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Henry Hayward v. J. R. Downing and J. Wayne Eldredge and Lynn D. Wright v. J. R. Downing and J. Wayne Eldredge : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

HENRY HAYWARD,

Plaintiff and Respondent,

vs.

J. R. DOWNING and J. WAYNE
ELDREDGE,

Defendants and Appellants,

and

LYNN D. WRIGHT, a Minor, by JESSE
WRIGHT, his Guardian ad litem,

Plaintiff and Respondent,

vs.

J. R. DOWNING and J. WAYNE
ELDREDGE,

Defendants and Appellants.

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial
District In And For Salt Lake County,
State of Utah

FILED
Honorable Harold A. Hogenson, Judge

NOV 1 - 1948

GUSTIN & RICHARDS,

CLERK, SUPREME COURT, UTAH *Attorneys for Defendants
and Appellants.*

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J. R. DOWNING and J. WAYNE
ELDREDGE,

Defendants and Appellants.

Case No.
7216

Case No.
7217

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action brought by the plaintiffs to recover damages for personal injuries allegedly caused by the negligence of the defendants. These cases have previously been before this court. *Hayward v. Downing, Wright v. Downing*, 189 P. (2d) 442, decided on February 5, 1948. In the previous appeal, both cases having been consolidated as in the instant case, this court held the trial

court to have been in error when it granted a motion of nonsuit and reversed the judgment of the trial court, remanding the cases for new trial. The two cases are now before this court upon appeal from judgments entered upon verdicts, in each instance in favor of the plaintiff.

As pointed out by the court in its former decision, the two defendants were co-partners engaged in the promotion of wrestling matches for public exhibition in the Coliseum Building at the State Fair Grounds in Salt Lake City, of which building defendants were lessees. Seats for patrons extended in all directions from the stage, each row of seats being elevated slightly above the row in front of it. On the east wall of the arena there was a small platform or alcove about fifteen feet above the floor and about five feet above the last row of seats, which were immediately below it. There were no ordinary devices by which customers could reach the platform or alcove, nor were there any accommodations provided for the seating of patrons thereon. Access to the platform or alcove was gained by the person intending to sit thereon grasping an overhead iron beam with his hands and then swinging "Tarzan-like" onto the platform.

On the evening of April 26, 1946, the date of the accident, the two plaintiffs, with others, were sitting upon the platform watching the wrestling matches after having secured, as they testified, the express permission of the defendant Downing to sit there. Both Hayward and Wright were sixteen years old at the time (Tr. pp. 114, 219). During the progress of the last bout the platform

collapsed and the two plaintiffs fell to the floor of the building and were injured. Some six weeks before the accident one of the plaintiffs (Tr. pp. 154-155), and some of the companions of both of the plaintiffs, were sitting upon the platform when the weight of the same was increased by the addition of two individuals, strangers to the boys. The platform sagged a few inches on this occasion whereupon the strangers left the platform but the boys remained on the same throughout that particular evening and continued to sit there upon subsequent occasions until the platform collapsed during the evening of the day in question.

In the previous appeal the court held that the plaintiffs occupied the status of "invitees" as to the platform, the court ruling as follows:

"But when one of the defendants expressly consented that plaintiffs sit upon the platform, the invitation was broadened to include the platform, at least as to plaintiffs. We do not wish to be understood as holding that in every case where an invitee as to one part of the premises receives permission to go upon another part of the premises, he thereby becomes an invitee as to such second part. Our holding is limited strictly to the facts of this case—where an invitee as to one part of the premises, receives permission to go upon another part of the premises in furtherance of the object or purpose for which he was originally invited upon the premises (in this case, to view the wrestling matches) he becomes an invitee as to such second part of the premises. As to other and different fact situations, we express no opinion." (Italics ours).

In the re-trial, and properly so, the foregoing rule was accepted as the law of the case with the main factual situation centering about the question as to whether or not the defendants, and particularly the defendant Downing, gave the boys express permission to sit upon the platform. Counsel in his opening statement (Tr. p. 110) stated that the proof would show that the boys sat on the platform "with the express consent of Mr. Downing that they could sit up there." The complaint in the Hayward case (Tr. p. 2) alleges that the plaintiff "was directed by the defendant J. R. Downing to sit upon said stage or platform," and in the Wright case the complaint (Tr. p. 6) makes the same allegation, and which allegations were by the answers in each case denied (Tr. pp. 21-32, 34-36). In view of the errors to be hereafter assigned we think it important to keep in mind that an issue was raised as to whether or not the boys were sitting upon the platform with the *express* consent or permission of the defendant, and particularly in view of the previous decision of this court.

