

1953

Thad L. Hatch et al v. Garrett Freight Lines, Inc. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

THAD L. HATCH, Administrator with
the Will Annexed in the Matter of the
Estate of Herbert Sheldon Neeshan, De-
ceased, and IVA M. NEESHAN,

Plaintiff and Appellant,
vs.

GARRETT FREIGHT LINES, INC., a
corporation,

Defendant and Respondent.

CONNIE LIETZ and ELDON P. LIETZ

Plaintiffs and Appellants,
vs.

GARRETT FREIGHT LINES, INC., a
corporation,

Defendant and Respondent.

JAMES P. XENAKIS and JENNIE
XENAKIS,

Plaintiffs and Appellants,
vs.

GARRETT FREIGHT LINES, INC., a
corporation,

Defendant and Respondent.

RESPONDENT'S BRIEF

STEWART, CANNON & HANSON
Attorneys for Defendant and
Respondent

FILED
SEP 19 1953
Supreme Court, Utah

Case No. 7976
Case No. 7974
Case No. 7975

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IN THE SUPREME COURT of the STATE OF UTAH

THAD L. HATCH, et al
CONNIE LIETZ, et al
JAMES P. XENAKIS, et al

Plaintiffs and Appellants

vs.

GARRETT FREIGHT LINES, INC., a
corporation,

Defendant and Respondent.

Case Nos.

7974

7975

7976

Consolidated
for Trial

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The case arose out of a collision which occurred on U. S. Highway 91 about 5:30 A. M. on October 19, 1951 on a long curve a few miles south of Kanosh, Millard County, Utah. Defendant Garrett Freight Lines, Inc. was driving and operating its tractor and semi trailer south. The north bound car was a 1951 model green Studebaker in which was riding Captain James P. Xenakis, Connie Lietz, her daughter Joanne Lietz, Captain Herbert Sheldon Neeshan and his son Robert Neeshan.

Captain Xenakis, Mrs. Lietz and her child had driven from Phoenix to Las Vegas where they picked up Captain Neeshan and his son and were traveling to Salt

Lake to go deer hunting. They had been driving all night. The last known stop prior to the collision was at St. George, where Captain Neeshan (according to Mrs. Lietz' statement to the investigating officers) had taken over the wheel. Except for this statement there is no proof as to who was driving the Studebaker.

All occupants of the Studebaker were instantly killed except Mrs. Lietz who was asleep in the rear seat. The five actions were filed, four alleged death claims and the personal injury claim of Mrs. Lietz. All were consolidated for jury trial before the Honorable A. H. Ellett.

DEFENDANT'S THEORY

Defendant's evidence, based on the testimony of eye witnesses and the physical facts described by the investigating officers, showed that the Studebaker as it approached and came into the curve was traveling about 80 miles per hour. Its right wheels traveled along the right gravel shoulder about 200 feet when it suddenly swerved out of control and directly across the highway into violent collision with the defendant's tractor on defendant's right hand side at a point which eye witnesses estimate to have been three or four feet from the shoulder.

PLAINTIFFS' THEORY

Plaintiffs' theory was that the defendant's truck was driven onto the wrong side of the highway just prior to the collision, causing a collision between the two vehicles while the Studebaker was well within its right hand or proper lane of traffic.

ISSUE AS TO LIABILITY

To show the agreed issues it has been necessary to supplement the Record on appeal to include the pre-trial and hearing on defendant's Motion for Summary Judgment before the trial judge, Honorable A. H. Ellett, on December 27, 1952 (R. 859-69). The Motion For Summary Judgment was based on affidavits and depositions of eye witnesses, which showed that the collision occurred well on defendant's side near its right shoulder. Plaintiffs presented nothing to the contrary. The court pointed out that the Motion was not controverted and that plaintiffs would have to indicate in what respect there would be any issue or issues for the court or jury to try, to which counsel responded:

"Mr. Schoenhals: *It happened on my side of the highway*, Your Honor." (R. 868)

Plaintiffs' counsel then proceeded to comment on the matter of brakes, claiming that if defendant's brakes were defective it would tend to pull the tractor onto the wrong side. To this the court said and counsel answered:

"THE COURT: That goes to the wrong side.

"Mr. Schoenhals: Yes." (R. 868)

No further claim was made by Plaintiffs' and it was agreed in open court that the question of liability would first be determined in the form of a special verdict (R. 361).

SPECIAL VERDICTS

The following special verdicts were submitted and unanimously answered by the jurors as follows:

"Question No. 1. Do you find by a prepon-

derance of the evidence in this case that the tractor or the Studebaker, or either of them, was negligently driven to the left of the center of the highway immediately preceding the collision involved in this lawsuit?

"Answer ('Yes or No') *Yes*

"Question No. 2. If your answer to Question No. 1 is 'Yes', name the vehicles which you so found was negligently driven across the center of the highway.

"Answer: *Studebaker*" (R. 219)

STATEMENT OF FACTS

It would be impossible to agree with Appellants' Statement Of Facts, which consists essentially of self serving conclusions contrary to the actual physical evidence and testimony of eye witnesses. We will, therefore, undertake to set forth the facts as developed by both parties.

EYE WITNESSES

There were dis-interested eye witnesses, residents of Kaysville, who were going deer hunting, namely Hal Noyes, James Faile and Roy Talbot, riding in a 1949 Ford pickup truck which was following defendant's rig. Roy Talbot, riding in the center of the front seat, was asleep when the collision occurred but Noyes and Faile both observed the collision.

HAL NOYES

Hal Noyes, who was riding on the right hand side of the pickup, testified: That they had followed the Garrett truck from Fillmore through Kanosh and were

traveling about 150 to 250 feet behind defendant's truck (R. 373-4). It was just as dawn was breaking (R. 743).

He observed the Studebaker automobile before the collision and saw the impact (R. 734). He saw two bodies come through the windshield of the Studebaker (R. 740). He marked an "X" on Exhibit 1 showing the approximate place of impact just north of the point between the Mobile Gas sign and the forked fence post near defendant's right hand shoulder (R. 737). He said the point of impact was not more than four feet from defendant's right shoulder (R. 738).

With respect to the Studebaker, he testified he saw it from the time it came over a hill on the long stretch approaching the curve, traveling at least 80 miles per hour (R. 739).

He testified defendant's truck was traveling extremely close to his right shoulder and observed the driver turn his lights to "low beam" (R. 736-7). Defendant's tractor and trailer did not make any change in its course of travel except

"Immediately before the impact, just a matter of, well, almost too short a time to mention, the truck driver did steer his wheels to the left to avoid the impact."

Thereafter the truck continued on across the highway after the impact (R. 743-4). He estimated his own speed and that of defendant's tractor as between 35 and 40 miles per hour (R. 738).

He and his companions after stopping on the right hand side immediately got out to assist the injured (R.

740). Among other things they kicked the debris to the side so that cars coming from both directions could go between the rear of the trailer and the seats of the Studebaker (R. 741). He did not know any of the people involved in the accident.

JAMES FAILE

James Faile, driver of the pickup, testified: That he was following about 200 to 250 feet behind defendant's rig at about 35 miles per hour. He saw the Studebaker quite a ways up the road before the impact and observed its spot light blink on and off (R. 780). The Studebaker was traveling 70 to 80 miles per hour.

"He (the Studebaker) came down and just before it got to the truck it swerved across" and "came off the side" as he, Faile, was trying to stop. At the time the Studebaker collided with it, defendant's truck "was traveling close to the edge of the oil on the right hand side" (R. 781). He (defendant's driver) turned just a little to the left; "looked like he was trying to miss . . ."

He, Faile, came to a stop on the right hand side about 50 feet back of defendant's trailer (R. 782). He assisted in putting out flares and some of the debris was moved so traffic could get through (R. 782-3).

LAREN SOMSEN

Laren Somsen, defendant's driver, testified that he resides in Murray; that he had been driving for the Garrett Freight Lines since 1944 and was still employed in the same capacity (R. 531). While so employed his regular run was from Salt Lake City to Cedar City.

He left Salt Lake City on October 19, the day of the accident, about 12:30 A. M. He stopped at Fillmore about 5:00 A. M. (R. 532) and made the usual check of his equipment (R. 533). He passed through Kanosh. In approaching the curve he said:

"I was traveling on my side of the road and as I approached this curve you could see the lights of a car coming off the hill * * *. As I went into the curve I dimmed my headlights. * * * As I got most of the way through the curve, these lights appeared. * * * Coming towards me off the hill. That is the lights coming from the Studebaker traveling north on the highway (R. 534). The lights suddenly took off toward the wrong side of the highway toward me. * * * Naturally I hit the brakes. I swore, I think I jerked the steering wheel at the same time, but it was all over that fast. I was hit at the same time. It was all simultaneous. I was thrown against the steering wheel. * * * It jarred me enough that my foot came off the brake, I grabbed the hand valve and set the brakes on the trailer and brought the outfit to a stop. * * * Until he swerved toward me, I was traveling approximately two or three feet from the center of the road." (Possible two or three feet from the west edge of the hard surface (R. 535).)

He explained that as the Studebaker approached the curve the driver was using the spot light which blinked on and off (R. 549). The spot light went off when the car (Studebaker) went out of control (R.543). It appeared to him that the Studebaker approached between 80 and 90 miles per hour (R. 537) and was about 100 feet away when it went out of control across the highway

(R. 537, 573). He said:

“He was right on his side of the road when he went out of control. * * * He shot across the highway and then his lights straightened up towards me and that is all.” (R. 538)

Prior to the accident he had occasion to use his brakes frequently and they were in good working order (R. 531). He made the usual check of his equipment at Fillmore about 5:00 A. M. (R. 533). The load was 56,000 to 57,000 pounds (R. 543).

He and Sheriff Culbert Robinson appear in Exhibit “F”, a picture where they are pointing to marks made by the Studebaker crossing the highway (R. 539). These fresh marks were traced from where they commenced on the east or southeast shoulder of the highway to where they shot across the highway, thereafter leaving the highway where it (the Studebaker) spun around. They also traced and observed the marks of defendant’s truck (R. 539, 540).

By stipulation the tachograph was received in evidence showing the speed of the defendant’s tractor at approximately 37 miles per hour (R. 544). It was explained that the tachograph records the stops and the speed of the tractor (R. 545).

PHYSICAL EVIDENCE

The accident was investigated the morning it happened by Sheriff Culbert Robinson of Millard County, Highway Patrolman Eldon C. Sherwood of Nephi and Patrolman Stanley White. Pictures were taken by Lamar Brunson of Fillmore (about 9:00 A. M., R. 609) under

