Now whether anybody had been under the truck making an examination prior to the time that you made your examination, between five and six o'clock in the morning of September 7, you don't know that do you?

A. I do not.

Q. When you got back there was the defendant's mother and father there?

A. Yes, sir.

Q. What?

A. Yes.

Q. What they had done to make an examination of that truck you don't know, do you?

A. No, I don't know whether they made an examination of it or not.

Q. What time Sunday morning was it when you found the tooth on top of the front axle?

A. *That was when I made the examination, right after daylight. I don't know what the correct time was, but it was as soon as it got daylight.*

Q. *That was between five and six o'clock in the morning then?*

A. *Yes, sir.*

Q. *And you found the tooth at that time on top of the axle?*

A. *Yes, sir.*

Q. *And there isn't any question that that statement is true; is that correct?*

A. *No question at all.'*

Is that what you so testified to at the preliminary hearing?

A. Yes, that is my testimony.

'Q. If Dr. Stevens wasn't there between five and six o'clock in the morning then you didn't hand it to him at that time you found it, did you?

MR. COLTON: We object to that question as being duplicatus.

Q. I will withdraw the question. When you found the tooth between five and six o'clock in the morning, Dr. Stevens wasn't there to see it?

A. If it was between five and six.

Q. Well, you told us it was just about daylight?

A. Yes.

Q. And you told us it was between five and six o'clock in the morning less than two minutes ago?

A. I said that.'

MR. COLTON: Just a minute. I think counsel should read what the record indicates here, that he was interrupted in his answer.

MR. McCULLOUGH: I wouldn't say that, I will say what the record shows.

'Q. And you told us it was between five and six o'clock in the morning not less than two minutes ago?

A. I said that.'

Then there is a dash by the reporter.

'Q. Wait a minute. Did you tell us less than two minutes ago that it was between five and six o'clock in the morning? If you didn't, I will have the reporter read it.

MR. COLTON: Well, let him answer.

A. I believe I stated if that was the time, it was after daylight, and if it was between five and six o'clock that was the time.

Q. Well it wouldn't be between nine and ten o'clock in the morning, would it?

A. No.

Q. And the time that you are talking about you were there, right after daybreak?

A. Yes.

Q. And the people you tell us about as being there were there right after daybreak.

A. Yes, sir.

Q. Including Dr. Stevens?

A. Yes.'

Is that what your testimony was, Mr. Hatch?

A. That is my testimony." (T. 293 to 296)

DR. STEVENS POSITIVELY TESTIFIED THAT HE DID NOT SEE S. D. HATCH JUST AFTER DAYLIGHT BETWEEN FIVE AND SIX O'CLOCK IN THE MORNING OF SEPTEMBER 7th; THAT HE DID NOT SEE THE TOOTH IN QUESTION UNTIL SAMMY HATCH SHOWED IT TO HIM BETWEEN NINE AND TEN O'CLOCK SUNDAY MORNING. (T. 358-9).

The accuracy of Dr. Stevens testimony is equally dubious. At the preliminary hearing, Dr. Stevens testified that the tooth which he examined and filed his initials "J. W." in, was the upper right first bicuspid. (T. 345-346). On his cross examination at the trial, this witness became very much disturbed when he perceived that the tooth had been examined by defendant's experts and then he changed his testimony, stating that the tooth in question was a second bicuspid and not the upper right first bicuspid as he testified to at the preliminary hearing; that he had made a mistake in his testimony at the preliminary hearing. (T. 346, 350-1-2). The doctor further testified at the trial that he identified the tooth by reason of the fact that he had used an explorer found in the undertaking parlor to probe into the socket

of the missing tooth and discovered that the tooth was broken off in there; that part of the root structure was still there, that, the Apical end was still there in the socket. He reluctantly confirmed his testimony given at the preliminary hearing as shown by the following testimony:

“Q. Now you say, you testified here a few minutes ago that there was an instrument over at the undertaking parlor that looked like,— what was that instrument, that you called it?

A. Oh, it was an explorer, prober, several instruments over there.

Q. And you say from that explorer you determined that the socket of this missing tooth in the cadaver’s mouth, you say that there was a tooth broken off in there.

A. Part of the root structure was still there, the Apical end was still there in the socket.

Q. I will ask you if you testified as follows at the preliminary hearing when this question or such a matter was talked about whether you could tell there was any broken tooth, on page 52:

‘Q. *And that is approximately the size that would fit into that missing tooth, or the cavity of the missing tooth, is it doctor?*

A. *Yes, sir.*

Q. *Was the tooth broken off?*

A. *The tooth was, yes.*

Q. *Was the rest of the tooth in the cavity or was it knocked out, too?*

- A. *I can't tell you that; there was no X-ray made.*
- Q. *Did you make an examination to determine that?*
- A. *No, the blood was clotted in the socket and I didn't probe to see about that.*
- Q. *But the socket was there, was it; you could see that?*
- A. *Yes.*
- Q. *The balance of the tooth, you couldn't determine whether it was in the socket or not?*
- A. *No.*
- Q. *Nor you didn't determine that?*
- A. *No.'*
Isn't that what you testified to?
- A. *I didn't remember probing for that root at the time.*
- Q. *Just a minute. I am asking you if that is what you testified at the preliminary hearing?*
- A. *Yes.*
- Q. *Then in face of that sworn testimony you come into court now and tell us that you did exactly opposite from what you testified?*
- A. *I made a mistake in telling you I didn't probe for that tooth, for I did.' (T. 353-354).*

The testimony of JOHN D. GIBBS lends further credence to the fact that the Peterson truck was not involved in this accident. Gibbs is an entirely disinter-

ested witness. He is a graduate of the University of Oklahoma and a surveyor for the Texas Company. In company with a Mr. Gump, he left Artesia for Vernal, Utah, a few minutes before 2:00 o'clock on the morning of September 7th. He saw Dean Peterson at the H & H Cafe in Artesia about 10:00 o'clock on Saturday evening. There was nothing abnormal about the manner in which he talked nor the manner in which he walked. He again saw Mr. Peterson at the Club 40 around midnight. He heard him talking to different people at that place, observed his actions and, from his observation, he was not under the influence of intoxicating liquor. He and Mr. Gump left Artesia about 2:00 o'clock driving a water truck of the H. R. Findley Company. (T. 128). They were travelling toward Vernal on Highway 40. They passed a number of passenger vehicles, including a passenger bus about the time they arrived at the Colorado line. When they were about eight miles east of Artesia at a point known as the junction of the Bonanza road with Highway 40, the Peterson truck driven by Dean Peterson passed them going toward Vernal. Mr. Gibbs positively identified the truck as the one he had seen in Artesia and many times before in Vernal. He definitely identified the truck from defendant's Exhibit "3" and also identified the same truck when he reached the police station when ordered to report there by Highway Patrolman S. D. Hatch. He testified that Peterson was travelling about 35 miles per hour and that they followed close behind him until they got up about the Jensen bridge. The Jensen bridge is

