

1957

Walter Anderson v. Arthur Hardman dba Hardman Auto Sales et al : Brief of Defendant and Appellant Arthur Hardman

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

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WALTER ANDERSON,

Plaintiff and Respondent,

vs.

ARTHUR HARDMAN, dba HARD-
MAN AUTO SALES, NATHAN
CHILD and BARRUS MOTOR
COMPANY,

Defendants and Appellants,

Clerk, Supreme Court, Utah

BRIEF OF DEFENDANT AND APPELLANT
ARTHUR HARDMAN

HANSON & BALDWIN

*Attorneys for Defendant and
Appellant Arthur Hardman*

SUBJECT INDEX

	Page
NATURE OF THE CASE.....	1
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS.....	5
ARGUMENT	5
POINT I. THE DEFENDANT NATHAN CHILD WAS NOT DRIVING SAID PICKUP TRUCK AT THE TIME OF THE ACCIDENT AS THE AGENT OR SERVANT OF THE DEFENDANT ARTHUR HARD- MAN	5
POINT II. THE COURT ERRED IN ITS INSTRUCTIONS BY SUBMITTING ISSUES TO THE JURY WHICH WERE NOT SUPPORTED BY THE EVIDENCE AND BY FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT HARDMAN'S THEORY OF THE CASE.....	30
CONCLUSION	37

INDEX OF AUTHORITIES

Bates vs. Simpson (Utah), 239 P. 2d 749, 121 Utah 165.....	25
Bingham City, et al. vs. Industrial Commission, 66 Utah 390, 243 P. 113.....	6
Coleman vs. Bent, 100 Conn. 527, 124 Atl. 224.....	26
Davis v. Semloh Hotel, Inc., 86 Utah 318, 44 P. 2d 689.....	12
Derrick vs. Salt Lake & Ogden Ry. Co., 50 Utah 573, 168 P. 335	23
Dowsett vs. Dowsett, 116 Utah 12, 207 P. 2d 809.....	8
Fox vs. Lavender, 89 Utah 115, 56 P. 2d 1049.....	7, 25
Foxley vs. Gallagher, 55 Utah 298, 185 P. 77.....	24
Galarowicz vs. Ward, 230 P. 2d 576, 119 Utah 611.....	28

INDEX CONTINUED

	PAGE
Heaston v. Martinez, 3 Utah 2d 259, 282 P. 2d 833.....	17
Jackson vs. James, 97 Utah 41, 89 P. 2d 235.....	14
Jensen vs. Utah Ry., 72 Utah 366, 270 P. 349.....	36
Jones v. C. I. Trust, 64 Utah 151, 228 P. 896.....	10, 17
Knold vs. Rio Grande Western Ry., 21 Utah 379, 60 P. 1021....	36
Oberhansley vs Travelers Insurance Co., 295 P. 2d 1093, Utah	6
Startin vs. Madsen, 120 Utah 631, 237 P. 2d 834.....	35

TEXTS

31 A.L.R. (2) 1445.....	22
Restatement of the Law of Agency, Vol. 1, Sec. 1.....	7
Restatement of the Law of Agency, Vol. 1, Sec. 220.....	5
Restatement of the Law of Torts, Vol. 2, Sec. 491.....	26
Utah Code Annotated, 1953, Section 41-1-72.....	13
Utah Code Annotated, 1953, Section 41-1-77.....	17
Utah Code Annotated, 1953, Sections 60-2-2 and 60-2-3.....	9

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BRIEF OF DEFENDANT AND APPELLANT
ARTHUR HARDMAN

NATURE OF THE CASE

On December 20, 1955, Nathan Child was driving a 1951 International Pickup truck east on Highway 40, approximately ten miles west of Salt Lake City when the vehicle suddenly veered from the south side of the highway to the north side where it collided with an automobile driven by one George Williams in which the plaintiff was riding, resulting in severe injuries to plaintiff and Child.

The plaintiff sought to recover damages against

Nathan Child, Arthur Hardman, dba Hardman Auto Sales, and Barrus Motor Company. The suit was brought against Hardman as a defendant upon the theory that Child was his servant or agent and against Barrus Motor Company upon the theory that the steering apparatus and the wheels of the vehicle were in a defective condition, which the Barrus Motor Company knew or should have known.

1

The allegations of negligence were denied by all three defendants. Hardman also denied that Child was his agent or servant. A jury returned a verdict in favor of the plaintiff and against the defendants Hardman and Child in the sum of \$5,632.00.