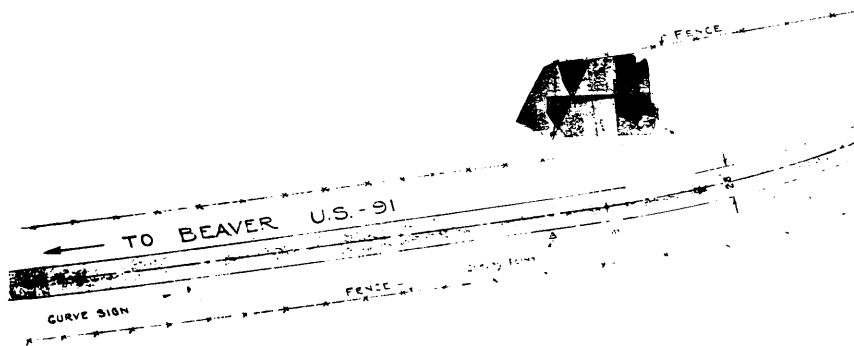




Exhibit B — Looking South





Exhibit A — Looking South







Exhibit E — Looking West

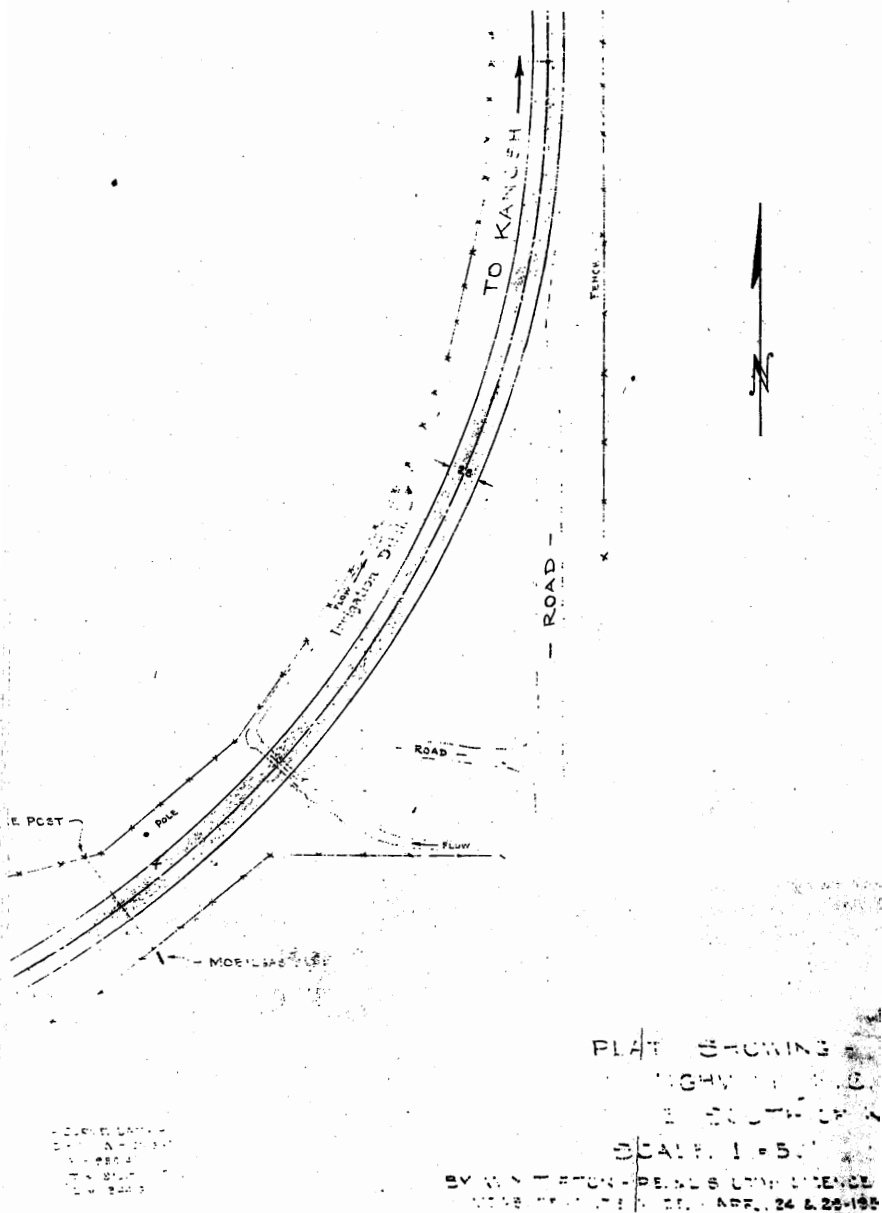




Exhibit F — Looking North



Exhibit N — Looking North



the direction of and at the request of Sheriff Robinson (R. 604). These pictures show the tire marks of the two vehicles and their damaged condition and the general scene of the accident.

At the trial counsel for plaintiffs used huge enlargement of these photographs (see Exhibit A-F) and encumbered the Record with so many photographs, reprints, drawings, charts and other exhibits as to make it difficult, if not impossible, to follow the Record. To assist the reader, therefore, we have herein reproduced a few of the pertinent exhibits, including the map prepared by W. Y. Tipton showing the curve.

CULBERT ROBINSON

Culbert Robinson, Sheriff of Millard County, testified that he had been sheriff of the county for ten years and he received a phone call around a quarter to six and immediately left Fillmore to go to the scene of the accident, 16 miles (R. 588). After attending to the injured and making sure there were flagmen (R. 589) he made an examination for brake marks of both vehicles, Exhibit B (R. 590). When he first arrived at the scene it was light enough to clearly see the marks (R. 609). He was assisted in the investigation and taking of measurements by Highway Patrolman Stanley White and Eldon Sherwood.

He traced the tire marks of both cars. On Exhibit B he placed a small "X" on the two tire marks of the Studebaker leading into the debris (R. 591-2).

With reference to Exhibit N, another picture taken by Mr. Brunson (R. 592), Sheriff Robinson is shown

pointing to the Studebaker marks crossing the highway and beyond on the opposite side Mr. Somsen is pointing with another baton where Robinson had him point from where these tire marks could be followed "through to where it came to rest." He could also follow these tire marks back the other direction south along the shoulder (R. 579) for an overall distance of 328 feet, that is, the entire distance along the shoulder and across the highway and into the debris (R. 597, 601). With reference to these marks, and in particular with reference to the marks crossing the highway shown in Exhibit F, he said the mark was that of a "tire mark" as distinguished from a "brake mark" and said

"There were markings of the tread on the highway that showed the markings were the same as on the side of the tire." (Studebaker) (R. 601).

He was present when Mr. Tipton made his measurements and prepared the map (R. 619).

These marks he drew for illustrative purposes along the shoulder and across the highway as shown on Exhibit 16 (R. 599, 600-1).

He was unable to find any north bound tire marks on defendant's left hand side or the east side of the highway (as testified to by plaintiffs' witnesses Bowman, Middleton and Staples, R. 593).

STANLEY WHITE

Highway Patrolman White received a call just prior to 8:00 A. M. He first went to the hospital at Fillmore (R. 621). There he conferred with Dr. Freeman and saw the injured. He then proceeded to the scene and with

Sheriff Robinson made a preliminary investigation stepping off the distances (R. 622). Upon arrival of Patrolman Sherwood they recorded the measurements with a tape. They took the measurements from a point designated as the "crescent" (see Exhibit 12) near the point of impact on the northwest side of the road. They measured the marks of the Studebaker which were traceable, commencing from the south on the east gravel shoulder 328 feet south of the accident (R. 624). This tire mark was followed 200 feet along the east shoulder where it left the shoulder, crossing the hard surface portion of the highway at an angle (R. 625) (Exhibit F) and then into the debris on the opposite side (R. 636). He described the right wheel mark along the shoulder and to a point until after it crossed the center of the highway as being darker and more distinct. Thereafter, as the marks turned, then the opposite side or the left tire marks leading into the debris were the darker (R. 625-6, Exhibit B).

It was roughly one-third of the total distance of 328 feet (or approximately 109 feet) from the crescent or approximate point of impact to where the Studebaker marks left the shoulder to cross the hard surface, swerving into the debris on the opposite side (R. 636). They traced the wobbly flat tire marks from the approximate place of impact through to the right front tire of defendant's tractor. It was blown out at the time of impact (see Exhibits "B" and 12).

Other measurements were made, it being 39 feet from the crescent to the rear of the defendant's tractor (R. 622), 60 feet from the crescent to the engine of the

Studebaker which from the force of the impact was thrown into the field to the northwest (R. 628), 12 feet from the "crescent" to the Studebaker which came to rest west of the highway (R. 633) and 7 feet from the center of the highway to the "crescent" or gouge mark (see Exhibit 12, R. 635-6).

He said there were no other wavey or irregular tire marks other than that of the flat tire (R. 631) and he was unable to find any tire marks of any north bound vehicles such as those described by witnesses Bowman et al. There were "no other marks on the highway" (R. 628).

CRESCENT

The only explanation of the "crescent" or "gouge" mark, vaguely shown in the form of an arc (Exhibit 12) well on defendant's side of the highway was the testimony of Sam Taylor, who made an inspection of the mark and the Studebaker and found that the width of the "crescent" and the rim of the Studebaker both measured approximately five inches. He also found that the left front rim of the Studebaker where the tire was flattened and torn loose (see Exhibit "D") was bent on both the outside and inside lip (R. 669-70-71). This was the only evidence of the actual cause of the "crescent", from which point the measurements of the investigating officers were made.

ELDON C. SHERWOOD

Eldon C. Sherwood, a highway patrolman from Nephi, similarly identified the wobbly flat tire marks in Exhibit "B" which he could clearly trace from the area

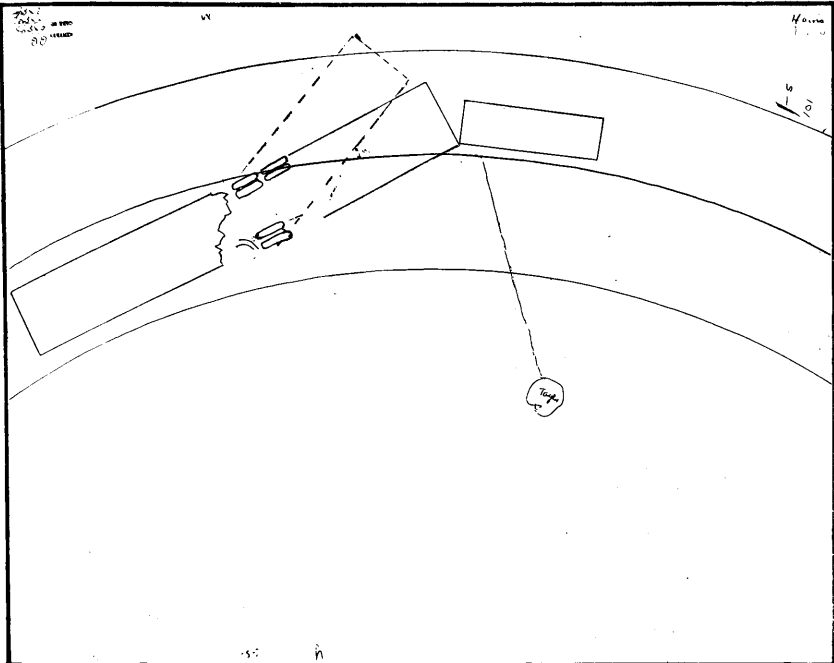
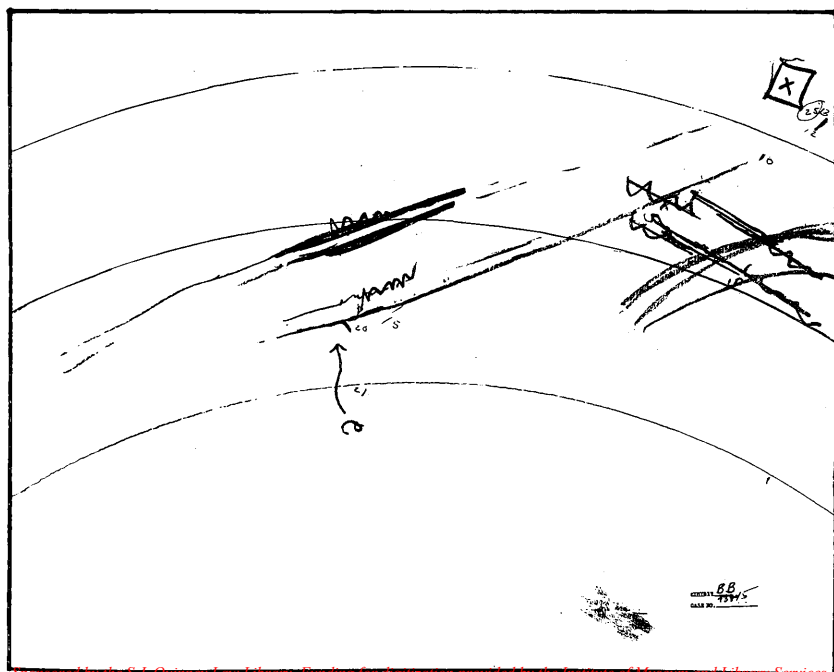


Exhibit GG



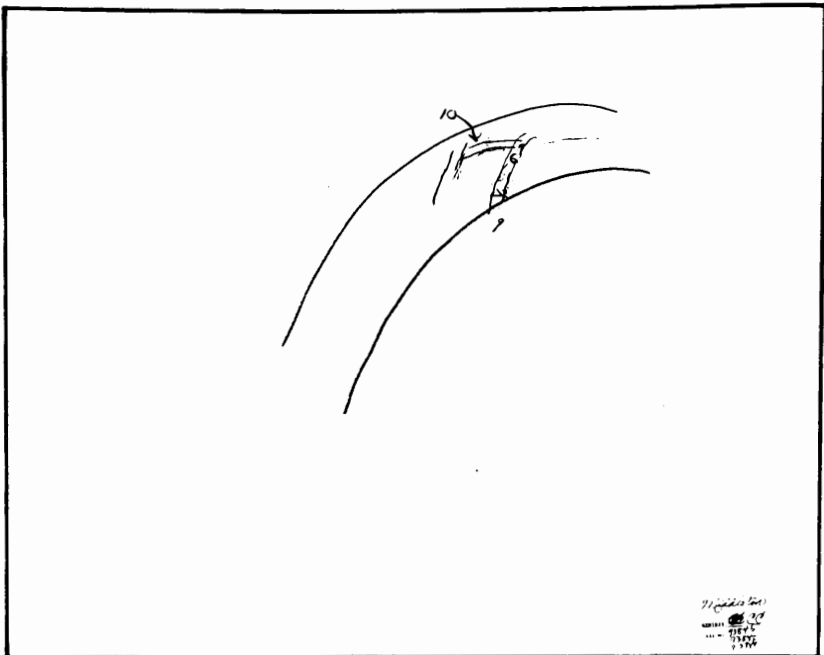


Exhibit CC

of the wreckage to the right front flat tire of the defendant's truck (R. 641-2). He also said that he examined for tire marks in the defendant's left hand lane or the area where Mr. Bowman et al claimed to have seen tire marks of the Studebaker and explained that there were no such tire marks in that vicinity (R. 644-5).

When Mr. Sherwood was asked to describe the tire marks leading along the shoulder and across the highway, Mr. Schoenhals injected objections on the ground that the testimony would be repetitious and that the photographs spoke for themselves. Thereupon it was stipulated at the suggestion of the court that officer Sherwood would testify in regard to such tire marks and the physical evidence the same as officer White and Sheriff Robinson (R. 640).