east of the point of the alleged accident and crosses the Green River at the little town known as Jensen. The clearance lights and tail lights of the Peterson truck were in their vision from the time the truck left the Bonanza road to the Jensen bridge, where the road turns. They lost sight of the Peterson truck as they slowed down to see if the cafe was open at Jensen. Mr. Gibbs testified he did not observe any pickup truck parked on the righthand side of the road as you go toward Vernal between the Bonanza road and the Jensen bridge. (T. 403). They did not observe any object in the road like a human body and they saw no evidence of any accident between those points. They had good sealed beam headlights on their truck. Had there been any pickup truck parked on the righthand side of the road or if any body had been lying in the road they would have seen it during the ride from Bonanza road to the Jensen bridge. They were stopped by Highway Patrolman S. D. Hatch on Highway 40 near the Gateway Cafe. This was five minutes after Dean Peterson's truck had been flagged down by Sammy Hatch. (T. 271). Sammy Hatch took the driver's license of Mr. Gump and ordered him to go to the city offices and leave his truck and remain there until Hatch returned. They did as they were ordered and went to the city office and there saw the Peterson truck parked outside and Mr. Peterson, who was waiting in the office. The truck they saw was the same truck which they followed from the Bonanza road right up to the Jensen bridge. (T. 40). After they arrived, defendant's father, mother and sister came to

the city office. Gibbs was with the Peterson family, including the defendant, for about 2½ hours during which time they examined the truck very carefully. He had occasion to talk with Dean Peterson throughout the period. He heard many questions propounded to Dean by his mother and father and the replies which Dean made to these questions. (T. 410). That during said time Dean Peterson's speech was coherent. He was normal as he walked around and examined the truck. That he did not observe the odor of intoxicating liquor on his breath. That if there had been intoxicating liquor on his breath he would have sensed it as he talked with him throughout the 2½-hour period which he was with them at the city offices. (T. 411-412). That during the examination of the truck by the Peterson family and himself and Mr. Gump, no one stopped them in their examination, including Night Marshal Calvin Jorgenson. They left the city offices around 6:00 o'clock in the morning and came back between 9:00 and 10:00 o'clock, when Mr. Gump got his driver's license back and they picked up the water truck and left. This witness clearly exonerated Mr. Peterson from any participation in the alleged accident.

MR. JEFF L. DAVIS, a married man with two children and a resident of Orem, Utah, who formerly lived at Craig, Colorado, testified that he was living in Craig, Colorado, on September 6th and at that time he did not know any of the Peterson family, including Dean Peterson; that he was working for Chester Watson at Craig, Colorado. That prior to that time he had

stored some furniture over at Vernal at the home of Mrs. Harvey Knight. That he hired a Ford pickup truck from the firm of Jones & Laughlin to go to Vernal to pick up his furniture in storage and bring it to Craig where he was residing. In company with a driver by the name of Jones he left Craig around 8:00 o'clock Saturday night, September 6th. He arrived in Vernal about midnight. After getting their furniture loaded at Mrs. Knight's home they left Vernal for Craig, Colorado, after 1:30 a.m. Sunday morning September 7th. (T. 543-5). They were travelling on Highway 40 between 20 and 25 miles an hour with a load of furniture. The witness had gone over this road many times before and was familiar with the various land marks. They went over the Green River bridge at Jensen. When they were about 17 miles out of Vernal or about 4 miles east of Jensen, a 1941 Chevrolet passed them going toward Artesia. When the car passed they were on a curve just as the road starts up a long grade. When the car passed them it was steaming, that is the steam was coming out of the radiator. The passenger car was travelling somewhere around 55 or 60 miles an hour. The hill or grade was about a mile and a quarter long. They continued to watch the car and just before it got to the top of the grade it stopped because it had got so hot that the engine froze up. When they got up to the car they noticed that the radiator and the grill were caved in and the righthand fender was badly damaged. The radiator was "plumb dry" with a large hole in the radiator. There were two men and three girls. The

two men were so drunk they couldn't talk. The girls said they were out of water and they hit a colt or something down by Jensen. (T. 548). They hooked a chain on the damaged Chevrolet automobile and started to pull the Chevrolet into Artesia. The man steering the Chevrolet, because of his drunken condition, could not guide it and Mr. Jones went back and steered the car while Davis drove the pickup truck to the Jones Trucking Company in Artesia. It was after 3:00 o'clock when they got to Artesia. When they stopped at Artesia they examined the Chevrolet. There was a five-inch hole in the radiator, the fender was pretty well smashed in and rubbing on the tire, the bumper was bent down. (T. 551). They left the Chevrolet at Artesia and then drove on into Craig. The fact that this witness is entirely disinterested and his testimony remained absolutely unimpeached, notwithstanding he gave the names of prominent people in Vernal who could easily verify his presence at Vernal at the times which he testified to, no effort was ever made by the prosecution to impeach his testimony. It is clear that this Chevrolet car participated in the accident in question as no other accident was reported on this night.

Another enigma arises in this case when George Engen and his wife, Elsie Engen, two prominent citizens of Jensen, who operate the cafe known as Mom's Cafe, testified in support of defendant's Motion for a New Trial that on Sunday, September 7, 1947, at the hour of 3:15 A.M. when they were about to close their cafe, Bert Karen and his brother, Lawrence, drove up to the

cafe. That Bert Karen went over to Harry Au Miller's house next to the cafe to get him to phone. While Bert Karen was getting Harry Au Miller, Mr. and Mrs. Engen came out in front of their cafe and asked Lawrence Karen what was the matter. Lawrence Karen replied, "*We had a fight and the son of a bitch got out to piss and Bert ran over him.*" Mr. and Mrs. Engen saw the red Federal truck driven by Dean Peterson approximately fifteen minutes before the Karen brothers arrived at the cafe. See affidavit in support of motion for new trial, R. 46, and the testimony of these witnesses, T. 733 to 765.

Defendant, Joseph Dean Peterson, took the stand in his own defense. Mr. Peterson had overseas campaign service for approximately four years; he was wounded by shrapnel in his face which made one side of his face out of line with the other; that he did not drive the Federal truck anytime during the day of September 6th but that his sister was driving the truck during that day; that he got through work at his father's mill about 7:00 o'clock in the evening and drove over to Jensen on business and later to Artesia. He had one drink about 7:00 o'clock in the evening from the bottle which he purchased at Vernal to treat his business associates at Jensen. That the bottle was never opened after leaving Jensen. The remainder of this bottle was found by Sammy Hatch in his truck along with a coca-cola mixer. The bottle bore a Utah liquor stamp and was more than half full after five people had a drink out of it at Jensen. (T. 583). He went over to Artesia for the purpose of

getting a permit to haul flour into Colorado. That he had some beer at Artesia but did not drink any hard liquor. (T. 588, 591). That he did not have any accident with his truck as alleged by the prosecution and he was not under the influence of intoxicating liquor at anytime during the night of September 6th and the early morning of September 7th. The great preponderance of the evidence substantiates this latter statement. There was no urinalysis made. S. D. HATCH and SHERIFF SNYDER testified that in their opinion he was under the influence of intoxicating liquor, but the Colorado officer, JOE TOBLER, who observed him throughout the evening, refused to testify that he was intoxicated and in answer to the question as to whether or not he was intoxicated, said that all he would say was that he had been drinking. (T. 332).