This appeal is taken by the defendant Hardman upon the grounds that there was no evidence to go to the jury on the issue of whether Child was his servant or agent and that his motion for a directed verdict of No Cause of Action made at the close of the evidence should have been granted. Defendant Hardman also contends that the court erroneously gave certain instructions and refused to give others.

STATEMENT OF FACTS

The defendant Arthur Hardman is a resident of Sunset, Utah, where he operated a garage and used car lot (R. 91). The defendant Child had known Hardman for some time before December 20, 1955 (the date of the accident). They had done business together in the past.

Some weeks before December 20th Child informed

Hardman that he was interested in buying a used pickup truck (R. 83). Sometime after, and a few days before December 20th, Hardman told Child that he thought he had located a pickup in Tooele, Utah, which might interest him. Arrangements were made for Child to accompany Hardman on a trip to Tooele in order that he could see the vehicle (R. 83). They traveled to Tooele in Hardman's wrecker. Child paid no part of the trip expense (R. 84). Arrived at Barrus Motor Company at about 10:00 o'clock A.M. (R. 96). The vehicle they were interested in was not there when they first arrived but was returned to Barrus Motor Company about one hour later.

Child was interested in the vehicle and in order to ascertain its mechanical condition Hardman and Child both drove it (R. 97). They noticed that the window was defective, the speedometer did not work and that the oil pressure was low. There may have been one or two other minor defects (R. 98). Hardman noticed nothing unusual in the steering mechanism or the way the vehicle drove (R. 97). Child said that he would take the truck if the defects which they noticed were repaired (R. 84 and 98), which was done by Barrus Motor to Child's satisfaction (R. 90 and 98).

The purchase price agreed on by Hardman and Child was \$650.00 plus the turn-in value of Child's '41 truck (R. 86, 87 and 94). Hardman would not have purchased the truck from Barrus Motor if Child hadn't told him that he would buy it from him as Hardman didn't want to pay property tax on it, which would have been due

January 1, 1956 (R. 85 and 94). Hardman paid Barrus Motor \$600.00 for the pickup (R. 92). They delivered to him the Certificate of Title, a Bill of Sale and a receipt for the \$600.00 payment (R. 92 and 93) but not the Registration Certificate (R. 95) which they were unable to locate. These documents were not delivered by Hardman to Child, which would have been done when they returned to Sunset (R. 93 and 99). Other than the paper work the deal between Child and Hardman was completed verbally before they left Tooele on the return trip (R. 94).

When they were ready to leave Tooele Hardman delivered possession of the pickup to Child (R. 95). Child said that he would follow Hardman in the pickup truck and Hardman suggested that they occasionally pass each other on the way back so that if either had trouble the other would know about it (R. 87 and 208). Child put Hardman's Dealer's License Plates on the pickup truck before they left Tooele (R. 91). After leaving Tooele on the return trip Hardman stopped at Mills Junction to check the cables on the vehicle he was towing (R. 205). Child stopped behind him. After resuming the trip Child had passed Hardman once, and had passed him the second time when the accident happened (R. 209, 217-219).

Hardman did not purchase the gasoline for the pickup truck (R. 414), nor did he pay or agree to pay Child any compensation.

STATEMENT OF POINTS

POINT I.

THE DEFENDANT NATHAN CHILD WAS NOT DRIVING SAID PICKUP TRUCK AT THE TIME OF THE ACCIDENT AS THE AGENT OR SERVANT OF THE DEFENDANT ARTHUR HARDMAN.

POINT II.

THE COURT ERRED IN ITS INSTRUCTIONS BY SUBMITTING ISSUES TO THE JURY WHICH WERE NOT SUPPORTED BY THE EVIDENCE AND BY FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT HARDMAN'S THEORY OF THE CASE.

ARGUMENT

POINT I.

THE DEFENDANT NATHAN CHILD WAS NOT DRIVING SAID PICKUP TRUCK AT THE TIME OF THE ACCIDENT AS THE AGENT OR SERVANT OF THE DEFENDANT ARTHUR HARDMAN.

If liability is to be imposed upon Hardman because of the negligence of Child it must be upon some theory under which Hardman exercised the control or had the right to control the manner in which Child drove the vehicle. Plaintiff alleges in his complaint that Child was the servant or agent of Hardman.

Considering first whether the relationship was master and servant, the *Restatement of the Law of Agency*, Volume 1, Section 220 defines a servant as follows:

“(1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.”