PLAINTIFFS' THEORY

Plaintiffs' theory was clearly demonstrated by a drawing, Exhibit "GG" prepared before trial showing a collision entirely on defendant's left or wrong side of the highway. Plaintiffs' Exhibits "BB" and "CC" were also used to illustrate the testimony of plaintiffs' witnesses. For convenience we have reproduced these exhibits herein to illustrate the testimony. (Ex. 66-BB-CC)

As proof that the collision occurred in the east lane Appellants claimed there were north bound tire marks of the Studebaker in the east lane intersecting the tractor marks. To establish these marks they called Harry T. Bowman, a friend and former co-worker of Captain

Xenakis who was killed in the accident (R. 315), and James A. Middleton and Harold and Grant Staples, who later went with Bowman to the scene.

HAROLD T. BOWMAN

Harold T. Bowman testified he went alone to the scene of the accident about 4:30 or 4:45 P. M. the day it occurred. He didn't examine it thoroughly that day (R. 271, 274). He made two visits the following day, October 20th, and a fourth visit the day after, October 21st. On the later visits he took Harold and Grant Staples and apparently Mr. Middleton (R. 316, 332).

On his visit the second day, October 20th, there had been traffic over the particular area. It wasn't the same (R. 276). On that day, the 20th, he examined them (R. 285). He said there was a *faint set of tire marks* east of the center of the road (R. 286) which stopped just before they got to the cross marks of the tractor.

"They just came to that point and there were no more marks" (R. 287). They just disappeared. He couldn't trace them any further (R. 313). He said these marks were two feet east of the center of the highway (R. 296) and on Exhibit BB marked two blue lines to illustrate their location (R. 303).

He observed another set of tire marks (identified by the investigating officers as the Studebaker marks) approaching from the south and crossing the highway as shown in Exhibit F, which he marked in red on Exhibit BB. He said the first mentioned marks appeared wider than the others crossing the highway (R. 290, 304). He didn't measure or use a tape and all measurements were

only approximations (R. 316). He said he couldn't be accurate when he was "guessing" (R. 317). He had no personal knowledge that any of the marks were made by the Studebaker involved in the accident (R. 334).

He identified three small parts of the Studebaker (Exhibits U, V and W) which he said he found on the east shoulder (R. 294).

On the day following the accident he also claimed to have observed some zig zag marks, about the approximate length of the tractor back from the so-called point of impact on the east side (R. 275, 279, 280, 282-3) where again he made no measurements but guessed (R. 300).

He denied seeing any wavy or zig zag marks made by defendant's right front flat tire.

JAMES A. MIDDLETON

James A. Middleton, a student from the B. Y. U. at Provo, was deer hunting. He couldn't remember the day but believed it was October 21st (R. 340). He testified:

"Well, Mr. Bowman and I walked out where we saw one track and it * * * looked like pretty old track." (R. 344) "He stood in the middle of the road and these lines, I imagine made by an automobile, were about two feet on that (east) side of the road." (R. 346)

He made a similar drawing as Bowman, marked Exhibit CC, showing the alleged Studebaker marks on the east side and the other north bound tire marks (identified by the investigating officers as the Studebaker marks) crossing the highway which he marked 6 and 7 on the same Exhibit (R. 346-7-8).

When asked by Mr. Schoenhals about zig zag marks from the tires of defendant's tractor, he said

"It is quite hard to say because we were just walking out there." (R. 343)

He had never discussed the matter with Mr. Bowman or Mr. Schoenhals, he had just met Schoenhals that day (R. 353).

HAROLD STAPLES

Harold Staples similarly testified to accompanying Mr. Bowman on October 20th seeing "some faint marks up in front of the truck" on the south or southeast side (R. 358). He acknowledged seeing another set that curved across the highway and undertook by way of estimate (R. 419) to say that the former were narrower than the latter (R. 358-9-60).

GRANT STAPLES

Grant Staples likewise went with Bowman the day after the accident. He did not make any measurements and his testimony was admittedly cumulative of Bowman's (R. 529).

To bolster his theory counsel for Appellants attempted to prove that the marks crossing the highway and proceeding across and through the debris were not caused by the Studebaker but by a Mercury that approached from the south and applied its brakes after the accident. Counsel had adroitly taken an affidavit dated November 4, 1951 (about two weeks after the accident) from James Faile, written in his, counsel's, handwriting and later supplemented with two typewritten affidavits both dated December 13, 1952 (all contained

in Exhibit 14). He even went further and attached affidavits of Faile bearing the same date, December 13th, to the photographs marked Exhibits "OO" and "PP". These affidavits, five in all, were calculated to show that the Studebaker marks, as identified by the investigating officers, were those of the Mercury.

Counsel for appellants did not call Faile as a witness nor use any of the affidavits or Faile's testimony as direct proof, but secretly concealed them as a surprise to impeach Faile.

Faile's testimony and a court reporter's statement taken before Cecil Tucker in Ogden on January 22, 1952 (see Exhibit 13) show that Faile was undoubtedly mistaken if not mislead with respect to the matter contained in the affidavits.

On direct examination Faile testified that the Mercury when it approached did not stop far enough north to get into the debris (R. 784). On cross examination by counsel for plaintiffs he acknowledged that he had signed the affidavits in Mr. Schoenhals' office in the presence of Schoenhals and Andreasen, where the typewritten forms had already been prepared (R. 792). He further testified that the morning of the accident he hadn't paid much attention to the marks and explained that he had previously identified the Mercury tire marks south of the accident as shown by the circle in Exhibit "H" (R. 797-8). With reference to the court reporter's statement taken January 22nd, he had similarly shown that the Mercury stopped south of the accident and debris (R. 798-01).

From the court reporter's statement (Exhibit 13) it was clear that Faile had no knowledge such as that contained in the affidavits. He was there questioned with respect to Exhibit "F" as follows:

"Q. He is pointing to a mark across the highway, and a gentleman further back in the picture pointing to the line near the shoulder, did you examine the tire marks there?

"A. No I didn't.

"Q. You wouldn't know whether they were caused by the Studebaker or not.

"A. No I wouldn't know whether they were on it or not, I didn't pay attention to that.

* * *

"Q. On exhibit F, I think you said about the tire marks there that you didn't scrutinize the highway close enough or examine that close enough to know what marks exactly were there.

"A. No. The only ones I did pay any particular attention to is the one where the guy in the Mercury turned completely around in the road.

"Q. Was that south of the place shown in exhibit F?

"A. Yes.

"Q. There were other tire marks further down, a little ways?

"A. *Yes, the one the Mercury made was further south of these.*"

ROY TALBOT

Roy Talbot testified that when the Mercury approached he was standing 50 to 75 feet south of the

wreckage flagging traffic, that is south of the rear end of defendant's tractor and the debris (R. 806, 810). That the Mercury stopped about 15 to 20 feet south of him (R. 810), which would make a total distance of 65 to 90 feet south of the accident that the Mercury stopped.

Noyes testified that at that time he was standing right by the seats of the Studebaker keeping passing cars from coming too close to the bodies. The Mercury approached from the south (R. 742) and was traveling fast and applied its brakes. He further testified that it stopped a safe distance south of him. With reference to Exhibit "B" he pointed out that it stopped at a place on the highway south of the passenger automobile shown in such exhibit and that the Mercury at no time came into or near the debris involved in the accident (R. 743).

HORACE CLARK

Horace Clark testified he drove his 1951 Mercury north approaching the scene of the accident about 5:30 A. M. That he brought his Mercury to a stop on the right hand side short of defendant's truck. He did not drive into the debris (R. 811-813).

BRAKES

In bringing the matter of brakes before the court it appears that counsel for Appellants has greatly exaggerated this matter.

Appellants' counsel was furnished with all of the service records of the tractor and trailer units and the only fault that he could find was that on September 24, 1951 the right rear brake drum of the tractor was relined

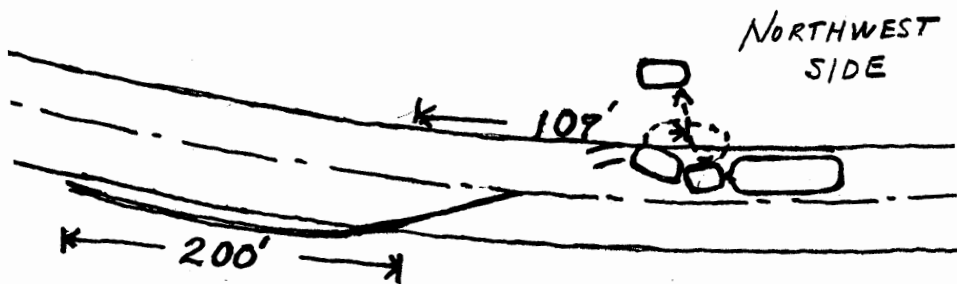
and that the instructions in the book directed that both ends of the axle should be relined at the same time. It must be remembered that on the tractor trailer unit there are sixteen wheels with brakes, four axles in all, and if there had been any uneven braking power in one axle it could only have a very minimal effect on the unit as a whole.

It was shown through Theo Soden, defendant's shop foreman at Pocatello, that since publication of the service record in question an improved make of cam had come into operation so that irregardless of the amount of wear on any particular brake lining the amount of air pressure would be equal in each wheel (R. 766, 7, 8).

With the use of the new cam on the unit it would be impossible for one of the wheels to lock (R. 769, 70).

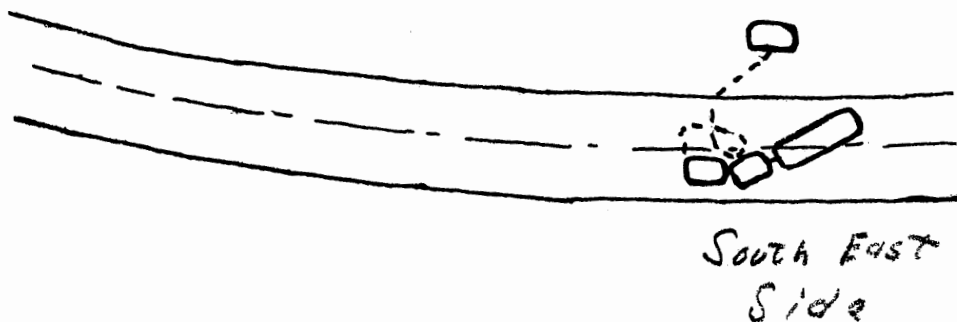
It also appears from the tractor service record and the testimony of Mr. Soden that all of the brakes were inspected and adjusted on October 10th and October 17th and were in good working order, the latter date being just two days before the accident (R. 770, 1).

Mr. Soden, after observing the photographs, also explained that the tire marks made by the tractors and trailer were normal and did not indicate a bad brake condition (R. 771). He explained that the maximum braking efficiency occurs just before the wheels start to slide or burn rubber (R. 771), and that the tractor and trailer turning at the angle they did and on the slope in question would normally throw its weight onto the right hand side which would force rotation of the right wheels for a longer period than the wheels on the



Defendant's Theory

to Cedar City ← → to Kanosh



Plaintiff's Theory

left hand side, which accounts for the darker marks on the left side as shown in the photographs (R. 772). Under these circumstances the wheels on the right could be performing just as much braking function as the ones on the left (R. 772).

Laren Somson testified that he used his brakes throughout the trip and that they were in good working order.

Expert witnesses were used by both sides to demonstrate the physical possibility of the collision as contended for by each of the parties. The only dispute in issue, however, was which vehicle had turned onto its wrong side of the highway just prior to the impact. The foregoing summary of the evidence, therefore, should be sufficient to here illustrate the theory of the respective parties as defined at the pre-trial and pursued by each in the presentation of the evidence.

The jury by its verdict unanimously found that the accident occurred as the eye witnesses said it did upon defendant's side of the highway. Appellants have not challenged the correctness of the finding and the judgment, which is upheld by the great weight, if not all, of the evidence, but here seeks a reversal based upon twelve alleged assignments of error which we respectfully submit in no sense justify a new trial.

ARGUMENT

I. CLAIMED ERROR IN REFUSING TO SUBMIT TO THE JURY INSTRUCTIONS WITH RESPECT TO FAULTY BRAKES.

As hereinabove shown by the pre-trial order and

plaintiffs' theory as developed by the evidence, it is clear that the ultimate issue for the jury was, which vehicle turned or was driven onto the wrong side causing the collision. Under either theory no collision would have occurred had not one or the other of the vehicles been driven across the highway. Certainly neither plaintiffs nor defendant at the pre-trial made any claim that the collision would have occurred had not the other vehicle been driven across. Counsel for Appellants even went further and effectively acknowledged that there was no emergency which caused the Studebaker to swerve across the highway, as his theory was that the accident was not caused in that manner.

We direct the court's attention to the fact that the matter of brakes was specifically brought up and discussed at the pre-trial and counsel for Appellants acknowledged that that matter went only to the ultimate question of who got on the wrong side.

"The Court: That only goes to the wrong side.

"Mr. Schoenhals: Yes."

Special verdicts were prepared by the court and on the morning of the second day of the trial, at a conference in the Judge's chambers, it was specifically agreed

"That a special verdict may be used here to determine whether or not there is liability, and that no evidence of damages will be offered to the jury until they first determine the question of whether or not there is liability." (R. 361)

In submitting the ultimate question to the jury the court did not limit either party in their respective

theories as to why one or either of the vehicles got onto the wrong side just prior to the collision. Plaintiffs were not limited in presenting evidence and arguing their theory to the jury. In fact, counsel was given great leeway in that regard and in particular as to the claimed matter of brakes.