Aside from the general denials, the answers in both cases, by way of affirmative defense, raise the issue of contributory negligence and assumption of risk. In these particulars it is alleged that there were ample seats provided for patrons but that nevertheless the plaintiffs voluntarily, and upon their own initiative, elected to and did sit upon the platform; that the platform was not a place provided for the seating of patrons nor for the seating of the plaintiffs but had been constructed by

parties unknown to the defendants long prior to defendants' lease of the premises for decorative purposes, and not at any time intended for the purpose of seating or accommodating patrons; that the plaintiffs gained access to the platform not by means furnished by the defendants but by the unusual and unnatural method of being lifted by companions and drawing themselves up a portion of the way with their arms and elbows; that the plaintiffs at the time alleged in their respective complaints knew or in the exercise of reasonable care, caution and circumspection should have known the hazards, if any, involved in sitting or standing upon the platform, at which time the plaintiffs and each of them were trespassers and not guests or invitees of the defendants and that the plaintiffs assumed all of the risks and hazards, if any, in connection with their presence upon the platform.

In support of the denials and affirmative allegations of the answers, the defendant Downing testified that the boys had not asked for permission to sit on the platform; that the orders to everyone were to the effect that no one be permitted to sit there (Tr. pp. 356-357); that he did not know that the boys were sitting on the platform that evening and that his orders were to keep them out of the alcove or off the platform at all times (Tr. p. 361). To the same effect was the testimony of the defendant Eldredge (Tr. p. 365), who also testified that after the platform collapsed two of the boys, including the plaintiff Hayward had the appearance of having been drinking (Tr. p. 366). Ernest E. Morris, a

spectator at the wrestling matches on the night in question and at the time the floor collapsed, testified that he saw boys in the alcove and during the evening he heard a disturbance "stamping of feet and one thing and another" from the alcove (Tr. pp. 298-299). Walter J. Lewis, one of the defendants' employees, testified that he knew both Hayward and Wright and that on a prior occasion the boys had asked him for permission to sit in the alcove "I told them no, they couldn't do it. They said, 'We would see Mr. Downing'; and they went to see Mr. Downing and he positively said 'No'; and I always talked to Mr. Downing, and he said, 'By all means keep them off from up there'." (Tr. p. 300); that the boys themselves had come to the conclusion that it was better for them not to get up there (Tr. p. 306), and that people were not permitted to sit in the alcove at any time (Tr. p. 310).

E. F. Adams, the ticket taker for the defendants during the month of April 1946 (Tr. p. 310), saw the Hayward boy and another boy wrestling on the platform on the night in question and just as one of the bouts had finished one of the boys raised the other's hand as a token, and as the witness turned to get an officer to put the boys down he heard the crash (Tr. p. 311), and that people were never allowed to sit on the platform (Tr. p. 313). Arthur D. Murphy, a police officer for Salt Lake City for some thirty-six years (Tr. p. 317) and privately employed by the defendants for policing the wrestling matches (Tr. p. 318), testified that he allowed no one

to sit on the platform and that on several occasions he got boys down from there, including the two plaintiffs (Tr. p. 318); that on the night of the accident and earlier in the evening before the platform collapsed he ordered Eugene Logan, one of the plaintiffs' companions, off the platform, who at the time was impudent and rude. Just before the crash the witness' attention was directed to the back of the building on account of some commotion and when he got back into the other portion of the building the platform had collapsed (Tr. p. 319). He testified that immediately after the accident he observed the condition of the boys and observed that they (Christensen and Hayward, Tr. p. 324) had been drinking (Tr. p. 320); that the boys had been ordered from the platform on other occasions and had always got down (Tr. p. 325).

