DR. M. M. TOWNSEND for his Wife, DR. RACHEL TOWNSEND, Appellant, *v.* RICHARD COOPER, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued March 22, 27, 1951. Decided May 11, 1951.

1. It is unlawful to operate a motor vehicle without an operator's license.
2. When a party undertakes an act for another, even without pay, and injures the other in the act, he may be liable.
3. A common carrier is not excused from liability for inevitable or unavoidable accidents which are not acts of God.
4. An appellate court is authorized to render whatever judgment the court below should have rendered.

Plaintiff-appellant sued defendant-appellee for damages for injuries suffered by his wife in an automobile accident. After the first trial a new trial was ordered, in which the jury found for the defendant. Upon appeal, *judgment reversed and damages awarded.*

T. Gyibli Collins for appellant. *Momolu S. Cooper* for appellee.

MR. JUSTICE DAVIS delivered the opinion of the Court.

The appellant, Dr. M. M. Townsend, under authority of our statutes, and especially that portion relating to personal injuries and redress therefor, on January 25, 1949, instituted before the Circuit Court of the Sixth Judicial Circuit an action of damages against the appellee, Richard Cooper.

Appellee conducts a trucking service between Millsburg, his home town, Arthington and Suehn. On Wednesday, October 6, 1948, appellant's wife, Dr. Rachel Townsend, boarded appellee's truck as a passenger to Ar-

thington. When the journey commenced, the truck was driven by one John Hill, the regular and licensed driver; but as the journey continued, in the pushing of the truck out of some mud, appellee asked driver Hill to surrender the wheel, from which moment appellee drove the truck. The records further disclose that, after discharging some passengers on West Road in Arthington, appellee was driving toward Arthington, the destination of appellant's wife; and that, since the speed with which appellee was driving was very fast, he ran the truck against an embankment in an effort to turn a curve. Thereupon Mrs. Townsend hit her head against the windshield, or front glass, sustaining wounds on her nose and right eye. Appellee forthwith brought Mrs. Townsend to Monrovia, and, of course without reference to her husband, placed her in the Carrie V. Dyer Memorial Hospital under the care and treatment of Dr. Arthur Schnitzer and Mrs. Magdelene Dennis. When appellant received the information from one W. T. Moore, he inquired first at the Government Hospital, and, not having found his wife there, proceeded to the Baptist Hospital, where he found her in a semiconscious state with bandages and ice caps over her head and face. The attending physician reported that she was suffering from contusion of the forehead, traumatism of the right eye, and fracture of the nose. It is also shown in the record that it was not until after one week from the day of the accident that appellee, Richard Cooper, called upon appellant, Dr. M. M. Townsend, to inform him of what had happened to his wife and to discuss the matter with him.

After several meetings or conferences between the parties and their relatives with a view to bringing about a settlement of the matter out of court, the Reverend June Moore, heading a special committee to which the matter had been entrusted, proposed and recommended that appellee pay appellant two thousand dollars damages, and that the matter be settled out of court. Appellant, as the

records show, reluctantly agreed to accept the said amount. The relatives of appellee, Richard Cooper, who were present at the conference, requested an opportunity to take the proposal home, and to take the proposed damage figure under advisement. Thus the last of the conferences adjourned with an understanding to meet again in order to get appellee's reaction. A week or so later, without seeing appellee, the Reverend June Moore received a letter from Messrs. Cooper and Tamba, solicitors and attorneys at law, informing him that their client Richard Cooper, the appellee, would not assume any responsibility for paying any damages as a result of the motor truck incident. Because of this, appellant turned to the courts for redress in these proceedings.

A study of the pleadings filed by appellee, and of the brief submitted to this Court, shows that his defense was based upon the following grounds:

1. Although plaintiff alleged, in his complaint, that he had been damaged in the sum of $9,580.00, yet he produced no evidence to prove any portion of this amount; because, to use appellee's own language, "he [meaning appellant] paid nothing to any doctor or nurse; for Richard Cooper had paid all the bills."
2. Plaintiff is not entitled to recover because the evidence shows that appellee, Richard Cooper, was endeavoring, gratis, to assist appellant's wife in driving her to Arthington when the accident occurred.
3. The act of Richard Cooper in conveying appellant's wife to Arthington in his truck was a lawful act; and therefore he cannot be held liable for anything that happened as a result thereof.

We further quote Counts "1," "2" and "3" of the appellee's brief:

1. The verdict of the jury was sound, based upon the evidence and in keeping with the legal instructions of the trial judge; for, the plaintiff having alleged

that he had been damaged in the specific sum of $9,580.00, produced no evidence to prove even a single cent: he had paid absolutely nothing to any doctor or nurse; Richard Cooper had paid all the bills.