Plaintiffs' theory that defendant's truck may have been driven or veered to the left on account of faulty brakes was no more an ultimate issue than the tremendous speed of plaintiffs' Studebaker automobile as it entered the curve, getting onto the loose gravel and then careening across the highway. Defendant's requested instruction in this connection (R. 215) was not given as the agreed procedure and purpose of the special verdict was to limit the issue to the ultimate and determining fact. The procedure followed by the court to obtain a finding on the ultimate issue operated so as to confine both parties to such issue, but neither was limited in showing any reasons or grounds for their claim that the other vehicle negligently crossed the highway just before the collision.

Plaintiffs made 35 requested instructions, including 1A, 1B, 15A, 16A and 21 A, many of which were not proper statements of the law. Be that as it may, there was no need for the court to give the requested instructions of either party when there was one agreed ultimate issue.

The court did give appropriate instructions as would enable the jury to make findings upon the issue submitted to them (R. 87). Included among the instruc-

tions were the usual instructions upon preponderance of evidence, proximate cause, credibility of the witness, etc. Also included among the instructions were the following:

“No. 4

“You are instructed that it was unlawful for either the driver of the Studebaker automobile or the driver of the Garrett truck to drive his vehicle to the left of the center of the highway upon which he was traveling unless he drove across the center of the big highway for the purpose of avoiding an accident; and if either driver drove to the left of the center of the highway at a time when it was not necessary to do so to avoid an accident, he would be negligent as a matter of law.” (R. 88)

“No. 4

“Negligence is defined as the failure to do that which an ordinarily reasonable prudent person would have done under the same or similar circumstances, or it is the doing of that which an ordinarily prudent person would not have done under the given circumstances of the case. The fault may lie in acting or in failing to act, and the duty to act or not to act is measured by the exigencies of the occasion.” (R. 89)

The jury unanimously found that the plaintiffs' and Appellants' vehicle, the Studebaker automobile, was negligently driven across the center of the highway. They did not find that the defendant's vehicle was driven across the highway. Their failure to find that the defendant's vehicle was driven across the center of the highway must be construed against the Appellants, since they had the burden of proof, and, therefore, it is an

express finding that the defendant's vehicle was not driven across the center of the highway. There is abundant evidence in the record to sustain the jury's finding.

"It is a rule of general application that it is not the province of the appellate court to weigh the evidence where it is conflicting. The rule, as more broadly stated in most jurisdictions, is that the verdict or findings of the jury rendered on the trial of a case will not be disturbed by a reviewing court where the evidence is conflicting and the case has been fairly submitted to the jury under proper instructions; * * *" 5 C.J.S. 671

Special verdicts are authorized by Rule 49-A, Utah Rules Of Civil Procedure, Utah Code Annotated 1953, which provides:

"(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted

without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

A special verdict is distinguished from a general verdict in *Smith v. Ireland*, 4 Utah 187, 7 Pac. 749 as follows:

"A general verdict is a direct statement of a conclusion of law, and is an indirect statement of the facts from which the conclusion is drawn; it expressly affirms the law and inferentially the facts. The jury are directed by the court to indicate the facts found from the evidence by the statement of a conclusion of law. *If they believe certain facts, they are told to state certain conclusion, and if they do not believe such facts, to state another conclusion.*"

"The court states the law applicable to the facts which the evidence tends to prove, and if the jury finds the facts they state the conclusions as charged. In the case of a general verdict, the court states the law applicable to the facts before they are found by the jury, and *in a special verdict the court declares the law applicable to them afterwards.* In either case, the jury is judge of the facts and the court of the law."

Thus, it is seen that in a general verdict the court instructs the jury on the law applicable to various factual situations which the jury may find and the jury actually applies the law to the facts, as the law has been defined by the court's instructions, and come up with a verdict which is actually a conclusion of law. In such an instance, it is of course proper to instruct the jury as to the law

which may be applicable to whatever ultimate facts they may find under the evidence of the case.

However, a special verdict only requires the jury to find the ultimate facts and the court, rather than the jury, applies the law to the facts. There is, therefore, no necessity for the jury to be instructed upon the law applicable to all the various aspects of the case. They only need such instructions as will enable them to determine the ultimate facts.

Moreover, the form of the special verdict should be concise and should not relate to evidentiary facts.

“Evidential Facts. Questions to the jury should relate to the ultimate facts, and not merely to the evidence on which such ultimate facts rest. The purpose of having the jury find specially on a particular question is to ascertain the fact itself, and not merely the evidence which may tend to prove it, hence, parties to an action have no right, under the guise of submitting questions of fact to be found specially by the jury, to require them to give their views on each item of evidence, thus practically subjecting them to a cross-examination as to the entire case.” 53 Am. Jur. 743

We have in this case two automobiles approaching each other on a two-lane highway from opposite directions. There can be no ultimate factor which caused the collision of those two vehicles except that one or the other or both drove onto the wrong side of the road. Although there may have been a number of reasons why one or the other or both would drive on the wrong side of the road, which might or might not have been negligent, they, in themselves, could not be the proximate

cause of the accident and, therefore, are not the ultimate fact on which liability, if any, must rest. For example, one of the drivers may have failed to keep a proper lookout, traveled too fast, failed to keep proper control or driven a vehicle with faulty brakes. Any of the actions may be negligent but could not, in themselves, cause this accident. They are only evidence tending to prove the ultimate issue, that one or the other negligently drove over the center line onto the wrong side of the road. Appellants were not precluded from introducing evidence on the speed of defendant's vehicle, lookout or faulty brakes; nor were they precluded from using this evidence in their argument to the jury. The jury, however, were only concerned with this evidence in its probative value as to whether defendant's vehicle was negligently driven onto the wrong side of the highway.

The jury was advised by instruction No. 4 that it was negligence, under the evidence in this case, for either driver to drive his car over the center line, regardless of the reason, faulty brakes or otherwise, with the one exception that the driver drove onto the wrong side to avoid an accident. This instruction was sufficiently broad to cover the theory of the plaintiffs' case and to enable the jury intelligently to decide the ultimate issue of fact put to them. It was even more favorable to plaintiffs than was claimed by them at the pre-trial where it was acknowledged that there was no emergency which caused the Studebaker to swing out of control and across the highway.

It is true that a party is entitled to have his theory

submitted to the jury to the extent that it is supported by evidence and pleading in the case. This does not mean that the court must give the exact instructions requested by a party if the theory is covered in substance by the other instructions. The instructions requested by Appellants in the form requested would have confused rather than aided the jury. The jury may have believed that the brakes on defendant's vehicle were repaired in a faulty manner and yet, found that defendant did not drive to the wrong side of the highway prior to the impact. Under the instructions requested, a finding of faulty brakes might be understood to compel a finding that defendant's vehicle was driven to the wrong side of the highway, a conclusion which does not necessarily follow.

The jury by their unanimous finding that the defendant's truck was not driven to the wrong side of the highway and that the Studebaker was, determined the ultimate issue agreed at the pre-trial. It was the province of the jury to determine the ultimate issue, as was their reasons or grounds for so finding.

Thus it is seen that the court adequately instructed the jury for them to answer the interrogatories put to them and was not guilty of prejudicial error by reason of his not giving the instructions requested by both parties as to why or what reason it was claimed the other vehicle crossed the highway.

CROSS EXAMINATION OF SHERIFF CULBERT ROBINSON

Counsel for Appellants complains of the ruling of the court relative to his cross examination of Sheriff

Robinson. On page 617 of the Record Mr. Schoenhals, while cross examining the Sheriff who investigated the accident, asked this question:

“Q. Sheriff: Are you familiar with the fact that there is a State law requiring that all brakes . . .”

The court ruled:

“The Court: Well, now, let me tell the jury what the law is, and let's not be telling them by inference here. If we need any law told to the jury, I will explain that to them so you don't have to bother the sheriff about it.”

The court's ruling was proper since it is the duty of the court in a trial of an action to instruct the jury on what the law is. Counsel should not attempt to instruct them by his examination of witnesses.

CROSS EXAMINATION OF THEO SODEN

On page 10 of his Brief, counsel for Appellants complains of the court's ruling with regard to cross examination of the witness Theo Soden. On page 775 of the Record counsel asks the question:

“Q. and, therefore, isn't it true that if you put a newer lining in that you are apt to get less friction area on a newer lining than you are on the older lining?”

Just previous to that question, counsel had asked the same witness:

“Q. You wouldn't know. Isn't it also possible that when you place in a new lining, that the new lining if looked at under a microscope has like mountains and valleys in it and the area of friction of the new lining might be much less than

the area of friction on the new lining. Isn't that the situation?

"A. Yes, that would be true."

The court instructed the witness that the second question was repetitious and that he need not answer the same. A reading of the two questions will show that the second question was repetitious and that, therefore, the court's ruling was correct.

II. CLAIMED ERROR IN THE COURT'S INSTRUCTION NO. 4.

Appellants contend that the court's instruction No. 4, hereafter quoted, was erroneous in that the words "drive his vehicle to the left of the center of the highway" were not broad enough to include the movement of the vehicle to the wrong side of the highway by reason of faulty brakes. This assignment is essentially a re-argument of the matter under point No. I.

"Instruction No. 4

"You are instructed that it was unlawful for, either the driver of the Studebaker automobile or the driver of the Garrett truck to drive his vehicle to the left of the center of the highway upon which he was traveling unless he drove across the center of the highway for the purpose of avoiding an accident; and if either driver drove to the left of the center of the highway at a time when it was not necessary to do so to avoid an accident, he would be negligent as a matter of law." (R. 88, Vol. 2)

The court's instruction applied equally to each party and fairly stated the issue. To specify reasons why either driver drove to the left amount to a comment on

the evidence and tend to invade the province of the jury. Furthermore, counsel for Appellants would undoubtedly have then claimed that the court, by the instruction, unduly limited him to brakes as the sole reason why defendant crossed the highway, if he did so cross.

Respondent might just as well argue that the court should have supplemented the instruction by commenting on the unlawful and excessive speed, failure of proper lookout and loss of control, etc. on the part of the operator of the Studebaker automobile. The instruction as given was fair; in fact even favorable to Appellants in that Appellants had acknowledged that there was no emergency which caused the driver of the Studebaker to veer onto the wrong side. The instruction given did not suggest to the jury why either vehicle was driven onto the wrong side, but wisely left the issue to the jury.

Appellants' objections to the instructions of the court made at the time of the trial are to be found on page 853, line 24 and 854 of the Record. *Nowhere in their objections is there any objection taken to the wording of the court's instruction No. 4.*

It is axiomatic that in order for one to complain of an instruction he must do so at the time of trial and give the trial court an opportunity to correct any error.

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to this case giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objections."

Moreover, the instruction as given by the court was sufficiently broad to cover the situation should the jury have believed from the evidence that the defendant's truck was propelled across a highway by the application of faulty brakes, was turned in that direction, or for some other reason crossed over on the wrong side of the highway. In the sense used in the instruction, "drive" is defined by Webster to mean:

"To urge on and direct the motions of, as horse, hence, also to convey in a vehicle" (Websters Collegiate Dictionary 3rd Ed.)

The phrase, "drive his vehicle to the left of the center of the highway" conotes a number of actions to persons of ordinary experience and intelligence. It conotes the direction and control of an automobile by the application of power through an accelerator, the control of that power by the shifting of gears, the stopping of the vehicle by the application of brakes, the turning of an automobile by the steering wheel. Actually the term "drive" implies to the ordinary individual all the actions which are necessary to direct and control an automobile in its course upon a highway. It may imply the absence of such control and direction when used in such terms as reckless driving and driving too fast for existing conditions.

In construing instructions, we must not put a super technical construction upon the words used, but they must be construed liberally and in this sense they would be understood by the jury.

"Instructions should not be subjected to a

critical analysis, such as is applied in construing pleadings, statutes, or even contracts. On the contrary, when reviewed, they should be accorded fair and reasonable construction, with a view to ascertaining the meaning probably placed upon them by the jury. It is elementary that an instruction should be interpreted in the light of the evidence and theories presented by the respective parties, and that several instructions are to be considered together as constituting the single charge of the court. The words employed should be accorded their natural and accepted meaning, and even though an instruction is not in the language approved by usage, it will be held sufficient if couched in terms plainly conveying the same meaning." 2 Bancrofts Code Practice And Remedies 1990.

The jury had listened to evidence for four days, expert and otherwise, all of which was directed toward proving which vehicle was on the wrong side of the highway at the time of impact. Appellants had thoroughly explored their theory, that the defendant's vehicle was propelled across the highway by the application of faulty brakes. Both in the examination of witnesses and in argument they were allowed great leeway even to the extent of demonstrating how they claimed the collision occurred. The jury had the issue, the theories and the evidence well in mind and naturally would interpret the instruction given in light of them.

In view of the evidence and the plain meaning of the word "drive", there can be no question that the instruction given by the court was understood by the jury to cover a situation (if the jury had chosen to believe

the evidence to that effect) where the driver of defendant's vehicle drove his vehicle onto the wrong side of the road, whether by an application of faulty brakes or otherwise. Their answer in the defendant's favor must be construed as a finding that the defendant's vehicle did not pass onto the wrong side of the road prior to the impact between the two vehicles.