Joseph L. Sloan, an employee of Salt Lake City, a patron of the wrestling matches attending approximately ninety per cent of all of the events but not present on the night in question, testified to have personally "chased" people from the platform (Tr. p. 332). Vern F. Johnson, likewise a patron and at the arena on the night in question, saw Officer Murphy order the boys off the platform and then saw the boys get back again just before the platform collapsed (Tr. p. 336). Grant Pitts, a patron on the night in question, observed boys on the platform before the collapse arguing with Officer Murphy who told them to get down, which they did (Tr. p. 339), and saw other boys or the same boys return to

the platform during an intermission (Tr. p. 340). Darwin Steadman, an usher, saw three or four boys on the platform scuffling amongst themselves. The boys had been ordered down, the rule of the house being that no one could sit upon the platform and that it was the witness' duty to see to the seating of patrons (Tr. p. 343). Sidney Neslen, a student at the University of Utah and a patron of the wrestling matches, attempted to sit on the platform sometime between the date of January 7, 1946 and March 12th of that year when he was ordered down by a fireman and later by an usher. (Tr. p. 353).

The Wright and Hayward boys were from Bountiful and attended the wrestling matches with young companions from that place, calling themselves the "Bountiful crowd". The Bountiful boys were the only ones that testified to having obtained permission from Mr. Downing to sit on the platform. The trial court, notwithstanding the testimony of disinterested witnesses as to what actually occurred on the night in question with respect to the boys having been ordered off the platform and with respect to the general practice in that regard, refused to submit an interrogatory to the jury to be used in connection with the general verdict, the interrogatory being so framed as to require a yes or no answer to the question "Did either one of the defendants tell the plaintiff or his companions that he, the said plaintiff or said companions, might sit on the platform or alcove on the night the accident occurred?" (Tr. p. 71). The trial court did not consistently submit the

question of the alleged express consent or permission for the boys to sit upon the platform, limited the application of the rule of contributory negligence and refused to submit the issue of assumption of risk and permitted, over objection, plaintiffs' counsel to argue the responsibility of a proprietor who maintains an attractive nuisance on his premises, a theory not contemplated by the pleadings or proper from the proof. These, in the main, are the questions to be determined upon this appeal.

STATEMENTS OF ERRORS RELIED UPON

1. The court erred in not submitting to the jury the question of assumption of risk (Requested Instructions, 9 Tr. p. 68; 10 Tr. p. 69; 11 Tr. p. 70; all refused. Exception p. 389).

2. The court erred in not consistently instructing that plaintiffs had the burden of proving express consent to sit where they did (Requested Instruction 7 refused Tr. p. 66. Exception Tr. p. 388).

3. The court erred in its instruction on contributory negligence and in refusing to instruct as requested (Instruction Tr. p. 50; Requested instructions 3 Tr. p. 62; 4 Tr. p. 63. Exception Tr. p. 388).

4. The court erred in failing to instruct on defendants' theory that consent or permission was not given to the plaintiffs to sit where they did (Requested Instruction 8 Tr. p. 67. Exception Tr. p. 388).

5. The court erred in refusing to submit a special interrogatory to the jury, to be returned in connection with its general verdict, inquiring as to whether or not either one of the defendants told the plaintiff or his companions that he, the said plaintiff, or his companions might sit on the platform or alcove on the night the accident occurred (Requested Instruction 12 Tr. p. 71. Exception Tr. p. 389).

6. The court erred in permitting plaintiffs' counsel to argue before the jury to the effect that it was negligence on the part of the defendants to permit the opening in the wall known as the alcove to remain there as an inducement for boys of the ages of fourteen, fifteen and sixteen to sit, and upon being so requested to fail and refuse to instruct the jury that that was not an issue in the case (Argument, request and exception Tr. pp. 384-386).

7. That the court erred in overruling and denying defendants' motions for new trial (Motions Tr. pp. 80-83, 390-395. Ruling Tr. p. 396).

8. The verdict and judgment thereon in each of the cases is not supported by but is contrary to the evidence.

ARGUMENT

The assignments of error and the various propositions involved group themselves for argument as follows:

1. The Jury Was Not Adequately Instructed On The Defense Of Assumption Of Risk.

From the fact that the boys, according to their testimony, requested permission from Mr. Downing on each evening that they attended the bouts to sit in the alcove, it can reasonably be inferred that they were conscious of possible hazards in so doing. The Bountiful boys, and particularly the plaintiff Hayward, were on the platform and in the alcove several weeks before the accident when the floor of the same "bent in a little" (Tr. p. 154) when additional weight was added.

"Q. But it was the floor that started to give way in one corner; is that it?