Another member of the Colorado State Patrol, C. P. ALLISON, testified in relation to the condition of the defendant, that about 10:00 o'clock in the evening he noticed the smell of liquor on his breath. (T. 373).

CALVIN JORGENSEN, the night marshal at Vernal, testified that defendant was under the influence of intoxicating liquor and when asked why he permitted him to drive his truck if he was in that condition, answered "yes" to the following question: "So you let him drive the truck under the influence of intoxicating liquor rather than leave your car and get in his truck to take him up to the city office? Is that your answer? Yes, sir."

The defendant's witnesses, who were present from

the time that Dean Peterson arrived at the police station at about 3:30 A.M. to the time he was taken to jail at 6:00 o'clock in the morning, all testified that there was no evidence of intoxication or that Dean Peterson was under the influence of liquor at that time. JOHN D. GIBBS, a totally disinterested witness, who talked and associated with Peterson during those 2½ hours, testified definitely that there was no evidence of intoxication as far as the defendant was concerned ^{or} that he was under the influence of intoxicating liquor. The Justice of the Peace at Artesia, MR. WILLIAM H. SAHLI, and MRS. ADAIR BRIMHALL, who observed the defendant throughout the evening, testified that he was not under the influence of liquor at anytime while he was in Artesia. The fact that the Colorado highway patrol officers refused to testify that he was under the influence of liquor has considerable probative force. The most the prosecution could get from these witnesses was that, in their opinion, the defendant had been drinking.

MR. ELISHA WARNER, Commissioner of the State Tax Commission, testified that on the 28th of June, 1947, the driver's license of Dean Peterson was revoked by the State Tax Commission and the defendant was not present at the revocation herein; that the action of the Commission was predicated upon the report from Justice of the Peace Wayne Johnson at Springville, Utah, that defendant was convicted of driving a car under the influence of liquor. The trial court refused defendant the right to present evidence that there was no such a conviction ever had in the justice court of Wayne Johnson.

STATEMENT OF ERRORS

1. The court erred in overruling defendant's motion to strike the entire testimony of Elisha Warner covering revocation of the driver's license of the defendant. (T. 227).

2. The court erred in receiving in evidence State's Exhibit N, the certified copy of the order of revocation of defendant's driver's license. (T. 227, 228).

3. The court erred in overruling defendant's objection to the State's offer to introduce in evidence the testimony of Elisha Warner taken on his voir dire examination, covering the transcript from page 212 to 225.

4. The court erred in overruling defendant's motion to dismiss the information and discharge the defendant; said motion was made at the close of the State's case. Grounds for said motion are contained in transcript pages 388 to 389.

5. The court erred in refusing to give defendant's requested instruction No. 1. (R. 22, T. 728).

6. The court erred in failing to give defendant's requested instruction No. 2. (R. 23, T. 728).

7. The court erred in refusing to give defendant's requested instruction No. 3. (R. 24, T. 728).

8. The court erred in failing to give defendant's requested instruction No. 4. (R. 25, T. 728).

9. The court erred in failing to give defendant's requested instruction No. 5. (R. 26, T. 728).

10. The court erred in failing to give defendant's requested instruction No. 6. (R. 27, T. 728).

11. The court erred in giving Instruction No. 1. (R. 28, T. 728).

12. The court erred in giving Paragraph 2 of said Instruction No. 1. (R. 28, T. 728).

13. The court erred in giving Instruction No. 7 and each and every part thereof. (R. 31, T. 729).

14. The court erred in giving that portion of Instruction No. 7 which reads: "First, operating a motor vehicle while under the influence of intoxicating liquor." (R. 31, T. 729).

15. The court erred in giving that portion of Instruction No. 7 which reads: "Second, driving while his driver's license was revoked." (R. 31, T. 729).

16. The court erred in giving that portion of Instruction No. 7 which reads: "And, third, reckless driving, or, in other words, driving in wilful or wanton disregard for the safety of others." (R. 31, T. 729).

17. The court erred in giving Instruction No. 8. (R. 31, T. 729).

18. The court erred in giving that portion of said Instruction No. 8 which reads, beginning with the sixth line, "and at such time, and while so operating his truck he was under the influence of intoxicating liquor, and that, being so, he drove his said truck recklessly or in marked disregard for the safety of the deceased." (R. 31, T. 729).

19. The court erred in using the word "or" in line 9 of said Instruction No. 8. (R. 31, T. 729).

20. The court erred in giving Instruction No. 9 and each and every part thereof. (R. 32, T. 730).

21. The court erred in giving Instruction No. 10 and each and every part thereof. (R. 33, T. 730).

22. The court erred in giving that portion of Instruction No. 10 which reads, beginning with the word "and" in the third line, "And when such an unlawful act is done recklessly or with marked disregard for the safety of others." (R. 33, T. 730).

23. The court erred in giving that portion of said Instruction No. 10 beginning with the word "and" in the 13th line, which reads as follows: "And that he drove his said truck recklessly or with marked disregard for the safety of the deceased." (R. 33, T. 730).

24. The court erred in using the word "or" in the 15th line of said Instruction No. 10. (R. 33, T. 730).

25. The court erred in giving Instruction No. 11 and each and every part thereof. (R. 33, T. 730).

26. The court erred in giving Instruction No. 12 and each and every part thereof. (R. 34, T. 730).

27. The court erred in giving Instruction No. 13 and each and every part thereof. (R. 34, T. 731).

28. The court erred in giving Instruction No. 15 and each and every part thereof. (R. 36, T. 731).

29. The court erred in giving that portion of said Instruction No. 15 which reads: "Such negligence, however, does not justify or excuse the defendant from running into or against him with his truck, if you find from the evidence beyond reasonable doubt that the defendant

did run into or against him with his truck.” (R. 36, T. 731).

30. The court erred in overruling defendant’s motion for a new trial. (R. 43, T. 779).

31. The court erred in overruling defendant’s objection to the questions propounded to S. D. Hatch as to whether or not defendant was under the influence of intoxicating liquor as shown by the following testimony:

“Q. And from your observation of the defendant Joseph Dean Peterson that you have just testified to as he got out of the truck, and after he got out of the truck, have you an opinion as to whether or not he was intoxicated?