III. REFUSAL OF THE COURT TO GIVE INSTRUCTIONS 1-B, 2, 3, 4, 5, 6, 7, 8, 10, 11, 16, 17, 26 and 27.

Consistent with the theory of the case as claimed by both parties, we have pointed out why it was not necessary for the trial court to give the requested instructions of either party as the matter was fairly resolved in the form of special verdicts. Counsel for Appellants' argument under this topic seems calculated to over-emphasize the matter of brakes when it was no more related to the ultimate issue than the terrific speed, loss of control and reckless conduct on the part of the operator of the Studebaker. Appellants were no more limited than was Respondent.

Appellants were in no manner limited in their evidence or argument to the jury. The Record shows counsel for Respondents was given great latitude in showing the brake condition and in illustrating and demonstrating to the jury, to the extent that if any complaint is due the complaint should justifiably be made by defendant in permitting undue repetition. Certainly the statements asserted by counsel for Appellant as to such matters are wholly without foundation.

A review of the Record (R. 853-854) will show that

Appellants made no objections at the time of trial to the court's failure to give requested instructions 4, 5, 6, 8, 11, 16, 17, 26 and 27. *No reasons were assigned why any of the requested instructions should have been given,* and for reasons heretofore mentioned they cannot now be heard to complain at this time. Furthermore, counsel for Appellants' argument here is most certainly contrary to his statement to the trial court at the time of pre-trial that the matter of brakes, etc. only went to the ultimate issue of why either driver drove to the **wrong side**.

It further appears that counsel for Appellants entirely overlooks the fundamental difference between a trial where all issues are resolved in the form of a general verdict and a case tried by special verdicts under the new rules, particularly where the matter of special verdict is determined at pre-trial and by agreement in open court. Where there is a general verdict, as we have heretofore pointed out, the jury is required to resolve all issues and both find the facts and apply the law. When a special verdict is submitted the law is applied by the court to the facts as found by the jury.

In the case here before the court the jury's finding that the defendant did not negligently drive its truck onto the wrong side of the highway, that is that the defendant was not negligent, made any further inquiry into the evidentiary facts or any further application of law unnecessary, except by entry of appropriate judgment by act of the court. In any event in this case the rules of law to be applied would be applied by the court based on the ultimate facts as found by the jury, and

there is no reason why the jury should be instructed on law they were not expected to apply.

Appellants' complaint at page 14 of the court's refusal to give requested instructions No. 26 and 27 (R. 202-3) is inconsistent with the theory of either party.

In the first instance, no exceptions whatsoever were taken to the refusal of the court to give plaintiffs' requested instructions No. 26 and 27 (see R. 854). Plaintiffs at the trial did not make any claim that both units were riding the center line, and certainly the giving of instructions in that regard would have been erroneous under the evidence produced and contrary to the theory of either party as determined at the pre-trial. The theory of both parties and all the evidence presented was to the effect that the impact occurred clearly on one side of the road or the other, and not in the center or near the center of the road, and that one or the other of the parties was entirely to blame, but not both. The evidence showed that the right front side of defendant's vehicle collided with the left front fender of the plaintiffs' vehicle. This being the case, one of the vehicles would have to be clearly on the wrong side of the road at the time the two vehicles met. Had both of the vehicles been riding the center of the highway, the point of impact between the two vehicles would have been toward the left side of each vehicle.

Furthermore the tire marks, as evidenced by both parties, especially in the light of the testimony of the eye witnesses, necessarily showed that the impact occurred near the defendant's right hand shoulder or

where Bowman et al placed the alleged Studebaker marks entirely on the east side or in plaintiffs' proper lane of traffic.

Let us suppose that the jury had been instructed that the brakes should be adjusted equally and that the jury found that the defendant's were not so adjusted; or that they had been instructed on keeping a reasonable lookout and found that the defendant did not keep a proper lookout; or that they had been instructed on reasonable speed and found that the defendant was driving unreasonably fast. None of these findings would compel or even direct a verdict for the plaintiffs in this action. None of these actions could have been the ultimate proximate cause of the accident under the evidence and the theory of both parties. They are merely evidentiary in nature and, if true, would tend to show at most that the defendant did, in fact, drive over to the wrong side of the highway which was the ultimate fact to be decided by the jury.

IV. REFUSAL OF THE TRIAL COURT TO PERMIT GRANT STAPLES TO TESTIFY.

The Record beginning on page 526 will show that the plaintiffs called Grant Staples to testify on behalf of the Appellants. At that point, the Appellants had introduced about 21 pictures and 7 different diagrams, picturing the various marks on the highway at the scene of the accident and the damage to the two vehicles. He had also covered the marks on the highway in great detail by four witnesses, Harry T. Bowman, James A. Middleton, Harold Staples and Franklin Stuart Harris,

Jr. After Appellants' counsel had shown that Grant Staples had visited the area on the 20th of October, the day after the accident in question, the court asked Appellants' counsel:

"The Court: Is this testimony just going to be cumulative of what Mr. Bowman and Mr. Harold Staples have testified to?

"Mr. Schoenhals: I am going to have him draw a map of what he saw on the road.

"The Court: We have got so many maps, we will never find them. Is it only going to be cumulative of what these other men have testified to?

"Mr. Schoenhals: Yes.

"The Court: Let's not have that." (R. 528)

The Appellants then attempted to go into a description of the various marks on the highway and was permitted to do so to the point that it appeared that this witness would not testify to anything which had not already been testified to by previous witnesses.

There must be an end to an inquiry at some point. When it appears that previous witnesses have given the same evidence and that a witness's testimony is merely cumulative of what prior witnesses have testified, the trial judge, in his discretion, may exclude further testimony.

"There seems to be no doubt as to the right of a trial court, in the exercise of a sound and reasonable judicial discretion, to limit the number of witnesses that may be sworn by either party to a controversy covering a certain fact in issue. The trial court has power to direct the course of the

trial, and as one of the necessary incidents of that power it may limit the number of witnesses as to a certain point, when, in its opinion, further testimony on the point would be merely cumulative and of no assistance to the jury." (21 A. L. R. 335. See also 48 A. L. R. 947; *Skeen v. Mooney*, 8 Utah 157, 30 Pac. 363)

There is no question that the testimony of Grant Staples was merely cumulative of what had already been covered in great detail by the exhibits and other witnesses. It was well within the discretionary power of the trial court to exclude further evidence and the refusal to permit Grant Staples to duplicate the testimony was not error. It was similar to the court's suggestion to which Respondent agreed that the testimony of Utah Highway Patrolman Eldon C. Sherwood would be cumulative as to the same marks and measurements as the other investigating officers which they made the morning of the accident.

V. THE COURT DID NOT ERR IN REQUIRING QUESTIONS TO THE WITNESS HARRIS, AS TO HIS OPINIONS, TO BE SUBMITTED IN THE FORM OF HYPOTHETICAL QUESTIONS.

We cannot agree with Appellants' statement and conclusions nor the record as they have represented it to this court.

An examination of the Record (R. 337-526) will reveal that Dr. Franklin S. Harris was permitted to answer direct questions on those material and relevant facts which were within his own knowledge. He was permitted to testify as to the tests he made, the observa-

tions he made, measurements and marks that he found on the highway; however, the court did require that in questions asked of him as to his opinion in regard to the movements followed by the vehicles before and after the impact the factors upon which he was basing his opinion be set out either by means of hypothetical questions or otherwise.

The witness Harris was asked as an expert presumably to assist the jury in a scientific analysis of the evidence. As an expert, his testimony, of course, would only be of value to the jury in those matters which were beyond their own knowledge and experience or, as otherwise stated, were not a matter of common knowledge.

“Expert opinion testimony, while not limited or restricted in its scope to matters of science, art, or skill, is not allowed to invade the field of common knowledge. Such testimony cannot be received either to prove or to disprove those things which are supposed to lie within the common knowledge, experience, and education of men. It is inadmissible where the matter under consideration is of such a character that anyone of ordinary intelligence, without any peculiar habits or course of study, would be able to form a correct opinion. If the subject is one of common knowledge, as to which the facts can be intelligently described to the jury and understood by them and they can form a reasonable opinion for themselves, the opinion of an expert will be rejected. The mere fact that a witness may know more concerning the subject of inquiry and may better comprehend it than the jury does not qualify him as an expert whose opinion testimony may be given, unless the subject of inquiry relates to some trade, profes-

sion, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence. Unless the subject of inquiry does relate to some trade, profession, science, or art, it is within the province of the jury to form their own opinion, and not of witnesses, although experts, to express theirs. It is possible that the jurors may have less skill and experience than the witnesses and yet be able to draw their own conclusions. Expert testimony is not available for the purpose of giving a word of common meaning a technical significance." (20 Am. Jur. 651)

Moreover, the expert should not be allowed to invade the province of the jury. That is, where an opinion is based on facts on which there is a conflict of evidence, it should be clear to the jury that the weight of the opinion depends on what facts the jury may find to be true.

"Every expert opinion rests upon an assumption of fact; if the opinion is given upon a hypothetical question, its weight depends wholly on the jury finding that the assumed facts have been proved; if it is based on the expert's own testimony as to the facts, the truth of this testimony is no less open to their belief or disbelief; and, in addition, the soundness of the opinion itself is to be determined by the jury in consideration of its apparent reasonableness or their confidence in the skill and trustworthiness of the witness, and of any contradiction from any other experts." (20 Am. Jur. 654)

It is, therefore, important that the jury know the facts or basis on which the expert predicates his opinion:

otherwise, the opinion is meaningless to them for they have no way of determining when the opinion may come into play.

“Opinion testimony of an expert witness may be based upon facts within his own knowledge which he details to the jury before giving his opinion or upon hypothetical questions embracing facts supported by the evidence and relating to the particular matter upon which the expert’s opinion is sought, which facts, for the purpose of the opinion, are assumed to be true.” (20 Am. Jur. 661)

In the case of conflicting testimony, the questions must necessarily be formed in the form of hypothetical questions. To permit otherwise will allow the expert to invade the province of the jury and resolve conflicts in testimony which should be resolved by the jury.

“All courts agree that if there is any conflict between the witnesses as to facts on which an expert opinion is sought, the expert witness cannot, although he has heard the testimony, be asked to base his opinion on that testimony, because, to reach his conclusion, he must necessarily invade the province of the jury and pass on the credibility of witnesses and the weight of the evidence. In cases of conflict in the testimony heard by experts, a hypothetical statement of facts upon which their opinion is sought is required. It is generally agreed also that if the facts testified to by other witnesses are doubtful and remain to be found by the jury, it is improper to ask an expert who has heard the evidence for his opinion based upon such evidence. Also where the matter of allowing the expert to testify on the evidence is left to the discretion of the trial court, it is

held improper to incorporate testimony bodily in a complicated question." (20 Am. Jur. 664)

As was held in the case of *Diaz et al v. Industrial Commission of Utah*, 80 Utah 77, 13 Pac. (2d) 307, answers to hypothetical questions not founded upon, but contrary to, the established facts in the case can have no provative value.

Moreover, an expert witness may not be permitted to assume facts when there is no evidence of such facts in the Record. In the case of *Braddock v. Pacific Woodmen Life Ass'n.*, 89 Utah 75, 54 Pac. (2d) 1189, in which the issue before the court was the cause of the person's death, the hypothetical question asked of an expert witness, a doctor, was based on the assumption that the deceased had appeared to be strong and healthy during the months and for many years prior to the time he received a certain injury. The undisputed testimony was that he had had an attack of flu and other disturbances during that period of time. The hypothetical question assumed that there was an infection in the toe which had been injured and a fractured hip, of which there is no evidence. The trial court overruled an objection and permitted the doctor to state his opinion. The court said:

"The objection should have been sustained. (Citation given) Relevant matters in evidence respecting the deceased's visits to doctors, an attack of the flu, his hyperacidity of the stomach, his myocardiac condition, and the prescribing of digitalis for it, were entirely omitted from the question, while the witness was asked to assume the applicant was in good health, the very matter in

controversy, prior to his final illness. The doctor was also permitted to assume there was infection in the toe injury, and that the assured suffered a fractured hip of which there was no evidence. * * * While it is permissible that a hypothetical question be predicated on a statement of facts detailed by witnesses for one of the parties (citation), the question here omitted undisputed facts and included others not supported by evidence. Obviously, the question was improper and misleading."

Let us now examine some of the rulings of the court which the Appellants claim were erroneous. On page 437 of the Record, all the court did after the Appellants' counsel had been leading the witness for some time was to caution counsel as follows:

"The Court: Let me ask you not to lead this witness. You only let your witness say 'Yes' and you take a half an hour giving your question. Let the witness tell what he did, and we will get through quicker."

On page 440 of the Record, the witness volunteered the information that a pin on the truck was in such a position that it made the mark which was found upon the Studebaker. Upon a motion to strike, the court ruled:

"The Court: I think that that might go out and the jury told to disregard it. He could give the height of the pin as compared to other matters."

There can be no question but that the answer invaded the province of the jury, whose duty it was to determine what made the marks on the Studebaker.

All the way through the questioning of this witness,

counsel for the Appellants would ask his questions in a manner which merely required the witness to answer "Yes." On page 444, after four such questions, the court said:

"The Court: Mr. Schoenhals, you are leading this man. I am going to have to stop it. You have an expert down here who has something to tell the jury, and the only thing you let him say is 'Yes'. That is not proper. I have been overruling counsel so much I guess he has just given up making his objections, but I am fast going to insist that you let this witness tell his story and not lead him."