A. Yes." (Tr. pp. 154-155).

The witness Lewis testified:

"Q. Did the boys ever tell you Mr. Downing had told them they could, or couldn't sit up there?

A. They agreed not to go up there, after I told them. * * *

A. Well, they *come* to the conclusion it was better for them not to get up there. They felt as though it wasn't safe at the time. They weren't the only boys we had to keep down. And finally we had to go to Mr. Murphy and have Mr. Murphy come and help make them get off there." (Tr. pp. 305-306).

The witness also testified:

"Q. Did I understand you to say that the boys asked you if they could talk to Mr. Downing?

A. Yes, they asked me. I told them to see Mr. Downing.

Q. What happened after that?

- A. I wouldn't let them up there. They said, 'It is funny you won't let us up there'. They said 'We got word from Mr. Downing'. I said, 'By all means boys, it is not safe'." (Tr. p. 305).

Both answers (Tr. pp. 31-36) raised the issue that the plaintiffs assumed the risks and hazards, if any, in connection with their presence upon the platform. Specific instructions on that theory were requested as follows:

**"DEFENDANTS' REQUESTED INSTRUCTION
NO. 8.**

You are instructed that, if you find from the evidence in this case that the alcove or platform, where plaintiff was sitting or standing, was constructed for some purpose other than for patrons to sit or stand upon and that plaintiff was not given permission to sit there, and you further find that plaintiff was injured by reason of some matter not known to the defendants, or either of them, your verdict shall be for the defendants and against the plaintiff **NO CAUSE OF ACTION.**" (Tr. p. 67).

**"DEFENDANTS' REQUESTED INSTRUCTION
NO. 9.**

You are instructed that, if you find that the plaintiff did not obtain permission to occupy the alcove or platform where he was sitting, then you are instructed that he assumed all risk of injuries arising from the use of the platform or alcove, and, therefore, your verdict shall be for the defendants and against the plaintiff **NO CAUSE OF ACTION.**" (Tr. p. 68).

“DEFENDANTS’ REQUESTED INSTRUCTION
NO. 10.

You are instructed that if you find from the evidence in this case that the alcove or platform where plaintiff was sitting or standing was constructed for some purpose other than for patrons to sit or stand on, and that plaintiff was not directed to sit or stand there but did so of his own choice, he assumes the risk which may attach to such place, and if his injuries were caused by reason of the fact that said place was not properly constructed for patrons to sit and stand on, then your verdict shall be in favor of the defendants and against the plaintiff NO CAUSE OF ACTION.” (Tr. p. 69).

“DEFENDANTS’ REQUESTED INSTRUCTION
NO. 11.

You are instructed that if one voluntarily takes a place, which is more dangerous and hazardous than the place or location generally provided for patrons, he assumes the risk incidental to such hazards and if his injuries are caused by reason of his taking the more hazardous place, then your verdict should be in favor of the defendants and against the plaintiff NO CAUSE OF ACTION.” (Tr. p. 70).

The foregoing instructions were refused. All that the court said on the subject was in connection with its Instruction No. 1 where it summarized the issues (Tr. p. 44) omitting any reference to the subject in its further instructions.

The distinction between contributory negligence and assumption of risk is pointed out in the case of *Taylor v. Bamberger Electric R. Co.*, 62 Utah 552, 220 P. 695, where the court stated:

“The questions, therefore, for this court to determine are: Did plaintiff’s acts and conduct, as stated by himself, constitute contributory negligence per se, and did he assume the risk as matter of law? In this connection we desire to state that the question of assumption of risk is here discussed for the reason that in this case that issue was presented by the pleadings and the district court submitted it to the jury in connection with the issue of contributory negligence. Anything that is herein said on the question of assumption of risk is limited to the facts and circumstances of this case, and we do not now pass upon the question of whether, as between a common carrier and a passenger, that defense is ordinarily available to the carrier and, if so, to what extent.

As pointed out by this court in *Kuchenmeister v. L. A. & S. L. R. R. Co.*, 52 Utah, 116, 172 Pac. 725, there is a clear distinction between contributory negligence and assumption of risk. It has, however, also often been held that under certain circumstances the same acts or conduct may make one guilty of contributory negligence and also give rise to the defense of assumption of risk.