A. I do.

Q. You may state what that opinion is?

MR. McCULLOUGH: Object to it on the ground it is immaterial, incompetent and irrelevant, no proper foundation laid to admit it, and no proper qualification shown of this witness to testify.

THE COURT: Objection overruled.

A. Yes, in my opinion he was under the influence of intoxicating liquor.” (T. 120-121).

32. The court erred in overruling defendant’s objection to the questions propounded to Joe Tobler, a deputy sheriff of Moffit County, as to whether or not the defendant was intoxicated at 12:00 o’clock on the night of September 6th, as shown by the following testimony:

“Q. At twelve o’clock when you moved the defendant’s truck and observed him at the cafe, Club 40, what would you say with respect to his being intoxicated?”

MR. McCULLOUGH: I object to it on the ground that it is immaterial, incompetent, irrelevant, too remote, no proper foundation laid to admit it, and no qualification shown of this witness to testify.

THE COURT: Objection is overruled.

Q. You may answer.

A. Well, I saw no difference.

Q. Well, when?

A. At twelve o’clock or thereabouts.

Q. What would you say, was he intoxicated or not at that time?

A. I would say he had been drinking.” (T. 332).

33. The court erred in overruling defendant’s objection to the questions propounded to Calvin Jorgenson, night marshal of Vernal City, as to whether or not defendant was under the influence of intoxicating liquor, as shown by the following testimony:

“Q. Now in your opinion, Mr. Jorgenson, was the defendant under the influence of intoxicating liquor?”

A. Yes, sir.

MR. McCULLOUGH: Just a minute. I move to strike the answer. I tried to get the objection in before he answered but he answered too fast for me.

THE COURT: The answer may go out for the objection.

MR. McCULLOUGH: I object to it on the ground no proper foundation laid to admit it, and no qualification shown in this witness to testify.

THE COURT: The objection is overruled and the answer is reinstated." (T. 380-381).

ARGUMENT

Numerous statements of error have been assigned. Appellant will try to organize the Argument to cover these errors under various heads and propositions.

PROPOSITION I. THE COURT ERRED IN ADMITTING TESTIMONY OF THE REVOCATION OF THE DRIVER'S LICENSE OF THE DEFENDANT.

Statements of Error Nos. 1, 2 and 3 are covered under the foregoing Proposition. This issue was argued at length at the time Elisha Warner, State Tax Commissioner, was called as a witness. Mr. Warner's testimony was first taken on voir dire examination in the absence of the jury in support of the State's offer to show the revocation of the defendant's driver's license. The defendant objected to the introduction of this testimony on the grounds that it was immaterial, incompetent and irrelevant and that no proper foundation had been laid upon which such an offer could be received in evidence. (T. 212-225) The same objections were made to receiving in evidence State's Exhibit N, the certified copy of the Order of Revocation of defendant's driver's license. (T. 227-228). Defendant also made a motion to

strike the entire testimony of Elisha Warner covering the revocation of the driver's license of the defendant. (T. 227).

These objections were argued at length before the trial court. At the conclusion of the argument the court made its decision, in which he stated the following:

“THE COURT: Mr. McCullough, I think your argument is one this court might be perfectly willing to stand at your shoulder on before the Supreme Court. It is a little difficult for my reasoning to follow the reasoning of the decision in the Lingman case. But this court hasn't any inclination to attempt to overrule the Supreme Court. The decision that this court would make upon this record will put it squarely. If the law is going to be changed, the Supreme Court is the proper tribunal to change it. Thus, this being a voir dire proceeding, and the tender being to show that this license had been revoked, the court overrules the objection to the introduction of evidence. The court puts the ruling squarely upon that decision purposely in order that there can be no equivocation in the mind of the Supreme Court if this case reaches there that the ruling is made intentionally, with my analysis and interpretation of the holding of that court. If that court then desires to change the law or say that this court has misconceived an interpretation of its decision, it will be that court to do so. That will be the holding.

MR. McCULLOUGH: May we have an exception to your Honor's ruling?

THE COURT: Yes.” (T. 224-225).

The trial court predicated his decision entirely upon

the case of STATE OF UTAH v. LINGMAN, 97 Utah 180. Defendant contends that the trial court misconceived the holding of the Lingman case and his interpretation of the opinion of Mr. Justice Wolfe went far afield.

The questioned testimony was offered after all the testimony was received with reference to the operation of the truck alleged to have been driven by the defendant. There were only two eye witnesses to the operation of this car at the time of the alleged killing of James Curwood; that was the testimony of Bert E. Karen and his brother, Lawrence Karen, whose testimony has been fully reported in the Statement of Facts above set forth. Defendant contended in his argument before the trial court that no competent evidence had been offered and received upon which any court or jury could make a finding that the driving of the truck in question by the defendant without a license had any causal connection whatsoever with the injuring of James Curwood and his subsequent death.

In order that a person may be guilty of a criminal homicide arising from the negligent operation of an automobile, or its use for an unlawful purpose, or in violation of law, it is uniformly held that it must be shown that such negligent operation, or use for an unlawful purpose or in violation of law, was the direct and proximate cause of the death; that is, that there was present a causal connection between the act and the death. The trial court held that the foregoing is an adequate statement of the law except that in case

of driving a car without a license and driving a car under the influence of liquor were exceptions to the law by reason of the fact that the Supreme Court of Utah had definitely held in the case of *State v. Lingman* that it was not incumbent upon the State to show that such violations of law were the direct and proximate cause of the death of the deceased and, furthermore, that it was not incumbent upon the State to show any causal connection between such violations of law and the death of the deceased. Mr. Justice Wolfe in his able opinion in the *Lingman* case certainly does not make any such exceptions as contended for by the trial court in the instant case. The following excerpts are pertinent to this issue:

“ . . . Likewise, when one commits a misdemeanor, *malum in se*, it is enough that the killing occurred in the course of, or by reason of, such misdemeanor, AS LONG AS THERE IS A CAUSAL RELATIONSHIP BETWEEN THE ACT WHICH IS A MISDEMEANOR AND THE DEATH. But we think *arm (a)* also refers to some acts which are *malum prohibitum*, but not all such acts. . . .