There was certainly no evidence that Child was employed by Hardman. He was paid no compensation for traveling to Tooele or driving the pickup truck on the return trip. In the recent case of *Oberhansley vs. Travelers Insurance Co.*, 295 P. 2d 1093, Utah, one of the questions involved was whether Oberhansley was the employee of one Pearce, for whom he was driving a car to Evanston, Wyoming from Ogden. Pearce had given him \$10.00 for traveling expense. The former testified at the trial that if he had seen Oberhansley driving the car in the manner which might result in damage to it, he felt that he could tell him not to do so inasmuch as the car was his responsibility. In holding that the relationship was not master and servant this court quoted from the decision of *Bingham City, et al. vs. Industrial Commission*, 66 Utah 390, 243 P. 113, on page 393, as follows:

“The usual test by which to determine whether one person is another’s employe is whether the alleged employer possesses the power to control the other person in respect to the services performed by the latter and the power to discharge him for disobedience or misconduct. Under the Workmen’s Compensation Act it is also essential that some consideration be in fact paid or payable to the employe. The purpose of the act is to provide compensation for earning power lost in industry, and the only basis for computing compensation is the earning ability of the employe in the particular employment out of which the loss arises. In short, the term ‘employe’ indicates a person hired to work for wages as the employer may direct . . .”

The evidence is even more clear in this case that Child was not the employee or servant of Hardman.

Was the relationship between Hardman and Child that of principal and agent? Agency is defined in the *Restatement of the Law of Agency*, Vol. 1, Section 1, as follows:

“(1) Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

“(2) The one for whom action is to be taken is the principal.

“(3) The one who is to act is the agent.”

In the case of *Fox vs. Lavender*, 89 Utah 115, 56 P. 2d 1049, Justice Wolfe said:

“The test of whether one is the agent of the other depends upon the right of control of one over the other. The same principles of agency apply to the running of an automobile as apply to any other field of action. The fact that the automobile is capable of causing so much damage has led the court, sometimes unwillingly, to depart from the fundamental principles of principal and agent in order to hold owners responsible, the thought in the minds of the court being that more responsibility should be visited upon the owner of such an instrument because of the potentialities of mischief.”

* * * * *

“Many cases have loosely used such expressions such as ‘for and on behalf,’ or ‘in the business of,’ or ‘for the benefit of.’ As stated before, the inquiry must be directed to the question of

agency in the operation of the car rather than to the question of agency for the accomplishment of some ultimate purpose."

In the case of *Dowsett vs. Dowsett*, 116 Utah 12, 207 P. 2d 809, a boy in the Army requested his father and mother to bring his car to him, and the other was injured in an accident while the father was driving the car to the army camp where the boy was stationed. The mother subsequently brought an action against the boy upon the theory that the father was the agent or servant of the defendant.

"* * * '*An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For the purpose of determining liability, they are both 'independent contractors' and do not cause the person for whom the enterprise is undertaken to be responsible* * * *.' (Emphasis ours.)

"If respondent had no right of control over the driver of his car, the court did not err in directing a verdict of no cause of action. As shown above, a principal cannot be held responsible for the torts of his agent where he has no right of control over that agent."

One of the factors to be considered in determining whether Hardman had any right of control over the pickup is whether he was the owner of the vehicle, or to state it otherwise, whether there had been a sale of the vehicle to Child.

In this instance we are dealing with a specific piece

of property, that is, a pickup automobile. All of the repairs to the automobile had been made, that is, the automobile had been put in a deliverable state (R. 84, 90, 98) and the purchase price had been agreed upon (R. 86-88). Except for the necessary paper work and the actual payment of the purchase price, everything that was agreed to be done had been done and the transaction was complete (R. 94-95, 98). Hardman did not want to buy the pickup truck from Barrus unless Child would take it, as he had no market for it, and didn't want to pay the property tax which would be levied on the vehicle on January 1, 1956 (R. 84-85, 94). This being the case, ownership of the specific property had passed from Hardman to the defendant, Nathan Child, prior to the time the parties left Tooele. *Sections 60-2-2 and 60-2-3, Utah Code Annotated 1953*, relating to the transfer of property and title so far as those sections are applicable to this situation provide:

“60-2-2. Property and specific goods passes when parties so intend. (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

“(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

“60-2-3. *Rules for ascertaining intention.*— Unless a different intention appears, the following are rules for ascertaining the intention

of the parties as to the time at which the property and the goods is to pass to the buyer;

“Rule (1) Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed.