On page 446 of the Record, counsel for the Appellants asked the expert Harris:

"Doctor, calling your attention to Exhibit B, and particularly to the two marks in the red square between X2 and X, if you—do you have an opinion as to whether or not the two units coming together where the tractor and trailer was moving at a speed of between thirty-seven and thirty-nine miles per hour and where the Studebaker involved was traveling at a similar rate of speed, as to whether or not the impact at the angle you assume existed would or would not make any movement with respect to the rear duals of the tractor sufficient to make a noticeable mark on the highway?"

The question presumed that the Studebaker automobile was traveling at the same rate of speed as the tractor-trailer—37-39 miles an hour, (all of the evidence was that it was traveling about 80 miles per hour) and assumed an impact at a certain angle. There was no evidence in the Record that the Studebaker automobile was

going 37 miles per hour or that the point of impact was where the question assumed it to be. Moreover, the doctor was not asked to make any conclusion, but the question was put to determine if the very factors to be assumed were already established. The court recessed before ruling was had on the objection to the question and apparently counsel abandoned the question and the ruling was never forthcoming (R. 447).

On page 455 of the Record, the witness was asked to tell the jury what he observed with regard to skid marks. The court instructed counsel that the witness had been brought down to court as an expert and that, as an expert, he had to assume certain things to be true. That if counsel intended to use him merely as a lay witness his testimony would be merely cumulative of what the court already had and that he should be used as an expert on assumed facts.

On page 459 the doctor was asked to assume the rear dual wheels were in a certain position and that the tractor was 25 feet long. The doctor was then asked if this were true, where would the front end of the tractor be. Of course, it is elementary that the front end of the tractor would be 25 feet ahead of the rear dual wheels. The court ruled that that was merely a matter of sixth grade arithmetic and not a matter on which an expert's opinion was needed.

On page 468 of the Record, the witness was asked to express his opinion as to the movement the Studebaker would take after the impact, if the Studebaker and tractor met at the angle the witness had indicated. The witness answered:

"A. If there were a collision between two cars of this type taking place on the right front fender of the tractor, left front fender of the Studebaker shown by the damage to the two respective cars, from the damages to the two we can't say exactly what the contact angle is. We know that these two collided first because this is where the damage—it is only on this side and the imprint of license plate on this fender and the scratch marks across here. Now, from the examination of these shown in the pictures which were discussed earlier indicate that this is the type of thing which would do that damage * * *."

At that point the court stopped the doctor and asked him not to argue the facts, but rather to state his opinion as to the movement the Studebaker would take and the witness was then allowed to state his opinion.

On page 483 of the Record, the witness was asked to assume that the Studebaker was 100 feet from the tractor when it cut across the highway and that it was going more than 30 miles an hour. There was no evidence in the Record at that point before the court that the Studebaker was 100 feet away from the tractor when the Studebaker cut across the highway. The objection was sustained.

On page 884 of the Record, the doctor was asked to assume the impact occurred at the point indicated on Exhibit "GG" and assume that the Studebaker came to rest at the point shown on Exhibit "A" and as shown in Exhibit "E" and then asked, considering the relative movement of the Studebaker and tractor if that would be consistent with the impact occurring at the point

where he found it to occur in Exhibit "GG".

The question was faulty in a number of respects. First of all, it assumes that the impact occurred at "GG" and asks if it did occur at "GG", if that would be consistent with the impact occurring at "GG". Secondly, it was repetitious and the question was not put on the basis of any evidence, but rather is an assumption based on the assumption.

On page 518 of the Record, on redirect examination, the witness was asked to step down from the witness chair and to show the jury the complete movement of the two units as they engaged each other. The witness had been asked substantially the same thing and covered the same point on direct examination. The evidence was objected to on the grounds that it was repetitious. The court sustained the objections on that ground and on the ground that it was also argumentative and that the court did not believe that it would be proper for the expert to demonstrate his theory to the jury, that being a matter for counsel to do in his argument. The witness was then permitted to give his measurements as to the movements of the automobile.

On page 520 of the Record, the witness was asked, assuming that the marks on the rear of the truck were made do you have an opinion as to whether or not the Studebaker could have gone up in between the rear duals and made a particular mark? The court sustained an objection to the question on the grounds that it did not understand what facts were being assumed by the doctor and could not tell from the question whether or not it required an expert's opinion.

It is rather difficult to pull questions out of the context of the Record, together with a ruling on the particular question, and give the court a clear picture of the rules of evidence involved. In order to do that thoroughly, it would be necessary to set out the complete examination of the witness. A reading of the Record discloses that the questions asked of this witness in those instances where the court sustained an objection to them, were improperly framed. They did not state the facts to be assumed, or assumed facts which were not in the evidence. Many of the questions were leading. Others were not matters of expert opinion or invaded the province of the jury, or were repetitious. The court, rather than excluding testimony that should have been admitted, on occasions, allowed technically improper questions to be answered in order to get the benefit of the expert's opinion before the jury, which Appellants were permitted to do in full and in great detail.

VI. CLAIMED ERROR OF THE COURT IN DIRECTING THE TRIAL.

(a) Statement with respect to reading part of Noyes' statement.

An examination of the Record in which the statement quoted by Appellants appears, will show that the ruling of the court was not erroneous and the statement was not only not prejudicial to the Appellants but actually in their favor.

Starting on page 747 of the Record, the proceedings were as follows:

"Q. Showing you this statement here, this is your signature on this page, isn't it?

"A. Yes.

"Q. It says, 'Just before the impact of the two vehicles, the truck driver made a sharp turn to the left.' Doesn't it say that there?

"Mr. Hanson: Go ahead and read the rest of it.

"Mr. Schoenhals: Just a minute. Your Honor I object to Mr. Hanson—

"The Court: Yes. I think you ought not direct counsel.

"Mr. Hanson: Well—

"Mr. Schoenhals: I think if he is going to—

"The Court: Just a minute. Let me tell him something. If Mr. Schoenhals isn't asking these questions to suit you, make your objection to me.

"Mr. Hanson: If your Honor please, I object to counsel not reading the whole question, just reading part and stopping there. I could follow him read, and he read half and stopped.

"The Court: Go ahead. He may answer. You may have him read the rest of it.

"Q. Just before the impact of the two vehicles, the truck driver made a sharp turn to the left. Is that correct?

"A. That is correct, but the rest of the sentence on there—

"Q. Don't be anxious to help him out. You will get an opportunity, Mr. Noyes, to help him all you want.

"Mr. Hanson: Just a minute. I object to Mr. Schoenhals arguing with the witness.

"The Court: The objection is overruled. Go ahead, Mr. Schoenhals; and I say this to you: If either of these lawyers reads you half of a question, you might assume they are trying to deceive you. That should be lesson enough to you gentlemen if you don't read all that question you will find out they are going to think you are a stinker."

The remark complained of was made during a provoked argument between counsel and was made for the purpose of bringing that argument to an end and getting on with the trial. As was said in *Haslam v. Morrison*, 113 Utah 14, 190 Pac. (2d) 520 which involved a digression of a witness rather than counsel:

"But we must keep in mind that judges need not sit as sphinxes on the bench, nor should they be mere umpires. They should, to a certain extent, guide the course of the trial and when a witness is wandering or digressing, tactfully bring him back into line."

As is seen, the remark was proper in the court's conduct of the proceeding. But, assuming that it was not, there is nothing prejudicial to the Appellants about the remark. It does not pass upon the merits of either party's evidence, nor did it single out one counsel as against the other and hold him up to the ridicule, but the remark was addressed to both.

In *McClure v. Donovan* (Cal.), 195 Pac. (2d) 901 the court expressed a desire to have a certain witness testify whom the defendant did not call, even though the witness was present. The remarks of the court, to which

exception was taken, were made during an argument as to whether or not the witness should be called. The comment of court was held not to be prejudicial.

In *Seidenberg v. George* (Cal.), 172 Pac. (2d) 891, such remarks as "We are wasting a lot of time" made by the court in an effort to hasten the trial were held not to be prejudicial.

In *Palmer v. City of Long Beach* (Cal.), 189 Pac. (2d) 62, the appellant, after resting, stated that he desired to make a motion in chambers, to which the court replied, "Make the motion and I will rule." This remark was held not to be prejudicial.

In *Key et ux v. British American Oil Producing Co.* (Okla.), 167 Pac. (2d) 657, where the trial judge criticized counsel for examining a juror at length before exercising a preemptory challenge; and where on another occasion the trial judge said of appellant's counsel, "We are going to have to hold (named counsel) down or he will run away with the courthouse"; and where on another occasion during appellant's examination of the witness, during which he was leading the witness, the court said, "I will have to swear you", the remarks were held not to be prejudicial.

The court quoted the following from the *Corpus Juris* with approval:

"Where counsel engaged in the trial of an action is guilty of impropriety of misconduct, a proper admonition, censure or rebuke by the presiding judge, in the presence and hearing of the jury, is ordinarily not prejudicial, where not

couched in intemperate language, although it is ordinarily preferable that any rebuke be administered in the jury's absence. The judge is justified in using to counsel language sufficiently pointed and emphatic to put an end to objectionable conduct, and some warmth or asperity in interchanges between counsel and the court will not give ground for complaint, particularly in a hotly contested case." 64 C. J. 92, sec. 93.

"Improprieties or irregularities in the conduct of a judge are fatal, however, only where there is such departure from proper and orderly method of disposing of the action that the substantial rights of a party are materially affected. The manner or emphasis or force of expression of a judge that cannot be reasonably interpreted to express a wrong opinion as to the law or facts, or to express an opinion of a fact which should be left wholly to the jury, cannot be assigned as error, so mere decisiveness or abruptness of manner is not necessarily objectionable, nor is impatience, discourtesy, or bad manners, provided the essentials of sound judicial conduct are not violated, and complaint cannot ordinarily be made of the tone of voice used by the judge, unless some actual error is committed." 64 C. J. 102, sec. 107

Thus it is seen that the remarks of court were not in error and were not prejudicial to the appellant's case.

(b) Refusal of the Court to permit Sheriff Culbert Robinson to state his knowledge of state law.

Counsel for the plaintiffs asked Sheriff Robinson to state whether or not he knew the State law required the brakes on a vehicle to be in equal adjustment. The court did not permit the sheriff to answer that question. Ap-

pellants misconceive the basis of the court's ruling to be that the question is leading. Actually the objection is more fundamental. It calls for a witness to inform the court or the jury of what the law is. The rule of law in this instance was contained in a state statute of which the court takes judicial notice. It is the province of the court to instruct the jury as to the law and it is not proper for the counsel, either directly or through an examination of witnesses, to instruct or tell the jury what the law is.

“It may be laid down as a general rule that a witness is never permitted to give his opinion on a question of domestic law or in other matters which involve questions of law. This rule is applicable to both expert and non-expert witnesses. Testimony of expert witnesses is, in general, confined to matters of fact, as distinguished from matters of law. Opinion testimony of expert lawyers upon legal questions, other than that as to the law of another jurisdiction or that which amounts to a conclusion of a law, cannot be properly received in evidence, for the determination of such questions is exclusively within the province of the court. A party cannot appeal to a jury to decide legal questions by giving in evidence the opinions of public officers.” 20 Am. Jur. 672.

See also *Idaho Forwarding Company v. Firemen's Fund Ins. Co.*, 8 Utah 41, 29 Pac. 826, where the witness was not permitted to testify “how long the insurance was to be”, where the same was specifically covered by the written policy of insurance which was in evidence.

See also *North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Company*, 16 Utah 246, 52 Pac.

168, where it was held error to allow a witness to explain the purposes of a canal company and the powers of the corporation when the same were outlined in the Articles of Incorporation, held to be equivalent of law.

If there was any inference drawn by the jury that counsel for the Appellants was trying to deceive them as to what the law applicable to the situation was, the fault lay in the asking of an improper question, which called for an adverse ruling, rather than from the ruling itself, which we have demonstrated was perfectly proper.

Appellants' counsel's statements and version do not correctly reflect the Record. He was given great leeway in cross examining witnesses and presenting his theory, which greatly limited defendant in the amount of time available to present its evidence.

VII. PERMITTING THE JURY TO CARRY ON UNTIL ABOUT 10 P. M. WITH THE CASE.

The Appellants cite a self serving affidavit filed by them in support of a motion for a new trial as authority for the proposition that they were not given sufficient notice to having witnesses present and testify, particularly Dr. Freeman of Fillmore, Utah. The Record will show that at the end of the third day on Wednesday the following discussion occurred between the court and counsel:

"The Court: * * * Let me inquire, how many more witnesses will we have on liability?"

"Mr. Hanson: We will have, Your Honor, possibly three, one of whom will be rather long and the other two rather short. I won't say who they will be necessarily unless you want me to.

"The Court: No.

"Mr. Hanson: But there will be three witnesses.

"The Court: We will finish in good time by noon?

"Mr. Hanson: In addition to those three, there may be two other witnesses on the mechanism of the truck.

"The Court: We had better plan that we will have tomorrow on the liability, tomorrow morning.