“There are many other rules for driving mentioned in Title 57, the infraction of which may constitute a misdemeanor, but not all of which would constitute the basis for a conviction for manslaughter IF DEATH SHOULD RESULT FROM THE INFRACTION. Infractions of rules of traffic may run the gamut from mere inadvertence or slight omissions to ‘any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life,’ which

is first degree murder. R. S. 1933, 103-28-3. Concretely illustrated, the gamut of infractions of the traffic laws may range from all but completely stopping at a stop sign before entering a sparsely travelled portion of an arterial highway, to a drunken driver's madly careening down a traffic-laden street. Death from the former would only give rise to a civil action; from the latter perhaps a charge of murder. Where is the line at which the infraction becomes more than civil negligence, that is, criminal negligence? It is not possible to draw it mathematically. THE ACCORDION WORDS LIKE 'MERE NEGLIGENCE' AND 'GROSS NEGLIGENCE' OR 'WANTON NEGLIGENCE' SUGGEST COMPARISONS ONLY AND GIVE NO ABSOLUTE RULE FOR GUIDANCE. WE THINK THE 'UNLAWFUL ACT', THAT IS, THE INFRACTION, MUST BE DONE IN SUCH A MANNER AS TO MORE THAN CONSTITUTE A MERE THOUGHTLESS OMISSION OR SLIGHT DEVIATION FROM THE NORM OF PRUDENT CONDUCT. IT MUST BE RECKLESS OR IN MARKED DISREGARD FOR THE SAFETY OF OTHERS. WHEN IT DOES THAT, IT PASSES THE STATE OF MERE MALUM PROHIBITUM AND APPROACHES THE UNSOCIAL ASPECTS OF MALUM IN SE. And the spirit of the person while committing the infraction is not a test. A truck driver seriously bent on meeting a schedule of his rounds who shoots through an intersection as if he were driving the only car extant, is just as guilty of reckless conduct as the driver of a car full of revelers joyously celebrating a football victory. CRIMINAL NEGLIGENCE THEREFORE SUFFICIENT TO SATISFY ARM (A) OF

THE MANSLAUGHTER DEFINITION MEANS MORE THAN MERE THOUGHTLESSNESS OR SLIGHT CARELESSNESS. IT MEANS RECKLESS CONDUCT OR CONDUCT EVINCING A MARKED DISREGARD FOR THE SAFETY OF OTHERS.

“We now turn to arm (b) of the statute, R. S. 1933, 103-28-5(2), i.e., the commission of a lawful act which might produce death (1) done in an unlawful manner or (2) done without due care and circumspection. It will be noted that in this arm the act done contains the ingredient of ‘might produce death.’ Theoretically any act might produce death. A slight scratch of a pin ‘might’ produce death. We construe the phrase to mean ‘fraught with potentialities for producing death,’ illustrations of which are the running of a car at high speed, however carefully, handling of loaded arms, explosives, deadly germs, etc.

“The distinct characteristic then of arm (b) is that the act must be one which has knowable and apparent potentialities for resulting in death. If such an act is done in an unlawful manner or without due care and circumspection, the criminal negligence is present. In other words, a dangerous act done in an unlawful manner or even with lack of the care which such an act calls for is done with criminal negligence. It does not require reckless handling or conduct evincing marked disregard for the safety of others. The ingredient of intrinsic dangerousness, plus the unlawful manner or the lack of due care and circumspection demanded by the nature of the act, even be that slight, constitutes criminal negligence. It is quite true that certain infractions of the traffic laws where the violation is done in a reckless manner

or with marked disregard for the safety of others may also rise to the level of acts fraught with danger to human life, and perhaps be chargeable either under arm (a) or (b) of the statute.

“Strictly speaking, under (b) the doing of the dangerous act is not itself unlawful. There must always be the ingredient of doing it in an unlawful or careless manner, whilst under (a) some acts amounting to a violation of the traffic laws may be, by their very nature, dangerous to life. They are, therefore, unlawful and dangerous to human life, but since the test is reckless action or action marked by disregard of safety of others, the element that it might produce death if such element be present may be, in charging under the (a) arm, ignored. An illustration will make it clear. If the speed limit is thirty miles per hour and a driver goes thirty-five miles per hour, he is violating the law, but the jury must also find that his action in so going was reckless in order to convict him under the theory of the (a) arm. It may also be the case that such speed was one which under the circumstances might produce death, but that is looked at as incident to, or a consequence which may result from, the recklessness. Since the act itself was unlawful, the jury does not need to find that element. If, however, the speed limit is sixty miles per hour and the driver is going fifty-five miles an hour, he is not by that alone doing an unlawful act. But if the jury finds that such speed might produce death (which it well might), then he is guilty of manslaughter, if in addition he did not carefully watch the road and for that reason an accident occurred. Such would come under arm (b). But wherever the act he was doing was

itself unlawful and reckless, the charge may be under arm (a), without the jury's determining whether the recklessness was such as might produce death, for surely if a lawful act which might produce death if done without due care, is manslaughter, the doing of an unlawful act which might produce death is manslaughter. In arm (a) the element of its potentiality for producing death is not material. Its unlawfulness plus recklessness only is material.

"In another aspect some acts which are chargeable under (a) according to the above tests may be chargeable under (b) or, stated in another way, acts which are chargeable under (b) by a certain construction of the statute may be chargeable under (a). *Arm (b) speaks of the 'doing of a lawful act, which might produce death, in an unlawful manner'.* This excludes at once all acts which are totally prohibited, such as driving without a license, driving while under the influence of intoxicating liquor, driving a car with bad brakes or with lights below test standards, etc. None of these can, regardless of how careful the driving, come under (b). And if such act totally prohibited is done recklessly or with marked disregard for the safety of others, it will be done with criminal negligence and if death results will sustain a charge of manslaughter under arm (a)."

(STATE OF UTAH V. LINGMAN, 97 Utah 197 to 201.)

The writer cannot find the slightest implication in the decision of the Lingman case which would justify a trial court in holding that the unlawful act or acts upon which an involuntary manslaughter charge is based need not have a causal connection with the death of the

deceased. It is a cardinal principle of law that the unlawful act, to be a basis of the crime of involuntary manslaughter, must be the direct and proximate cause of the death of the deceased. In the instant case, where is there any causal connection between the driving of the Peterson truck by the defendant without a license and the death of the deceased? Certainly no one will contend that the fallacious "but for" rule has any application here. Therefore, it follows that death must be the natural result and the probable consequence of the commission of the unlawful act upon which the homicide is based. The following cases are illustrative of this rule:

California. *PEOPLE V. BLACK* (1931) 11 Cal. App. 90, 295. P. 87.

Delaware. *STATE V. LONG* (1919) 7 Boyce 397, 108 A. 36; *STATE V. McIVOR* (1920) 31 Del. 123, 111 A. 616.

Florida. *THOMPSON V. STATE* (1933) 108 Fla. 370, 146 So. 201.

Idaho. *STATE V. GEE* (1930) 48 Idaho 688, 284 P. 845.

Indiana. *DUNNVILLE V. STATE* (1919) 188 Ind. 373, 123 N.E. 689; *BLACKBURN V. STATE* (1932) 203 Ind. 332, 180 N.E. 180.

Michigan. *PEOPLE V. BARNES* (1914) 182 Mich. 179, 148 N.W. 400.

North Carolina. *STATE V. SATTERFIELD* (1930) 198 N.C. 682, 153 S.E. 155.

Ohio. *STATE V. SCHAEFFER* (1917) 96 Ohio St. 215, 117 N.E. 220, L.R.A. 1918B, 945, Ann.