“Rule (4) * * *

(b) Where in pursuance of a contract to sell the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in cases provided for in the next rule and in Section 60-2-4. (Rule 5 and Section 60-2-4 not applicable). * * *

In *Jones v. C. I. Trust*, 64 Utah 151, 228 P. 896, Jones owned a Chandler car. He left it with the Naylor-Woodruff Motor Company with authority given the Motor Company to sell it for \$1,500.00. There was a Cleveland car, the only one of its kind then on the floor of the Motor Company showroom. Jones and his son inspected the Cleveland car and declared they would buy it if the Chandler car could be sold for the price named, and the Motor Company was authorized, in the event of the sale of the Chandler car, to apply the purchase price on the price of the Cleveland car and Jones was to pay in addition the sum of \$375.00. Says the court:

“ A sale involves a present transfer of the

title in the goods from the seller to the buyer. A contract to sell implies that the title in the goods remains vested in the seller and is to be transferred to the buyer at some future time. Whether a contract is one of sale or an executory contract to sell depends always upon what the parties to it intend in regard to the time when the title in the property is to go to the buyer. If they intend the title to be transferred when the contract is made, it is a contract of sale; otherwise it is a contract to sell. The intention of the parties is the important and controlling fact to be considered and given effect in determining the nature of a contract in this regard. There may be a sale, a present passing of the title, notwithstanding that by the terms of the agreement the right to the possession of the thing sold is retained by the seller until the purchase price is paid. The intention must be determined from a consideration of the nature and terms of the contract, usages of trade, the conduct of the parties and the circumstances of the case. *If no contrary intention appears from such a consideration, then the law presumes, where the contract pertains to a specific chattel, in a deliverable state, that the parties intend the title to pass when the contract is made, and this is true regardless of the fact that payment of the price or delivery of the goods, or both, be postponed.*

The foregoing propositions are elementary. They are to be found in the provisions of the Uniform Sales Act, Comp. Laws of Utah, 1917, ss. 5110, 5127, 5128, Rule 1 (citing cases.)

* * *

“The parties to the contract now under consideration seem not to have expressed any intention whatever in regard to when the title in the new Cleveland sedan should vest in Jones. They

say nothing about that matter in the conversation on the morning of October 8th, nor in any of the correspondence which passed between them. Jones agreed, in effect, that he would buy the new sedan and pay \$1875.00 for it, if and when the sales company sold his old car for \$1500.00 net to him, the proceeds of the sale to that amount to apply upon the price of the new car, and that he would pay the balance of \$375.00 when he took possession of the new car. Both parties understood and intended that the sales company should retain the right to the possession of the sedan until the entire purchase price was paid. The company did sell the old car for more than the amount which Jones asked for it and received the money, so that Jones, as a result of that transaction, in fact paid \$1500.00 which is all that he claims in this action, toward the price of the new sedan. To all intents and purposes, the situation was then the same as if Jones had stepped into the sales company's office and handed over \$1500.00 in money as a part payment on the automobile, then on exhibition in the showroom, and said that he would return within a few days and pay the balance of \$375.00 and take the new car."

In the case of *Davis v. Semloh Hotel, Inc.*, 86 Utah 318, 44 P. (2) 689, an employer agreed to repurchase some shares of stock in the event the employee was discharged from his employment. Says the Court:

"Under the terms of the contract, whether or not the property in the stock passed to the buyer, the defendant was bound by his contract to repurchase and pay for the stock. The appellant having refused to pay for the stock according to the terms of the contract, the seller had the

right to maintain his action for the agreed price. The transaction did not contemplate an option on the part of the defendant to repurchase the stock, nor did it constitute what might be determined an offer to purchase the stock. It was a binding contract upon both parties subject only to a condition subsequent, viz., the discharge of the plaintiff from the employment contemplated in the contract. This condition subsequent having been fulfilled in the discharge of the plaintiff and the plaintiff having made tender of the stock, there would seem to be no good reason why he should not recover. *It was the clear intention of the parties that the title to the stock should pass to the defendant upon the happening of the events as outlined upon which the defendant became bound to pay.*"