2. The verdict of the jury was sound, based on the evidence of both plaintiff and defendant; for the burden of the evidence was that the appellee was sincerely endeavoring, gratis, to assist Dr. Rachel Townsend to reach her home in Arthington because she said she was ill, as indeed she was, and wanted to reach Arthington quickly to get in bed; what occurred was pure accident; driving her to Arthington was upon her own request; Cooper was neither reckless nor negligent, and showed by subsequent conduct that he was sorry, and he accordingly paid all medical bills submitted to him. Under these circumstances, the verdict was in keeping with the evidence, and the final judgment based thereon should be affirmed.
3. The act of Richard Cooper in conveying the appellant's wife in his truck to Arthington, upon her request, was a lawful act, and if an accident occurred in the performance of said act, the appellee is not liable in damages; for under the law, where one is engaged in a lawful act, an act not mischievous, rash, reckless or foolish, or naturally liable to result in injury to others, he is not responsible for damage due to unavoidable accident or casualty.

In a further effort to prosecute and prove his claim against the defendant in the court below, plaintiff introduced in evidence the following:

1. A medical certificate from Dr. Arthur Schnitzer, dated February 2, 1949, which reads as follows:

"This is to certify that Mrs. R. Townsend was admitted into the C. V. Dyer Memorial Hospital on October 6, 1948, under my medical treatment

and suffered from a contusion of her forehead with fracture of the right nasal bone. She was discharged as having been improved on October 16, 1948."

2. A certificate issued on November 15, 1948, by Dr. R. Duchiene, eye, ear, nose and throat specialist, which reads as follows:

   "This is to certify that I have attended to Mrs. Rachel Townsend from October 8, 1948, to the present day. The first examination, performed while the patient was confined to bed, revealed that she had been victim of an accident. The injuries noticed were the following:—Subconjuctival hemorrhage of the right eye, abolition of vision in the right eye, a deformation of the left side of the nose accompanied by obstruction of the nose and nasal hemorrhage.

   "The many examinations performed during the course of treatment allow me to state that Mrs. Rachel Townsend has a fracture of the nose and is affected with a complete loss of vision in the right eye."

3. A certificate issued by Dr. E. E. Zogbi, which reads as follows:

   "This is to certify that I, Dr. Zogbi, have examined and treated Mrs. Hill-Townsend for pains in the chest and side (left) caused probably by traumatism. This patient have taken fifteen treatment on the Electric Distormio. This treatment must be continued until she is cured."

Added to the foregoing is the testimony of the appellant himself, and of another witness for the appellant to the effect that: (1) as a result of the injury sustained by Mrs. Townsend on appellee's truck she had not been able to carry on her farming operations; and that (2) out of the amount of money charged by his lawyers for the prosecution of this case, as shown in the promissory note issued

them by him, appellant had already paid them a goodly and reasonable portion thereof and had obligated himself for payment of the balance.

Such evidence was, in our opinion, given by appellant in an effort to prove to the court and jury that he really had been injured by appellee and was entitled to some damages, even if not in the exact amount he had stated in his complaint.

Countering this effort of appellant, and with a view to proving that appellant was not entitled to recover any damages at all, appellee introduced evidence tending to show:

1. That the crashing of the truck, by reason of which appellant's wife sustained the injury, was purely an accident; and that, said accident not having been traced to negligence or recklessness of appellee, he could not be held liable.
2. That the conveying of appellant's wife by appellee from Millsburg to Arthington was gratis, and upon her own request; and, as such, it was, or would be, unfair for appellee to be saddled with liability for the injury appellant's wife sustained.
3. That the conveying of the appellant's wife to Arthington by appellee in his motor truck was a lawful act, and so in point of law he cannot be held liable for any injury sustained by her.

Having thus summarized the basic contentions of the parties, we proceed to apply the law to each point submitted, and thereby formulate issues and conclusions necessary to an impartial determination of the matter in controversy.

Let us take appellee's point that, since appellee's act in conveying appellant's wife to Arthington was lawful, appellee is not liable in damages. A lawful act is one authorized, or performed in conformity with, and within the manner prescribed by, existing law. In this country, any person who desires to operate or drive a motor vehicle is

required by law to obtain a license before he is authorized to drive such vehicle; and the act of driving without such a license is, *per se,* unlawful. The records in this case reveal that appellee, who was driving the truck at the time of the accident, was not a licensed driver; that one John Hill, a licensed driver, was in the truck; and that appellee, the owner, took over the wheel and did not surrender it to Hill, the driver. More than this, when appellee himself took the stand as a witness in his own behalf, he was asked whether he was a licensed driver, and his answer was: "I had my mechanic's license at the time. No, not truck license." By this answer one concludes that appellee, Richard Cooper, was not, at the time he was driving the truck, when this affair took place, a licensed driver; consequently the act could not have been lawful. And so if the act was not lawful, then according to his own proposition he is liable for any and all injuries sustained by passengers.