"Mr. Hanson: I think a good part of tomorrow morning.

"Mr. Schoenhals: Will I need any witnesses here tomorrow?

"The Court: If you have rebuttal on this liability, probably you should have them.

"Mr. Schoenhals: By noon?

"The Court: He might not go more than eleven o'clock. We are running behind our schedule. Let's have them.

"Mr. Hanson: If Your Honor please, I don't think we will go much more than eleven o'clock.

"The Court: Probably you should have yours here by eleven o'clock." (R. 648)

It, therefore, appears by the record that counsel for the plaintiffs was given ample notice that he should have any witnesses that he planned to use in rebuttal in court my 11:00 A.M. Thursday morning. Nowhere in the Record does it appear that counsel for the plaintiffs made

any objection to the court's continuing on and completing the case Thursday evening. The fact is it was his suggestion at the commencement of the case that it wouldn't take longer.

At the conclusion of the defendant's evidence, the Appellants were given an opportunity to put on their rebuttal (R. 819). At the conclusion of their rebuttal evidence the Appellants rested (R. 846).

Nothing was said at that time in regard to the Appellants' wishing to call another witness on Friday. Appellants rested unqualifiedly. The Appellants' Brief goes into what it is claimed Dr. Freeman would have testified had he been called. However, nowhere in the Record is there any mention made that the Appellants planned to call Dr. Freeman or any offer of proof made as to what he might have been expected to testify. He was never subpoenaed.

Appellants argue that it appeared to the jury that it was the plaintiffs' fault that they were being retained until ten P.M. Such a conclusion was unwarranted. The trial was concluded earlier in the evening and the jury was being retained not by the plaintiffs but by the court. It is only natural that if they felt any resentment, the resentment would be manifested toward the court rather than toward either of the parties. Even assuming that the jury blamed the parties for their being there until 10:00 P.M., there appears to be no reason why they should blame the plaintiffs any more than the defendants. In other words, there appears to be no reason why the jury should be particularly prejudiced against the plaintiffs

by reason of the fact that they were required to stay until 10:00 P.M.

The jury in this case was not greatly inconvenienced or kept up during the evening. If this court were to hold the trial courts were required, without exception, to adjourn at the hour of 5:00 P.M., regardless of the fact that a case might be finished inside of a few more hours, the holding would greatly hamper the administration of justice and add expense to the State. It was upon Appellants' representations that there was need to go beyond the fourth day. Most of the time spent after 6:00 P.M. was spent in instructing the jury and their deliberations in the jury room.

The determination of the manner in which a trial or hearing is conducted is a matter which lies within the discretion of the trial court and should not be interfered with by this court unless it clearly appears that the trial court abused its discretion, and that the parties were not given a fair trial.

In the case of *Kern County Finance Co. v. Iriart* (Cal.) 79 Pac. (2d) 764, counsel for one of the parties was committed to jail for a contempt of court in failing to obey its orders and admonitions. The claim was made that, by reason of loss of sleep, the counsel was too tired to continue with the case the following day. Nothing appeared in the Record which indicated the incapacity of counsel except that he asked for an adjournment for the noon recess at ten minutes to twelve, which was granted. The court held that there was nothing prejudicial in the manner in which the case was conducted.

In *Gunn v. Superior Court*, (Cal.) 173 Pac. (2d) 328, counsel was given an hour to argue his case, which he claimed was insufficient to present his argument to the court. The court held:

“The determination of the manner in which a trial or hearing in a court is to be carried on lies within the province of the court before which such proceeding is pending; and it is not for an appellate court to say that it should have proceeded in one way or another as long as no statutory or constitutional rights of the parties were infringed. And how much time parties may be allowed for argument in a trial before a court sitting without a jury, or whether they are to be allowed any at all, are matters within the discretion of the court before whom the hearing is had.”

Thus it is seen that the manner in which the trial is conducted is a matter within the discretion of the trial judge. The appellate court should not give its opinion as to how this trial court should have proceeded unless it appears that there was clearly an abuse of that discretion. From an examination of the Record in this case, it appears that the Appellants were given every opportunity to present their evidence and argument. In a trial which lasted four days with a very simple issue of fact, approximately the first two and one-half days and the last half day were taken by the Appellants. Out of the four days, the Appellants consumed approximately three. It is submitted that they now have no valid grounds for complaint.

VIII. STATEMENTS OF COUNSEL FOR DEFENDANT.

It is asserted that counsel for the defendant, during

the course of his argument, extended his hand to the driver of the defendant's truck, who is supposed to have displayed a "long, sad and forlorn face" and stated that the plaintiffs had charged him with the responsibility of the death of the people involved. This matter is nowhere in the Record, and the exaggerations of counsel for Appellants are neither justified nor substantiated, nor do we find any objection in the Record as to any misconduct of counsel during closing argument. This fact alone should dispose of counsel's argument on this point.

However, if the statement was made, it is not understood how it can be objectionable, since the statement is a true appraisal of the situation. Plaintiff's charged the defendant in their complaint and all through the trial with negligently causing the death and injury of the people involved. This was the very essence of their case. Of course, the defendant, being a fictional entity, could only act through some person. The driver and other agents or servants of the defendant having the custody, control and management of the vehicle, the instrumentality through which or upon which they operated, were the persons through whom the defendant acted. In reality then, any accusation against the defendant was an accusation of the persons through whom the defendant acted. The driver here, in every sense of the word, was being charged, along with other employees and agents of the defendant, with negligently causing the death or injury of the persons involved, and this assignment of error is without any basis.

IX. EXCLUSION OF WITNESSES.

Pages 256-260 of the Record will show the proceed-

ings which went on at the commencement of the trial in chambers relative to the exclusion of witnesses. The Record will show that all of the defendant's witnesses, with the exception of Laren Somsen, were excluded from the court room. The Record does not show that the Appellants ever objected to Mr. Somsen's remaining in the court room and it was determined if not agreed in chambers that defendant could have its driver and employee present. Appellants cannot now be heard to object to something to which they had no objections at the time the arrangements were made in chambers, and no objection was made at the time of trial.

“It has been said that where the rule regarding the exclusion of witnesses from the courtroom is invoked, unless some good reason is shown, all of the witnesses should be included. There are, however, some exceptions to the rule which are generally recognized. For example, the rules do not apply to a party to the action(and a corporation can only be represented by an employee), although there may be several parties on one side of the case. *The same is true of one directly interested in the result of the trial.* It is also said that the rule is inapplicable to an attorney for one of the parties, even though he is also represented on the trial by other attorneys; but the action of the trial court in excluding one of the attorneys for a party has been upheld. An exception to the rule has been applied in favor of a detective attached to the office of the prosecuting attorney or other officer whose duty it is to assist that officer in preparing cases. While it is usual also to except expert witnesses from the rule, a refusal to do so is in error and it has been

said that witnesses in rebuttal do not go under the rule." 53 Am. Jur. 47.

The defendant in this case was a corporation. Laren Somsen was an employee of that corporation and knew more about this particular accident and was more directly involved than any other agent or employee of the corporation. When a corporation is a party to a lawsuit, it has a right to be represented by some agent or employee of the corporation in the same manner as any other party. The fact that the agent or employee may also be a witness, should no more exclude him from the trial than any party to a lawsuit.

The reason for the rule excluding witnesses is to prevent witnesses from modifying their testimony to coincide to the testimony given by prior witnesses, which is a very desirable objective. On the other hand, we must not so tie an attorney's hands that he is unable to present his case or defense intelligently and effectively. He must have available to him during the course of the trial someone who is thoroughly acquainted with the facts of the accident. This principle has been recognized in a number of similar cases where courts have refused to exclude complaining witnesses and, as illustrated by the citation above, have refused to exclude a detective or other officers who have assisted in the preparation of a case.

In this case, then, we see that Laren Somsen was the only employee of the company thoroughly acquainted with the facts of the accident and had a right to represent his company in the courtroom and his presence was absolutely necessary for counsel to have available to them

information necessary to the defense of the action. Even had the Appellants objected to his remaining in the courtroom, their objection would not have been well taken, and no objection was made.

X. REFUSAL OF THE COURT TO GRANT A NEW TRIAL.

Appellants seem to base their argument for a new trial on a conflict of the evidence as to whether certain marks on the highway were made by an automobile driven by Horace Clark or by another Mercury automobile. In this regard they claim that they were surprised by the evidence of Horace Clark and that they did not have an opportunity to call the witnesses Hal Noyes, James Faile, Roy Talbot and a Dr. Freeman. An examination of the testimony of James Faile will indicate that the Appellants' counsel knew of the conflict of evidence which might arise in regard to the Mercury skid marks. Statements taken by him from Noyes, Talbot and Faile soon after the accident were not placed in the Record by counsel for Appellants. The evidence indicates that counsel had gone over this aspect of the case with the witness James Faile et al in detail prior to the trial. He had had the witness place certain marks on Exhibit "P", anticipating the very conflict which occurred (R. 789). There is, therefore, no reason why Appellants should have been surprised by this evidence.

Moreover, the Record indicates that the Appellants had earlier examined each of the witnesses Noyes, Faile and Talbot. Each of these witnesses had testified concerning the marks made by the Mercury automobile on

direct examination and had been cross-examined by the Appellants concerning the same (see pages 744, 784, 803, 809 of the Record).

As to the claim that the witnesses Faile, Noyes and Talbot were excluded, or we presume otherwise unavailable, when defendant presented Clark's testimony, the evidence shows that the witnesses Noyes and Talbot had been previously excused by the court after the court had asked counsel if there were any objections and no objections had been forthcoming (R. 758-810). The Record is silent as to what happened to the witness Faile, but there is no evidence that that witness was not immediately available and certainly no evidence that counsel for the defendant did anything to exclude or conceal these witnesses.

There is no showing in the Record that the Appellants requested any additional time to secure these witnesses. Nor is there any statement or offer of proof in the Record as to what the witnesses would have testified about. There is no evidence in the Record that Appellants so much as mentioned calling an additional witness, Dr. Freeman, or what that witness would have testified about. He was not subpoenaed and could have been if wanted.

After an adverse verdict had been rendered, it is a common practice for litigants to speculate on how the outcome of a case might have been modified if evidence which was not offered at the trial had been introduced. The law requires something more than that a party believes or represents there might have been evidence which

was not presented. It requires some legal and justifiable excuse for the evidence not to have been presented. In this case, it appears that the Appellants had no reason to be surprised at the evidence concerning the marks made by the Mercury automobile. They did have an opportunity to examine the witnesses Noyes, Faile and Talbot in regard to those marks. They were not deprived of their right of presenting any additional evidence which would have been proper. The court was, therefore, correct in denying the motion to grant a new trial.

XI. PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Appellants' argument is like the shot of a sawed-off shotgun which is designed to spread rapidly and covers a lot of ground. It is not specifically directed toward any point, but attempts to raise a multitude of items in the hope that they may hit upon something in which the court might find error. In the preceding part of Appellants' argument they argue that they should have a new trial on the ground that the witness James Faile was not given an opportunity to testify about the marks on the highway made by the Mercury automobile. In this part of the Brief, they attempt to argue that upon the basis of this witness's testimony concerning those marks they were entitled to a directed verdict.

In this part of their Brief, as throughout the Brief, they attempt to argue the facts of the case. We have covered the facts in the previous part of this Brief and will briefly touch upon them later. At this point we prefer to limit the argument to the legal principals involved.

The rule that a party to an action may not refresh the memory or even cross-examine his own witness is not without exception. Section 618, 58 Am. Jur. 342, cited by the Appellants in their Brief, provides:

"A party ordinarily cannot cross-examine his own witnesses. The purpose of cross-examination is to test the truthfulness of the testimony given by witnesses of the adverse party and to develop and explain their testimony as developed in their direct examination. With respect to one's own witness, it is only when he is hostile or testifies adversely that cross-examination is permitted. In the latter case, however, it is recognized that the witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist. The right to cross-examine in such a case, however, is not absolute, but rests in the discretion of the trial judge. Under the rule, a prosecuting attorney may be allowed to cross-examine his own witness where the latter had materially weakened the effect of important testimony given by him on a previous trial."

Section 799, 58 Am. Jur. 444 provides:

"A recognized exception to the rule that a witness may not be impeached by the party at whose instance he testifies exists in the case of a witness who is hostile or unwilling, or who by his testimony surprises the party calling him, provided the surprise is substantial. Well-recognized reasons and principles of the law of evidence support the proposition that, at least in the discretion of the trial court, a party surprised by the ad-

verse testimony of his own witness may show that the witness had made prior statements inconsistent with, or contradictory of, the testimony which he gave. It would be grossly unfair to permit a witness to entrap a party into calling him by making a statement, (especially an isolated conclusion) favorable to that party's contention, and then, when he is called and accredited by that party and gives testimony at variance with his previous statement and against that party's interest, to deny the party calling him the right to show that he was induced to do so by a previous statement of the witness made under such circumstances as to warrant a reasonable belief that the witness would repeat the statement when called to testify. But the court should be satisfied that the party has been taken by surprise, and that the testimony is contrary to what he had just cause to expect from the witness based upon his statements. Moreover, the statements must be contradictory of the witness' testimony."

See also *Morton v. Hood*, 105 Utah 484, 143 Pac. (2d) 434.