The undisputed facts and circumstances, according to the authorities to which we shall hereinafter refer, clearly bring this case within the doctrine just stated. In view of plaintiff’s statements, there is not a shadow of doubt that he acted with full knowledge of all the circumstances

surrounding him and that all that he did in the premises was done deliberately and with full appreciation of the danger to which he exposed himself. True, he may not have anticipated the lurching or swaying of the cars; hence it is contended that because the lurching of the cars was due to the defendant's negligence plaintiff did not assume the risk. It no doubt is true that under ordinary circumstances a passenger will not be held to have assumed a risk arising out of a carrier's negligence. In this case, however, the circumstances are extraordinary. Here the defendant had provided the plaintiff with a reasonably safe place in which he could have been safely carried to his destination. He, of his own volition and through intelligent choice, left the place where he was safe and chose one that was extremely dangerous. It might just as well be contended that although plaintiff had chosen to ride on the trucks under the cars and was injured by reason of the lurching of the cars, his conduct did not constitute contributory negligence, and that he did not assume the risk, since the lurching was caused by reason of a defect in the track which the defendant, in the exercise of that high degree of care which the law imposed on it, should have prevented."

The Taylor case, *supra*, is not a case involving the relationship of master and servant, in which class of cases the doctrine of assumption of risk is most frequently applied. That the doctrine is applicable in an action between persons not master and servant or not having relations by contract with each other, where the plaintiff knew and appreciated the danger and voluntarily put himself in the way of it, is recognized in the Taylor case

and in the case of *Edwards v. Southern Railway Company*, 169 So. 715, 106 A.L.R. 1133 (Ala.) where the court stated:

“In the case of *McGeever v. O’Byrne*, 203 Ala. 266, 269, 82 So. 508, the phrase ‘assumption of risk’ is fully considered, and it is there noted that the expression is sometimes loosely applied to cases where there was no contractual relation between the parties. The rule declared is, that it must be confined to cases where the plaintiff knew and appreciated the danger assumed, and with such knowledge and appreciation voluntarily put himself in the way of it.”

The uncontradicted testimony is that for some period of time the plaintiffs knew that the platform would sag or become loosened by reason of weight placed upon it; that they had been expressly warned that it was not safe and that they had concluded that it was not a safe or proper place for them to sit. Applying the doctrine of assumption of risk, and in view of the uncontroverted testimony, then it would follow that as a matter of law the plaintiffs should not be entitled to recover. At least the issue became one that the jury should have considered upon proper instruction stating and setting forth the law applicable to the facts in issue. This the court did not do. That it should have done so is fundamental, as stated in *Herndon v. Salt Lake City*, 34 Utah 65, 95 P. 646:

“Instructions should in all cases apply the law to the existing facts and circumstances, and in cases of negligence, where the duty varies with

the conditions, a mere general statement of the law with regard to the duty generally imposed is, if possible, worse than not to instruct at all.”

The mention of assumption of risk in outlining the issues, in Instruction No. 1, the lack of reference to it in Instruction No. 2 where it is stated without reference to the particular defense of assumption of risk “the defendants have the burden of proving by a preponderance of the evidence the contributory negligence, if any, of the plaintiff”, and no further reference throughout the instructions brings the case, we believe, within the rule announced by this court in *Martin v. Sheffield*, 189 P. (2d) 127, decided February 3, 1948, where the court held:

“Such instruction, uneluciated in any other part of the charge, might well be construed by the jury to mean that though the jury found negligence on the part of plaintiff which proximately contributed to the accident, nevertheless plaintiff was entitled to a verdict.

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

2. The Jury Was Not Adequately Instructed On The Defense Of Contributory Negligence.

The court refused Defendants’ Requested Instruction No. 3 (Tr. p. 62), which reads as follows:

“You are instructed that, if you find that the plaintiff by his acts or conduct other than

merely sitting upon the platform caused, or in any manner, no matter how slight, contributed to the accident, he cannot recover and your verdict must be in favor of the defendants NO CAUSE OF ACTION."

The court modified Defendants' Requested Instruction No. 4 (Tr. p. 63) which, as requested, read as follows:

"You are instructed that if you find from the evidence there was scuffling, wrestling, or playing on the alcove or platform, and that such conduct on the part of plaintiff or his companions caused or contributed to the giving away of the alcove or platform floor, then you are instructed that your verdict must be in favor of the defendants and against the plaintiff NO CAUSE OF ACTION."