Appellee argues that appellant is not entitled to recover because the evidence showed that appellee was taking appellant's wife to Arthington, and only upon her own request, because he, knowing that the roads were slippery, had ordered the truck locked up; and it was only on her account that he made the trip. This statement finds, in the record, opposing testimony which tends to neutralize its virtue, especially when it is shown, in appellee's own testimony, as well as in the testimony of his driver, John Hill, that there were other passengers travelling up by the truck on that day besides appellant's wife, and that these passengers were first taken to West Road before the truck set out in the direction leading to Mrs. Townsend's destination. Thus, in our opinion, appellee's contention lacks merit. According to our statutes, every act which is prejudicial to the interest of another, unless it be warranted by some law, "is the proper subject of an action." Rev. Stat., secs. 222, 233. Moreover, whether the act is an injury does not depend upon intent. Hence it is our

opinion that, whether or not a request was made by appellant's wife to be taken to Arthington, or whether appellee did so with honest and good intention, as is contended by him, since, as a common carrier, appellee took her aboard his truck, if it can be shown that she suffered any injury as a result of any accident that took place while in said truck, appellee is liable, unless he can prove that the accident occurred by act of God. Dilating on this point, where liability for such an accident does not result from an act of God or uncontrollable operation of nature, it must be attributed to misconduct or actionable negligence. From the facts and circumstances surrounding this case, the injury alleged to have been sustained by appellant's wife did not result from any act of God; for, in differentiating between an act of God and an inevitable accident, we have the following rule laid down in *American Jurisprudence:*

> "It has been previously remarked that by many authorities the expressions 'act of God' and 'inevitable accident' have been used in a similar sense as equivalent terms. According to the strict technical signification that the phrase 'act of God' has latterly acquired, however, the two expressions may be regarded as altogether distinct. Certain it is that, at the common law, a carrier has been held answerable for losses caused by accidents which were to it entirely inevitable. By 'inevitable accident' or 'unavoidable accident,' and, in this instance, the two terms are synonymous, is meant an unforeseen and unexpected event occurring externally to the person affected by it, and of which his own agency is not the proximate cause. In legal phraseology, therefore, such an expression does not denote an accident which it was physically impossible in the nature of things to prevent, but merely one that was not occasioned in any degree, either remotely or directly, by the want of that care or skill which the law holds every man bound to exercise. Conse-

quently, that may be an 'inevitable accident' which no foresight or precaution on the part of the carrier could prevent, although it had its origin either in whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. On the other hand, as has been observed above, the phrase 'act of God' denotes natural incidents that could not happen by the intervention of man, as storms, lightning, and tempests. So, while it is true that every 'act of God' is an inevitable accident, since no human agency can resist it, it does not therefore follow, in the sense of the books, that every inevitable accident is an act of God. For instance, damage done by lightning is an inevitable accident, and also an act of God; but the collision of two vessels in the dark, although it may well be an inevitable accident, is not an act of God, such as a stroke of lightning, nor is it so considered by the authorities. This distinction between an 'act of God' and an 'inevitable accident' is important as it marks one of the points of difference between the common and the civil law, which latter, according to all authorities, exempts the carrier from liability for inevitable accident." 9 Am. Jur. 851, *Carriers,* § 709.

According to the above citation, unless it can be shown that an injury results from an accident occasioned by the act of God, and not even by inevitable or unavoidable accident, a carrier cannot excuse himself from liability.

Before passing on the last point in appellee's brief, we note that our colleague, Mr. Justice Shannon, does not agree with some of our conclusions. But, most significantly, he agrees that, as an appellate court, we are authorized by law to give whatever judgment the court below should have given. It may be argued that, because Judge King ruled out the plea in appellee's answer which raised the question of accident, and left appellee

on a bare denial of the facts stated in the complaint, the particular issue or ruling made thereon should first be settled, and the case remanded with instructions in that light; but such an argument ceases to be plausible when the records show that a second trial of this case was had, and at that second trial appellee was not prejudiced by Judge King's ruling; for evidence was admitted tending to prove an accident; and it is with this evidence before us that we hold that appellee cannot excuse or exempt himself from liability under the mantle of accident, unless it is shown to result from an act of God.

We come now to appellee's contention that appellant did not prove such damage as to warrant an award by the jury; and hence the verdict in favor of appellee was right. We are unable to see the soundness of this contention. The medical certificates filed and admitted in evidence clearly show, and they were not contradicted by appellee, that appellant's wife did suffer injuries, such as fracture of the nose, and loss of vision in the right eye, as a result of the blow she received by the forcible striking of her head against the windshield of the truck; that, as a result of the accident, she had to be confined to hospital and treated; and that her earning capacity has been reduced or diminished because, besides losing the vision of her right eye, she has not, since the accident, been able to carry on her farming and distilling operations.