An examination of the Record will show that on direct examination, and as heretofore quoted from the Record, the witness Faile testified concerning the Mercury marks in a manner favorable to the defendants consistent with the other witnesses. (R. 779-784) On cross-examination, the witness while necessarily acknowledging signing the affidavits tried to explain, but was cut off by counsel for respondents (R. 784-791). On redirect examination, counsel for the defendant merely sought to show that statements the witness had made prior to the trial indicated, that he would testify as had been in-

dicated by his direct examination and that his testimony on cross-examination came as a surprise. There can be no question but that the defendant was surprised, otherwise defendants would not have called him as a witness and that the redirect examination of the witness clearly fell within the exception to the rule that a party cannot cross-examine or impeach his own witness.

A reading of the witness Failes' testimony (R. 779-805) will reveal that the testimony of this witness was not as favorable to appellant as it is asserted to be in the appellant's brief. The marks which appellant claims were made by the Mercury, rather than Studebaker, extended into the debris of the collision. On direct examination this witness was asked:

“Q. Did the Mercury get into the debris at all before it came to a stop?”

“A. I don't think it did.” (R. 784)

On cross-examination he admitted that he had observed plaintiff's Exhibit PP in plaintiff's counsel's office and initialed certain marks contained therein, as the marks made by the Mercury automobile. On redirect examination, he testified that he had been up to counsel for the plaintiff's office about two or three weeks prior to the trial and had made the marks on Exhibit PP (R. 793). On redirect examination, he reiterated his prior testimony on direct examination, as given in the court reporter's statement. It was for the jury to weigh his testimony, However, in determining the question of whether or not the court should have granted plaintiff's

motion for a judgment notwithstanding the verdict, we should keep in mind that his testimony that the marks which appellant claims were made by the Mercury rather than the Studebaker were not made by the Mercury, was corroborated by three other independent witnesses, Hal Noyes, Roy Talbot and Horace Clark and the affidavits concealed by counsel for respondent were used as impeaching rather than direct evidence. It is, therefore, submitted that there was not sufficient evidence upon which the court could have set aside the verdict and entered judgment in the plaintiff's favor.

XII. THE COURT'S REFUSAL TO PERMIT PLAINTIFF TO CROSS EXAMINE THE WITNESS CULBERT ROBINSON AND HAL NOYES.

The record does not bear out appellant's contention that he was not permitted to cross-examine either of the witnesses Culbert Robinson or the witness Hal Noyes. His cross-examination of Culbert Robinson will be found in the Record on Pages 610-618. Appellant's recross-examination of Culbert Robinson will be found in the Record on page 620. His cross-examination of the witness Hal Noyes will be found on pages 744 to 758 of the Record.

While appellants claim that they were not given an opportunity to cross-examine the witness Culbert Robinson, the only specific parts of the testimony they refer to is a ruling on the propriety of asking the Sheriff whether or not there was a law in the State of Utah which requires brakes to be adjusted equally on each side so that they will lay down equal tracts on each side, (R.

611-18 R. 617-6) which is not the first time counsel for respondent has reargued this point.

Upon objection from the defendant's counsel, the Sheriff was not permitted to answer either of the questions upon the grounds that the questions called for a conclusion of the law and that it was the court's function rather than the witnesses to instruct the jury as to what law was.

On page 756 of the Record, counsel attempted to go into the location of certain marks on the Studebaker automobile. There had been no testimony on direct examination concerning any of such marks on the Studebaker or otherwise. The objection to the question was sustained on the theory that it went beyond the scope of direct examination. Again on Page 756 counsel for the defendant asked Mr. Noyes:

“Q. Mr. Noyes, did you or did you not convince yourself that things had occurred at that accident that you did not observe?”

The question was objected to on the grounds that it was speculative. The court ruled:

“The Court. The objection is sustained. He may tell this jury what he saw or what he knows about it.”

It, therefore, appears that counsel for the appellant was not precluded from cross-examining the witness Culbert Robinson and Hal Noyes, but was merely precluded in the instances cited by him from asking an improper question.

SUMMARY

In this case the jury, after four days of trial on the question of liability, by their answers to the special interrogatories absolved the defendant from any blame for the accident out of which this action arises.

A reading of the voluminous record in the case evidences the fact that plaintiffs were given every opportunity to present their evidence to the court and indeed availed themselves of that opportunity to the extent of three-fourths of the entire time taken up by the trial in the presentation of their evidence. The accident involved two vehicles approaching each other on a highway approximately 24 feet in width, each driving in opposite directions. There was only one basis of negligence which could have been the ultimate cause of the accident, and certainly this was determined and acknowledged at the pre-trial, namely that one or the other of the two vehicles was driven onto the wrong side of the highway prior to the impact. The ultimate issue as determined at the pre-trial was also evident in the manner in which each side presented their evidence. Plaintiffs' theory was clearly to show that the impact occurred well on plaintiffs' side of the road and they similarly disclaimed that any impact could have occurred as claimed by defendant.

Considerable has been said by Appellants to the effect that the brakes on defendant's vehicle were improperly adjusted and maintained in such a manner as to cause the vehicle to veer to the left upon an applica-

tion of the brakes. Plaintiffs were permitted to present this theory in great detail and to examine their experts extensively. In the last analysis, however, the testimony was merely evidence of the ultimate issue as to which driver drove onto the wrong side of the highway. Appellants assert the trial judge was prejudiced against them and he committed errors in the conduct of the trial. Actually a reading of all the testimony at the time of the trial will disclose that the trial court, if anything, leaned over backwards in the plaintiffs' favor in allowing them to get all of their evidence before the jury. Only in those cases where the infraction of the rules were too flagrant to be overlooked did the court sustain an objection to any of the questions or preclude the admission of any evidence. Counsel for Appellants repeatedly asked leading and suggestive questions and demonstrated the accident before the jury while examining their witnesses. Even cellophane overlays, prepared prior to trial, were used to direct the witnesses. These were ingeniously marked in color with distances to portray exactly how counsel claimed the accident occurred. The court patiently permitted plaintiffs to present all of such evidence and in the end fairly submitted the issue to the jury. The jury unanimously and unmistakably found that the Studebaker was negligently driven across the highway just before the impact and that defendant's truck was not. Certainly the jury was justified, and we believe most certainly correct, in not permitting the accident to be re-constructed and in finding a verdict which was based upon the clear preponderance of the evidence and

the testimony of dis-interested eye witnesses corroborated by the marks and measurements as explained by the investigating officers.

A reading of the Record further shows that plaintiffs relied essentially upon conjecture and supposition. Counsel for Appellants based his theory upon the assumption that certain marks on the highway were made by certain tires on the defendant's vehicle and that those tires would have reacted in a certain way upon an impact between the two vehicles. If the jury chose not to believe any one of these suppositions or assumptions, plaintiffs' entire case must fall. One of many unreasonable assumptions was the assumption that Laren Somsen, driver of defendant's vehicle, which was rounding a gradual curve well on its own side at 37 miles per hour, would have any occasion to apply the brakes of the tractor in the manner in which they were applied or turn from his course unless some emergency situation presented itself to the driver. That emergency was the sudden entry of the Studebaker automobile over into his lane of traffic.

Counsel for Appellants, under his theory, expected the jury to entirely disregard the other evidence in the case and the eye witnesses and rely solely upon the vague testimony of Bowman et al and the opinion testimony of experts. The danger of placing too much emphasis on this type of evidence is apparent. In an automobile accident there are so many factors of such variable nature which must be taken into consideration that no expert, no matter how skilled, could arrive at a conclusion which

would not be subject to question. This principal has been recognized by some jurisdictions to the extent that an opinion of an expert as to the ultimate cause of an accident has been held to be inadmissible and, in any event, strictly limited.

“* * * Some of the courts lay down the rule that, in such case, to permit an expert to state even an answer to a hypothetical question, what was the cause of the accident would be to invade the jury’s domain and, therefore, that such an opinion is inadmissible.” 20 *Am. Jur.* 688.

In the case of *Fishman v. Silva* (Cal.), 2 Pac. (2d) 473, with reference to the use of opinion and expert testimony in automobile cases, said the court:

“* * * It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the simple reason that in partisan presentation there is an ever present temptation to forget essential facts which do not fit in. For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors of each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing

one, and the balance or equilibrium of each car at the time of impact. * * *

In *Johnston v. Peairs*, (Cal.), 3 Pac. (2d) 617 several experts were produced to show that when two cars came into collision under the circumstances shown by the evidence one of them would necessarily be up-set and that it would be physically and mechanically impossible for the one car to travel the 45 feet it did travel after the collision to strike plaintiff. Error was assigned on appeal for the failure of the lower court to admit in evidence the opinion testimony:

“The refusal of the court to admit such testimony is assigned as error. It is appellant’s contention that expert testimony was admissible to prove that these cars could not, if struck in the manner and under the circumstances testified to by plaintiff’s witnesses, have moved or come to rest in the manner also testified to. Such a contention is well answered in the case of *Fishman v. Silva* (Cal. App.) 2 P. (2d) 473, 474. * * *

The court then went on to quote the language in the *Silva* case above mentioned and held that it was not error to exclude such expert opinions.

In *Moniz v. Bettencourt* (Cal.), 76 Pac. (2d) 535, in holding expert opinion testimony was properly excluded, the court added:

“Courts look with disfavor upon this type of testimony upon the ground that it is impossible to establish all of the necessary elements such as the reaction of the human mind under a certain set of circumstances; the impossibility of having complete knowledge of the exact speed, course of the wind, if any, and force of the impact. * * *

Notwithstanding the questionable nature of plaintiffs' opinion expert testimony, plaintiffs were allowed great leeway in examining their expert witnesses as well as their lay witnesses. If such evidence could have been sufficient to establish an accident on the east side of the highway, certainly the expert testimony produced by defendant through Sam Taylor equally showed that the impact could have been on defendant's right hand side.

More important than any of the expert testimony, however, were the actual eye witnesses to the accident and the physical evidence on the highway. The independent witnesses Hal Noyes, James Faile and Roy Talbot were following defendant's vehicle down the highway and two of them, namely Noyes and Faile, saw the impact as it occurred three or four feet from the edge of defendant's shoulder. This testimony was corroborated by the unmistakable physical evidence examined by the investigating officers the morning the accident occurred.

It must be remembered that defendant's driver had only an approximate second's warning when the Studebaker swung across the highway into a crab-like motion, traveling at a terrific speed about 80 miles per hour. This, with the combined speed of defendant's tractor (37 miles per hour), made a resulting combined force of approximately 117 miles per hour, resulting in the explosive forces. There was no time for planned or deliberate action on the part of defendant's driver. He said he may have instinctively started to turn to the left to avoid the impact and the eye witnesses thought that he had started to so turn. The impact, coming in against the right front

of defendant's tractor, bent and pushed back the right front corner and wheel, locking the wheel and flattening the right front tire. It also flattened the left front tire of the Studebaker. Apparently a scissor-like action followed, which accounts for the marks on the side of the Studebaker and the damage and marks on the side of defendant's rig, all of which were described and accounted for by Sam Taylor who carefully examined both vehicles.

It also accounts for the tire marks of the Studebaker which were traceable by the officers from the area of the impact across the shoulder and to the point where the Studebaker came to rest. Tracing back from the scene of the accident, the Studebaker tire marks, as testified to by the officers, were clearly traceable from where it first entered the curve, getting onto its right shoulder and then swerving out of control to the point of impact and thus to where it came to rest.

At some point after the collision the crescent was evidently gouged by the rim of the left front wheel of the Studebaker.

Exhibit "B" clearly shows the wavey marks caused from the flattened tire of the defendant's right front wheel. The investigating officers testified how this flat tire mark was easily traced on through to the right front wheel. This type of mark certainly was suggestive of plaintiffs' theory that there were zig zag marks. Plaintiffs' witnesses denied that there were any marks from the flattened tire as shown in Exhibit "B".

Had the impact occurred where claimed by counsel for Appellants, it is extremely doubtful that defendant's

driver, Laren Somsen, could have stopped where he did almost instantaneously with the alleged impact on the east side.

It would be hard to believe that the vague tire marks claimed to have been observed by Bowman et al the day after the accident were made by the Studebaker or even related to the accident. Such evidence was certainly questionable especially when no examination was made by any of the plaintiffs' witnesses the day the accident occurred and only after there had been considerable traffic. The investigating officers said there were no such marks.

Nor was the claim as to the Mercury marks sufficient to require the jury to disregard the testimony of the eye witnesses and the investigating officers. There was ample and convincing evidence that when the Mercury stopped it came nowhere near the debris. Counsel's suggestion that there may have been two Mercurys is pure speculation and in any event there is no direct evidence that the marks examined by the officers were caused by a Mercury.

In the trial of the case the court, out of liberality to plaintiffs, left the issue for the jury. The jury returned clear and unqualified answers in favor of defendant and their verdict was based on the testimony of disinterested eye witnesses corroborated by the clear physical facts as witnessed by the investigating officers and others present immediately following the accident.

Appellants, in assigning everything imaginable as error, have failed in many instances to refer to any of

the Record and in other instances they have made bold assertions and conclusions not justified by the Record. A review of the proceedings shows that the court fairly and impartially tried the case and that there was no prejudicial error committed during the course of the trial.

Respectfully submitted,

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