The modified request is found in Instruction No. 7 (Tr. p. 50) as follows:

"You are instructed that if you find by a preponderance of evidence that the plaintiff engaged in scuffling, or wrestling on the alcove or platform, *and that such conduct on the part of plaintiff was what a reasonably prudent person would not have done under the facts and circumstances then and there existing* and proximately caused or contributed to the giving away of the alcove or platform floor, then you are instructed that your verdict must be in favor of the defendants and against the plaintiff, no cause of action."

The vice of the requested instruction given as modified is the language inserted by the court, emphasized above by italics.

The theory upon which the cases were tried, measured by the law of the case as announced in the former appeal, would not permit the plaintiffs any greater latitude under the status of invitees than that of sitting upon the platform for the purpose of viewing the wrestling bouts. To permit the jury to measure the plaintiffs' conduct while on the platform under the rule of conduct of that of a "reasonably prudent person" while doing something beyond the express permission granted goes beyond the law of the case and permits something more than the express permission contemplated. As the instruction was requested the abuse of the express privilege allegedly granted, making the plaintiffs invitees rather than trespassers, was stressed, the abuse being that of scuffling, wrestling or play on the platform; then that conduct in view of the circumstances of the case, if such conduct caused or contributed to the giving way of the platform, would be contributory negligence. And indeed it might well be argued that such conduct would in turn remove the plaintiffs from the status of invitees. In any event, as a matter of law, the jury should have been instructed that if in fact the boys were scuffling, wrestling or playing on the platform and that that conduct caused or contributed to the giving away of the platform, they were guilty of contributory negligence, but the court went further and permitted the jury by the instruction given to apply the reasonably prudent person rule notwithstanding the limitations of the express permission the defendants allegedly gave, which in turn this court has held to be the only thing that placed the plaintiffs in the

status of invitees. The instruction as given contains the same fundamental objection as the instruction in the Martin case, supra, and that is it "might well be construed by the jury to mean that though the jury found negligence on the part of plaintiff which proximately contributed to the accident, nevertheless plaintiff was entitled to a verdict."

3. The Jury Was Not Adequately Instructed On The Question Of "Express" Consent Or Permission, The Law Of The Case.

In the previous appeal and as heretofore pointed out the court held: "But when one of the defendants expressly consented that plaintiffs sit upon the platform, the invitation was broadened to include the platform, at least as to plaintiffs." In Instruction No. 2 the court omitted the expression "express permission", likewise in Instructions No. 4 and 5. The only place where the term "express permission" was used is found in that portion of Instruction No. 7 which reads:

"You are instructed that before the plaintiff can recover in this action he must prove by a preponderance of the evidence that he was given express permission to sit upon the place where he says he was sitting on the night of the accident. It is not sufficient that the plaintiff, or his companions, sat on the platform as a matter of custom or practice, or of their own volition, or even with the knowledge of the defendants, or either of them, and if, therefore, you find that the plaintiff was not given express permission to sit where he did, then your verdict shall be in favor of the defendants and against the plaintiff, no cause of action." (Tr. p. 50).

The court refused Defendants' Requested Instruction No. 7, which reads as follows:

"You are instructed that a request by the plaintiff to sit where he did is not the same as a direction to sit there. The plaintiff, before he can recover in this action, must show that he was directed to sit where the accident occurred." (Tr. p. 66).

The plaintiffs testified to sitting upon the platform on a number of previous occasions and having seen others do likewise. Whether or not express permission was obtained on previous occasions on behalf of the plaintiffs and others is debatable, but the court should not have been uncertain in the use of the expression "consent or permission" in view of the previous holding of the court, which holding centered the status of invitee about the term "express" permission.

In *Rio Grande Western Ry. Co. v. Stringham*, 39 Utah 236, 115 P. 967, the court holds:

"The former decision became and is the law of the case, and this court, as well as the litigants, are bound thereby."

From the whole of the charge it cannot help but appear that the court disregarded the significance of the term "express" consent and failed to give it proper emphasis consistently as the law of the case throughout the instructions.

4. The Court Failed To Give Any Emphasis To The Denials Of Plaintiffs' Contention.

Requested Instruction No. 8, which the court refused, was as follows:

“You are instructed, if you find from the evidence in this case that the alcove or platform, where plaintiff was sitting or standing, was constructed for some purpose other than for patrons to sit or stand upon and that plaintiff was not given permission to sit there, and you further find that plaintiff was injured by reason of some matter not known to the defendants, or either of them, your verdict shall be for the defendants and against the plaintiff NO CAUSE OF ACTION.” (Tr. p. 67).