Cas. 1918E, 1137; JACKSON V. STATE (1920) 101 Ohio St. 152, 127 N.E. 870.

Tennessee. KELLER V. STATE (1927) 155 Tenn. 633, 299 S.W. 803, 59 A.L.R. 685; HILLER V. STATE (1932) 164 Tenn. 388, 50 S.W. (2d) 225.

Texas. NORMAN V. STATE (1932) 121 Tex. Crim. Rep. 433, 52 S.W. (2d) 1051.

Virginia. GOODMAN V. COM. (1930) 153 Va. 943, 151 S.E. 168.

Canada. REX V. WILMOT (1930) 64 Ont. L. Rep. 605, 52 Can. Crim. Cas. 336 (1930) 1 D.L.R. 778.

Thus, in THOMPSON v. STATE (1933) 108 Fla. 370, 146 So. 201, it was said:

“The rule of liability as to criminal and civil negligence is not the same. But in either case, where violation of a statute or ordinance is relied on to prove that there was negligence in the infliction of injuries or death, the causal connection between the violation of the statute or ordinance and the injury or death inflicted must be established. And in criminal cases it must be established beyond a reasonable doubt. In this case it is not clear beyond a reasonable doubt that the mere violation of the state statute prohibiting the parking of motor vehicles on the highway (see chapter 10, 186 Acts 1925) caused the death of the driver of one of the colliding vehicles.”

In DUNNVILLE V. STATE (1919) 188 Ind. 373, 123 N.E. 689, it was held that whether the unlawful act is committed in such wilful disregard of the rights of

others as to show a wanton recklessness as to the life and limb of another person, or in violation of a positive statute under circumstances that show reckless disregard for the life and limb of another, it is always necessary, to support a conviction of manslaughter, that the unlawful act be the proximate cause of the death.

In *BLACKBURN V. STATE* (1932) 203 Ind. 332, 180 N.E. 180, it was said:

“It has been held by this court that, to constitute the crime of manslaughter, there must be such legal relation between the commission of the unlawful act and the homicide that it logically follows that the homicide occurred as a concomitant part of the perpetration of, or in furtherance of an attempt to commit, the unlawful act. Therefore it follows that death must be the natural result and the probable consequence of the commission of the unlawful act upon which the homicide is based.”

In *PEOPLE V. BARNES* (1914) 182 Mich. 179, 148 N.W. 400, a conviction of manslaughter for the killing of a pedestrian as the result of a collision, while operating an automobile on a public highway at an excessive rate of speed in violation of the statute relating to the operation of motor vehicles, was reversed on the ground that it did not appear that the homicide was the direct and natural result of the unlawful act.

Where the evidence in a prosecution for involuntary manslaughter based solely on the violation of a statute, fails to show a proximate causal relation between the breach of the statute and the death, which is essential

to such a prosecution, a conviction cannot be sustained. (STATE V. SATTERFIELD (1930) 198 N.C. 682, 153 S.E. 155.)

The following case and the dicta in the decision is squarely in point with defendant's position that the failure to comply with the license law is immaterial until it can be shown that such failure was the proximate cause of the death of the deceased.

In JACKSON V. STATE (1920) 101 Ohio St. 152, 127 N.E. 870, wherein it appeared that the killing was occasioned by the violation of a statute forbidding an excessive rate of speed in the operation of a motor vehicle, the court, in holding that the disobedience of the statute must have been the proximate cause of the death, said:

"The square question is raised here as to whether an accidental, unintentional killing of a person by another engaged in an unlawful act makes that person guilty of manslaughter under the statute, irrespective of any connection between the unlawful act and the unintentional killing, and it seems to this court that an analysis of the illogical and absurd results which would necessarily follow the recognition of such a rule will answer the query. For instance, if it be the law, as charged by the trial court in this case, that, if the jury find the accused unintentionally struck and killed the decedent, while engaged in an unlawful act, to wit, operating his car at a greater rate of speed than 15 miles per hour, they must find him guilty of manslaughter without reference to causation, then it must follow that if the accused had been violating any other

valid statute, however unconnected with the death at the time of the unintentional killing, he would be guilty of manslaughter. *For instance it is a violation of a valid statute to operate a motor vehicle without having first registered same with the secretary of state, . . . yet, . . . should the driver of an automobile, while driving his car without first having registered it with the secretary of state, . . . be so unfortunate as to unintentionally run over and kill a person who inadvertently or purposely projected himself in front of the car, he would be guilty of manslaughter; for clearly it would be an unintentional killing by a person operating a car in violation of a valid statute. And yet there would be no relationship between the violation of the statute and the death. The accident would have occurred just as surely had the motor vehicle been registered. . . . The proximate cause would have been the same in each case although the result to the driver of the car would have been the appalling difference between criminal guilt and legal innocence."*

The unlawful driving relied on as the basis for a manslaughter action must have been the proximate cause of death, and if death occurred from any cause other than the unlawful act, there is no criminal liability. *STATE V. SCHAEFFER* (1917) 96 Ohio St. 215, 117 N. E. 220, L.R.A. 1918B, 945, Ann. Cas. 1918E, 1137, wherein the court said that, "THE SAFER AND SOUNDER DOCTRINE SEEMS TO BE RECOGNIZED IN MOST OF THE STATES, THAT THE UNLAWFUL ACT MUST BE A PROXIMATE CAUSE OF THE KILLING."

The mere violation of a statute will not sustain a

conviction of manslaughter where it appears that the killing was not the natural or probable result of the unlawful act. (HILLER V. STATE (1932) 164 Tenn. 388, 50 S.W. (2d) 225.

The writer can conceive of very few situations in which the operation of an automobile without a driver's license could be the proximate cause of the death of a deceased in a case of involuntary manslaughter. For instance, if a person who is nearly blind was refused a license to drive motor vehicles because of impaired vision and then in marked disregard for the safety of others drove an automobile without a license and, in consequence of his impaired vision, killed the deceased, such unlawful act would be the basis of the crime of involuntary manslaughter. Testimony that his license had been refused because of impairment of vision would be competent because of its causal connection with the failure of the defendant to see the situation which resulted in the death of the deceased. But, in the instant case, where is there any such analogy? The evidence showed that the defendant's license had been revoked on an alleged violation of Title 57 for driving a motor vehicle under the influence of liquor. Therefore, the failure to have a license to drive the truck in question could not possibly have any causal connection with the death of the deceased and the admission of the testimony of Elisha Warner that the defendant's license had been revoked was erroneous and prejudicial. Such testimony would materially prejudice a jury against the defendant.

It is rather peculiar that the court ruled against

the defendant when this illegal evidence was received, then reversed his position when he instructed the jury that the illegal act of driving the truck without a license, to be a basis of the crime of involuntary manslaughter, must have directly and proximately caused the death of the deceased. See Instruction No. 10, R. 33.