To remand this case with instructions that a jury assess the amount of damages would, in our opinion, only mean a delay of justice. Since, therefore, all of the facts that a jury would have to consider in assessing the damages are now before us, and have been carefully studied by us; and since it is within our province, according to the provisions of our statutes, to render such judgment as should have been rendered by the court below, we hereby find that the appellant, from the facts given in evidence, and the law controlling, is entitled to recover against appellee; and therefore we hereby reverse the judgment of the court

below; and, after reviewing all the facts in the case, award damages in favor of appellant against appellee in the sum of four thousand dollars, which sum of money appellee shall pay, or cause to be paid over to appellant. Costs of these proceedings are ruled against appellee; and it is hereby so ordered.

Reversed.

MR. JUSTICE SHANNON, dissenting.

There have been so many irregularities committed during the trial of this case before the lower court, which are apparent from the records certified to us, that I cannot join my colleagues in the opinion just read. To my mind, this position tends to condone these irregularities, in addition to not finding support in our statutes as I understand them.

Circuit Judge C. T. O. King, in disposing of the legal pleadings herein, disallowed the plea of accident raised by the appellee in his answer and subsequent pleadings, and tried the case upon the merits of the complaint, the appellee resting on a bare denial of same. There is no record that the appellee excepted to this ruling but it is hardly believable that he did not.

Despite this order by Judge King, and the order by Judge Harris of a new trial, when the case came up on second trial before Judge Richards latitude was given appellee to offer evidence tending to prove accident, and appellant made no great effort to resist it. As a result, the jury found that "the defendant is not liable, but rather had an accident."

Against this verdict, appellant submitted a motion praying for a new trial, which was strongly resisted. In support of said motion, appellant contended that the verdict had introduced the issue of accident, which had been disallowed by the ruling of Judge King; and that, never-

theless, the trial judge had made the following peculiar ruling:

> "The court says that this is the second motion for new trial filed by the plaintiff, and the jury in the last case having brought in verdict substantially in the former case, the court does not see the necessity of granting a second new trial, and further, cases sometime must come to termination, and continually granting motions for new trial by the same party, will be carrying on a case eternally. The motion is therefore denied. To which plaintiff excepts."

Merely to reverse the judgment of the lower court would, besides omitting correction of several errors apparent on the record, some of which I have shown above, be contrary to the spirit and intent of our statutes:

> "It shall be the duty of every court, to which an appeal is taken, if the judgment of the first court is reversed, to give such judgment as that court ought to have given, and to ascertain the costs incurred since the first judgment, and to give judgment for them also." 1841 Digest, pt. II, tit. II, ch. XX, sec. 11; 2 Hub. 1579.

In this case a peculiar situation will be created since the verdict in the lower court, upon which the judgment now reversed was entered, was wholly against the appellant. The question arises whether we may properly both award and measure the damages.

Let us see what our statutes have to say:

> "When any superior or appellant court, shall reverse any final judgment, and it shall appear to them upon the record that the plaintiff, or the defendant in replevin, in a case where the goods replevied are in possession of the defendant, is entitled to recover, and it shall not appear, by the record, what sum such party ought to recover, they may proceed to give an imperfect judgment in favor of such party, and by consent

of parties, ascertain what ought to be the final judgment, and render such judgment; or if the parties will not consent to such ascertainment, shall order an ascertainment by a jury, at the bar of the court below, of the amount of the debt or damages, or the value of the property replevied, as the case may be, and direct such inferior court, to give final judgment upon such inquiry. If the action be brought to recover a liquidated sum, ascertained by an instrument of writing, signed by the party against whom the imperfect judgment is given, or if the case be one in which the court below might have ascertained the damages without a jury, such superior or appellate court may assess the debt or damages and give final judgment without the consent of parties.

"Where it does not appear to the appellate court by the record, on account of the mixture of questions of law and fact, for which party the judgment ought to be given, it shall be the duty of such superior or appellate court, to remand the case to the court in which it was originally tried to be tried over again." 1841 Digest, pt. II, tit. II, secs. 12, 13; 2 Hub. 1579.

In the instant case, I am of the opinion, backed by the law quoted, that we are without authority to measure or assess damages against the appellee, even if we are in agreement that the appellant is entitled to same, since the court below could not have assessed damages without a jury; and, further, it is my opinion that, after correcting the several errors committed at the trial in the court of origin, we are left with no alternative but to remand the case for new trial with instructions. Doing otherwise, as my colleagues have done, is not much different from what Judge Richards did in his ruling denying the motion for new trial at the second hearing from which this appeal emanates.

Consequently, I have refrained from appending my signature to the judgment in the case.