The requested instruction was on the theory that the jury might well disregard as unreliable the testimony of the Bountiful boys and find that the express permission or consent relied upon was not in fact extended to them, in which event then the court as a matter of law could say that the evidence fell short of establishing liability as against a trespasser or mere licensee, requiring the verdict of no cause of action. That theory, by way of instruction, was not separately stated nor clearly pointed out to the jury. What suggestion was made on that score was hidden in other instructions and comingled with other matters so as to result in a situation where the defense of denial was for all practical purposes entirely unelucidated in the charge, the criticism that the court found with the charge in the Martin case, *supra*.

Instruction No. 1 states that the defendants in each case denied “the said allegations of each of the plaintiffs”, the only reference to denials in that instruction.

Instruction No. 2 states that the plaintiff has the burden of proving by a preponderance of the evidence that the defendant Downing gave permission to sit in the alcove. Instruction No. 3 defines burden of proof and preponderance of the evidence. Instructions No. 1, 2 and 3 are so-called stock instructions. Instruction No. 4 emphasizes the fact that defendants admit the plaintiffs paid an admission fee to see the wrestling matches, and the plaintiffs contention that they had the permission of the defendant Downing to sit in the alcove, stating "this the defendants deny". The instruction then proceeds to state that if it is found from a preponderance of the evidence that the plaintiffs did have permission, then they were guests and the defendants owed the duty of exercising reasonable care. The instruction unnecessarily emphasizes the payment of an admission fee, emphasizes the guest relationship and minimizes, so far as language by implication can do so, the significance of the defendants' denial that permission was given. Instruction No. 5 is subject to the same criticism while Instruction No. 6 states that if the plaintiffs chose to sit at a place not ordinarily provided for patrons, and a place where they were not given permission to sit, the defendants would owe them no duty of inspection or otherwise to keep the place in a safe condition for the seating of patrons, but the instruction does not go further and state the legal effect of the want of permission so far as the law applicable to the facts in the instant cases is concerned.

Instruction No. 7 is as close as the court came to stating the legal effect of the lack or want of express permission for the boys to sit where they did, but it will be noticed that several independent subjects are treated in the one instruction. In fact the court included in Instruction No. 7 nearly all of the few requests that it gave on defendants' theory. In fairness we do not believe it can be said that the court gave proper emphasis to the significance of the want or lack of express permission, even in Instruction No. 7. None of the other instructions have anything whatsoever to do with the matter.

5. The Court Abused Its Discretion In Not Submitting The Special Interrogatory To Test The General Verdict.

By Requested Instruction No. 12 (Tr. p. 71) the defendants asked the court to submit the following:

“You are instructed that in connection with your general verdict in this case, whether it be for the plaintiff or whether it be for the defendants, that you are required to answer the following question or interrogatory:

Question: Did either one of the defendants tell the plaintiff or his companions that he, the said plaintiff, or his companions, might sit on the platform or alcove on the night the accident occurred?

Answer: ———.

The foregoing interrogatory shall be answered either yes or no, and 6 of the jurors concurring may make answer to the interrogatory by the foreman.”

We appreciate that under Section 104-25-2 U.C.A. 1943 the granting of a request such as the above is within the sound discretion of the trial court. The opinion of this court in the formal appeal makes the matter of express consent the outstanding and controlling fact in the whole case. As we have heretofore pointed out, the instructions of the court do not emphasize the matter of the existence or lack of express consent and the fact that the trial court refused the special interrogatory emphasizes the misconception that the court must have had of the previous ruling, the law of the case. Special interrogatories and findings to test the sufficiency of the general verdict should be encouraged and the useful purpose thereof in the administration of justice is apparent in a great number of cases but in the instant matter and where the appellate court has reversed and remanded for new trial, pointing out a controlling factual situation, most certainly it would be an abuse of discretion, where discretion is permitted, for the court not to give proper emphasis to the same. It can well be said that the controlling factual situation was camouflaged by a mass of verbiage concerning matters incidental to the crux of the situation. We submit that under the circumstances it was an abuse of discretion not to submit the requested interrogatory, and here again we call attention to the fact that there was testimony of several disinterested witnesses on the main point in issue.