To the same effect was instruction No. 8 in which the court stated that the driving of an automobile under the influence of liquor could not be the basis of involuntary manslaughter unless it was shown that the death of the deceased was directly and proximately caused thereby. R. 31.

Instruction No. 10, as given by the court reads as follows:

“You are instructed that it is unlawful for any person to operate a motor vehicle upon any public highway of this state while his license to do so is revoked, and when such an unlawful act is done recklessly or with marked disregard for the safety of others, the person so driving is guilty of criminal negligence, and where such criminal negligence directly and proximately causes a death, the person guilty of so operating such motor vehicle and thus causing the death, is guilty of involuntary manslaughter. That is to say, if the evidence in this case convinces your minds beyond reasonable doubt that at the time and place charged in the information the defendant did operate his truck upon a public highway as charged, and that at such time his driver's license had been revoked, and that he drove his said truck recklessly or with marked disregard for the safety of the deceased, AND THAT ALL OF SUCH ACTS DIRECTLY AND PROXIM-

ATELY CAUSED THE DEATH OF THE DECEASED, then the defendant is guilty of involuntary manslaughter and it is your duty to so find."

A careful scrutiny of the testimony of Bert and Lawrence Karen pertaining to the operation of the truck which it is alleged was involved in this accident clearly eliminates any possible finding by the court or the jury that the defendant's alleged unlawful act of driving his truck without a license was done recklessly, and with marked disregard for the safety of others, amounting to criminal negligence and that such criminal negligence directly and proximately caused the death of the deceased, James Curwood. There is not a scintilla of evidence in the record to justify a finding of simple negligence let alone criminal negligence. We respectfully call your attention to the verbatim testimony of Bert Karen, who observed the movement of this truck as it approached the place of the accident, the manner in which it was travelling, the manner in which the driver turned to the left to avoid striking the Karen truck, which was illegally parked in the road, and the operation of the truck after it passed the scene of the accident. Assuming that the truck in question struck the deceased (and the evidence clearly preponderates to the contrary) where is the evidence that shows that the defendant did anything in the operation of the truck which caused the injuries and subsequent death of the deceased? The deceased was found at the extreme left-hand edge of the hard surfaced pavement with his head

approximately 14 to 18 inches to the right of the left-hand edge of the pavement and his feet projecting over onto the shoulder of the road. Did the deceased inadvertently or purposely project himself in front of the truck? No one knows. What position was he in when he was struck by the truck? No one knows. Did he stumble in his drunken condition from the borrow pit onto the shoulder of the road in the path of the oncoming truck? No one knows. Was he struck when he was lying down? No one knows. The truck was being operated in a normal and safe manner at a normal and medium rate of speed. The driver was alert to the existence of the Karen truck in the course of his path and turned out as any normal and prudent driver would naturally do. Is it not logical to assume that the deceased probably stumbled from the left-hand borrow pit where he had gone to relieve himself in his drunken condition onto the road at the time of the accident, rather than conclude that the driver would turn his truck from its normal course to avoid striking the Karen truck and then recklessly and with marked disregard for the safety of others, run over the deceased.

PROPOSITION II. THE COURT ERRED IN ADMITTING EVIDENCE ON THE ISSUE AS TO WHETHER THE DEFENDANT WAS UNDER THE INFLUENCE OF INTOXICATING LIQUOR AT THE TIME OF THE ALLEGED CRIME.

This Proposition will cover defendant's Statements of Error Nos. 11, 12, 13, 14, 31, 32 and 33.

The great preponderance of the evidence clearly establishes that the defendant was not under the influence of intoxicating liquor at the time of the alleged crime or within a reasonable time before or thereafter. We have the testimony of three Vernal police officers that, in their opinion, he was under the influence of liquor, and, on the other side we have the testimony of two Colorado State Highway Patrolmen, Mr. Joe Tobler and C. P. Allison, who were called by the State and who definitely stated that all they could say from their observation of Mr. Peterson was that he had been drinking. Neither of these men would testify that he was under the influence of intoxicating liquor. The following disinterested witnesses, who were called by the defendant, clearly eliminates any implication that defendant was under the influence of intoxicating liquor. John D. Gibbs, who was riding in the water truck that followed the Peterson truck and who was with the defendant in custody for $2\frac{1}{2}$ hours at the police station, after $2\frac{1}{2}$ hours of observation of Mr. Peterson he freely testified that there was nothing to justify a finding that defendant was under the influence of intoxicating liquor. William H. Sahli, the Justice of the Peace at Artesia, Colorado, observed the defendant on Saturday night and up as late as 2:00 o'clock Sunday morning. He unequivocally said there was no evidence of intoxication or that the defendant was under the influence of intoxicating liquor. This testimony was corroborated by Mrs. Adair Brimhall, who observed the conduct of Mr. Peterson at the Club 40 up until the time that Peterson left

at or around 2:00 o'clock in the morning. The above defendant's witnesses were entirely disinterested. Then, in addition to these, we have the testimony of E. H. Peterson, Mary Peterson and Maxine Peterson, the father, mother and sister of the defendant, who were with him for approximately 2½ hours immediately following his arrest. It may be said these are interested witnesses. The Peterson family are one of the outstanding families in Uintah County. The father operates the flour mill in that section of Utah and it is hard to believe that a mother and father would testify under oath to an untruth as to their son's condition. The significant fact that the Colorado officers refused to corroborate the glib opinions of the police officers of Vernal lends credence to the positive assertions of the disinterested witnesses and the family of the defendant.

Irrespective of what finding should be made on the testimony on this issue, we call the court's attention to the fact that there was no foundation laid by any testimony of the State which would justify the court in admitting evidence as to whether or not the defendant was under the influence of intoxicating liquor. There was no action on the part of the defendant in the operation of his truck (assuming that his truck was involved in the accident) which would in anywise justify the court in admitting testimony that the defendant was under the influence of intoxicating liquor. The arguments advanced on the preceding Proposition are apropos on this issue. We challenge anyone to point out a single, solitary act on the part of the defendant in the

operation of his truck which would lay the foundation to admit evidence as to whether the defendant was under the influence of liquor. The trial court seemed to think that the failure to keep a proper lookout ahead was sufficient to permit the liquor issue to come into the case. A careful analysis of the testimony of the only two witnesses to this accident eliminates any implication that the defendant failed to maintain a proper lookout at the time of the accident. The evidence clearly shows to the contrary. Bert Karen testified that he watched the truck come from the east as it travelled toward his parked pickup truck; that it was travelling at a normal rate of speed, which was not slow nor fast but just medium, or about 35 miles per hour; that notwithstanding the Karen pickup truck was parked substantially out onto the hard surfaced area of the highway and in the path of the Peterson truck, Peterson drove his truck to the left and around the pickup truck in a manner which was prudent and careful in the opinion of Bert Karen, an experienced automobile mechanic; that the Peterson truck continued on up the road in a normal and proper manner. Where is there any evidence which the court or jury could say that James Curwood was in a position on the road so that a person, in the exercise of reasonable diligence would have seen him there in time to have avoided the accident? The deceased's own associates did not know how he got onto the road. They never even saw him get out of the truck. We don't know whether he projected himself in front of the Peterson truck, or how or in what manner he