6. The Suggestion By Way Of Argument Of An Attractive Nuisance Was Prejudicial.

The record on this point is as follows:

“MR. GUSTIN: First, your Honor, might we make a record of what occurred, during the closing argument of the plaintiff, the argument being made by Judge Tanner.

THE COURT: Yes.

MR. GUSTIN: Where he stated, in substance and effect, that it was negligence on the part of the defendants to permit the opening on the wall known as the alcove, to remain there as an inducement for boys of the age of fourteen years, or thereabouts, to sit. I believe I have stated the substance of what Mr. Tanner stated.

THE COURT: That in substance is right, is it not?

MR. TANNER: Fourteen, fifteen and sixteen.

MR. GUSTIN: All right, fourteen, fifteen and sixteen.

And that thereupon, the defendants, by counsel, asked the court to instruct the jury that that element was not one of the issues in the case, and the court stated that the jury had been instructed as to the elements in the case, and that that was sufficient. I think that is the substance.

THE COURT: I believe I said, Mr. Gustin, if my recollection is right, that the issues in the case were set forth in the instructions, and that the jury were the sole judges of the facts, and the court would let it stand at that.” (Tr. pp. 384-385).

In *Jensen v. Utah Ry. Co.*, 72 Utah 366, 270 P. 349, it was held:

“In this jurisdiction, arguments to the jury are made after, and not before, the charge of the court.

For purposes of arguments to the jury, counsel, of course, are required to accept the charge and yield obedience to it, and are not permitted to argue against it. So, when counsel in effect argued that one of the parents was negligent, whether for the purpose of showing that such negligence was the sole and proximate cause or a concurring cause of the injury, he, because of the charge, was not within his rights, though the argument may have been entirely in good faith. We of course recognize a wide scope and great liberality in arguments of causes to a jury. But here the court clearly withheld from the jury all questions of negligence of the parents for any and all purposes. In such case, on timely objections, as here made, to permit arguments, either directly or indirectly, with respect to such questions, tends to mislead the jury. While the court eliminated some of the argument, he ought to have eliminated the whole of it, bearing on the subject, and erred in not doing so.”

In *Kerby v. Oregon Short Line R. Co.*, 264 P. 377 (Idaho), the court said:

“An attorney should confine his arguments to the issues and the evidence adduced, and to inferences which can legitimately be drawn therefrom, and not go outside the record in an effort to prejudice the rights of the opposing party.”

The prejudicial effect of counsel's statement is readily apparent in a case of this kind. To suggest that the attractive nuisance theory of liability exists in the instant matter is to depart entirely from plaintiffs' theory that they were not trespassers but were invitees. There was nothing in the proof nor is there anything in the pleadings that would justify counsel's statement. What he said was clearly beyond the theory of the case and the instructions of the court. The statement was undoubtedly calculated to prejudice the jury against the proprietor of wrestling bouts who had accepted an admission charge. To be able to say without admonishment that the defendants were negligent in permitting the opening in the wall, known as the alcove, to remain there as an inducement for boys sixteen years of age and under to sit could not help but confuse the jury as to the true issues involved. The trial court was given an opportunity to instruct the jury that the matter suggested was not an element in the case and for the court to disregard the request and to state that the issues in the case were as set forth in the instructions, and that the jury were the sole judges of the facts, could not possibly have cured the situation. The effect of the statement, coupled with the failure of the court to act upon being requested, was to permit counsel to go outside of the issues of the case, to depart from the instructions of the court and to suggest a theory of absolute liability, and we contend thereby that prejudice is to be presumed.

CONCLUSION

Regardless of the sympathy that one might have for the unfortunate situation of the plaintiffs, the defendants were entitled to have their side of the case fairly and impartially presented to the jury with the law applicable thereto. When one considers the instructions as a whole, the failure of the trial court to crystallize the one controlling fact that was in issue through the medium of the special interrogatory, the over-reaching of counsel in his argument into a realm of absolute liability without restraint in a case where by the very nature of it, emotions and prejudice play such an important role, then we say that the errors committed, all added together, result in a situation where a fair trial was not had on matters peculiarly within the province and under the control of the court itself. The judgments appealed from should be reversed.

Respectfully submitted,

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and Appellants.*