came in contact with the Peterson truck. Did he stumble out of the borrow pit after the beam of the headlights of the Peterson truck had passed the spot where he was and then came in contact with the Peterson truck? No one knows. It was incumbent upon the State to show that the defendant not only failed to observe the defendant, or that in the exercise of reasonable diligence, should have observed him. The failure of the State to assume this burden and the fact that an accident occurred will not justify the court in permitting the liquor issue to be considered by the court or the jury in determining whether or not the defendant's acts and conduct were reckless and in marked disregard to the rights of the deceased. From the evidence in this case, how could any court or jury make a finding that the death of the deceased was proximately caused by the defendant being under the influence of intoxicating liquor? Even assuming that he was under the influence of intoxicating liquor, the principle of proximate cause has the same application to this alleged unlawful act as it does to the alleged unlawful act of driving the truck without a license, as set forth in our argument in the previous Proposition. The following citations are pertinent:

One who drives his car correctly, and on the proper side of the highway, even though he be then intoxicated, cannot be convicted of homicide if death results wholly from the carelessness or negligence of the driver of another car which collides with that driven by the accused. *NORMAN V. STATE* (1932) 121 Tex. Crim. Rep. 433, 52 S.W. (2d) 1051.

In *GOODMAN V. COM.* (1930) 153 Va. 943, 151 S.E. 168, a conviction of involuntary manslaughter was reversed where it was not shown that death was the natural and probable result of any reckless or culpably negligent act on the part of accused.

99 A.L.R. 772, 733, 774.

The driving of an automobile on a public highway, by a driver intoxicated or under the influence of liquor, is a crime by statute, and, if such act proximately causes the death of another, the driver is guilty of involuntary manslaughter. *BLASHFIELD*, Vol. 8, p. 102. *Cyclopedia of Automobile Law and Practice*.

PROPOSITION III. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO DISMISS THE INFORMATION AND DISCHARGE THE DEFENDANT AT THE CLOSE OF THE STATE'S CASE (T. 476-480) AND IN REFUSING TO GRANT DEFENDANT'S REQUESTED INSTRUCTION NO. 1 (R. 22, T. 728) TO DIRECT THE JURY TO RETURN A VERDICT OF NOT GUILTY.

This proposition covers Statements of Error Nos. 4 and 5.

Appellant contends that no competent evidence was offered and received upon which the court could permit the case to go to the jury. We have copiously set forth the facts in the Statement of Facts with the necessary transcript and record pages. It is manifestly impossible for a court or jury to make a finding of criminal negligence under the facts of this case as disclosed by the record. We again reiterate, it is incumbent upon

the State to prove criminal negligence on the part of the defendant, and that such criminal negligence was the proximate cause of the death of James Curwood. Where in the evidence can we find factual support that the State has successfully assumed this burden? The argument on the Statements of Error hereinabove set forth are equally apropos to the proposition here. Receiving of incompetent evidence on issues for which no proper foundation had been laid created a situation which not only befogged the court through his misinterpretation of the Lingman case, but misled the jury as to the application of the law of the case. The court should never have permitted the liquor and license issues to have come into the case until a proper foundation had been laid for the admission of this evidence. No such foundation was ever laid and defendant's motion to dismiss the information and discharge the defendant, made at the close of the State's case, should have been granted.

We submit that this court should reverse the verdict and remand the case to the trial court with instructions to dismiss the same.

PROPOSITION IV. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE ELEMENTS OF INVOLUNTARY MANSLAUGHTER AND THE LAW PERTAINING THERETO, BUT ON THE CONTRARY ERRONEOUSLY INSTRUCTED THE JURY ON THESE FUNDAMENTAL PRINCIPLES.

This Proposition covers defendant's Statements of

Error Nos. 5 to 29 inclusive, as hereinabove set forth.

Many of these statements of error have been previously discussed in this brief. Instructions pertaining to the liquor and license issues are excepted to for the reason that no competent evidence had been offered and received upon which a jury could make a finding on these issues.

We call the court's attention to the erroneous instructions in which the trial court uses the alternative "or" in place of the conjunctive "and" in defining criminal negligence. Criminal negligence, as defined by the ruling of your Honorable Court, clearly indicates that an unlawful act must be done recklessly and in marked disregard for the safety of others to constitute criminal negligence which is the basis of involuntary manslaughter. The trial court throughout his instructions uses the alternative "or" instead of the conjunctive "and". In other words the jury were instructed to find the defendant guilty if the defendant drove his truck recklessly *or* in marked disregard for the safety of others. Reckless driving may or may not be criminal negligence. Criminal negligence is defined by your Honorable Court in *State v. Lingman*, 97 Utah 180 as reckless conduct evincing a marked disregard for the safety of others. The defendant assigned as error the use of the alternative "or" instead of the conjunctive "and" in Instruction No. 7 (Statement of Error No. 16, R. 31, T. 729); Instruction No. 8 (Statements of Error No. 17, 18, 19, R. 31, T. 729); Instruction No. 10 (Statements of Error Nos. 21, 22, 23, 24, R. 33, T. 730).

Defendant contends that Instruction No. 15 (Statements of Error Nos. 28 and 29, R. 36, T. 731) and particularly that portion of said instruction which reads: *“Such negligence, however, does not justify or excuse the defendant from running into or against him with his truck, if you find from the evidence beyond reasonable doubt that the defendant did run into or against him with his truck,”* was ambiguous and misleading. The quoted portion of said instruction is left without qualification and therefore would mislead the jury into believing that irrespective of the negligence of the deceased in going upon the public highway in an intoxicated condition, that such negligence would not justify or excuse the defendant from running into or against him with his truck irrespective of whether or not defendant was criminally negligent in so doing.

CONCLUSION

From the foregoing it appears that the jury was erroneously instructed on matters of law to the prejudice of the appellant; that the verdict is contrary to the law and to the evidence; and that defendant's motion for new trial should have been granted. That there was no competent evidence offered and received upon which the court or jury could make a finding that the death of the deceased was proximately caused by an unlawful act or acts of the defendant amounting to criminal negligence. That there was nothing that appellant did or that he failed to do that can be said to have been the cause of the death of the deceased. That the

judgment appealed from should be reversed and the cause remanded for such further proceedings as to this court may seem proper.

Respectfully submitted,

McCULLOUGH, WILKINSON & BOYCE

Attorneys for Appellant

R. VERNE McCULLOUGH

of counsel