The evidence of a present sale and transfer of the title to the property is even stronger in this case than in the two preceding cases referred to for the reason that there was no condition subsequent upon which the title to the automobile should pass, such as the sale of another automobile or the discharge of an employee, but rather it was intended by the parties that the ownership should pass at the time possession was surrendered which occurred prior to the time the parties left Tooele and before this accident occurred. It may be anticipated that the plaintiff will contend that no present transfer of the possession of the automobile was made at the time the automobile was delivered in view of *Section 41-1-72, Utah Code Annotated*, which provides that title to an automobile shall be deemed not to have passed until the title is transferred in accordance with the re-

quirements of the motor vehicle law. This argument is met by the case of *Jackson v. James*, 97 Utah 41, 89 P. (2) 235. In that case, T. F. Jackson was the registered owner of a Dodge car, which Alice C. Jackson claimed was given to her by T. F. Jackson as a wedding present. There was no transfer of the ownership certificate by the State Tax Commission and, therefore, defendant, the administrator of Jackson's Estate, claimed that Alice was not the owner of the car in the absence of such a transfer. He therefore refused to deliver the car to her. The court rejected this contention and declared:

"But, argues appellant, even though the evidence shows a gift of the car to the plaintiff, yet the gift is void in law because the ownership registration was not transferred in the office of the State Tax Commission. In support of this proposition they cite Section 71, Chapter 46, Laws of Utah 1935, and the case of *Schwartz v. White*, 80 Utah 150, 13 P. (2) 643. Appellant however, misconstrues both the effect of the statute and the import of the decision. The statute cited reads:

" 'Section 71:

" 'Until the department shall have issued such new certificate of registration and certificate of ownership, delivery of any vehicle required to be registered shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose except as provided in Section 76 of the Act.' Be it noted that the section does not apply to all vehicles, but only to those required to be registered. By Section 19, before a

motor vehicle can be driven upon a public highway, it must be registered. By Section 61, the transfer or assignment of title to a car automatically terminates the registration. Section 63 provides that the transferee of title to a car, before operating such vehicle on a highway shall secure a new registration of title, thus recognizing that he gets the title without transfer of registration. Section 66 further supports this view and section 67 contains this significant provision:

“‘Upon any such transfer a new owner may either secure a new registration and certificate of title on proper application, upon presentation of *such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of the title or interest in or to chattels*. In such case, where such new owner, upon transferring his title or interest to another person shall execute and acknowledge an assignment and warranty of title and deliver the same, also the documents of authority or certified copies thereof as may be sufficient required by law to evidence the right of such person, to the person to whom such transfer is made.’

“Section 69 provides for transfer of registration in certain cases by affidavit. It seems therefore that Section 71 is not to be construed, as contended by appellant, as absolute and mandatory to pass a title. In the light of the whole chapter, it is evident that its provisions were written to protect innocent purchasers and third parties from fraud, but was not intended to be controlling as between the parties to the transaction. It may well be doubted that the Legislature could make mandatory any such formalities as

a prerequisite to transfer of title as between the parties. It can, of course, prescribe such rules to be effective as to third parties and it may perhaps provide that the registered title shall be an element in determining liability for damages resulting from the operation of the car, as indicated by Section 76.

“Let us now devote a few minutes to a more particular analysis of Section 71, the section upon which appellant relies. It will be noted from the italicized portion of the section quoted, *supra*, that the title shall be deemed to be incomplete. These provisions are not absolute, mandatory or controlling in their application. They do not confer or deny substantive rights. They are procedural or evidentiary in nature. They provide a flag of warning to prospective transferees or encumbrancers, much as do the registry acts relative to real estate or chattel mortgages. Such was the effect given the statute in *Schwartz v. White*, 80 Utah 150, 30 P. (2) 643.”

So it is seen that the fact that certificate of title was not delivered to Child at the time the possession of the automobile was turned over to him is not important or determinative of whether or not ownership of the vehicle passed for the reason that the statute was not intended to prescribe the time ownership should pass between the parties, but rather to protect third parties, who relying upon public records might seek to purchase the automobile.

The following citation contains the intimation that the Legislature might provide that the registration title shall be an element in determining liability from damages resulting from the operation of the car. This intimation

stems from what is now *Section 41-1-77*, which reads:

“The owner of a motor vehicle who has made a bona fide sale or transfer of his title or interest and who has delivered possession of such vehicle and certificate of registration and certificate of title thereto properly endorsed to the purchaser or transferee, shall not be liable for any damages thereafter resulting from the negligent operation of such vehicle by another.”

It will be noted that the statute does not declare that if there is no physical transfer of the title papers to the buyer, the seller will be liable for the negligence of the buyer; it merely states that if the car has been delivered to the buyer and with it the certificate of registration and certificate of title properly endorsed, the seller is no longer liable for damages to the buyer (even though no new certificate has been issued to the buyer). It is submitted that this supports the position which we have taken herein that the actual transfer of title by the State Tax Commission is not a prerequisite to the passing of title. This statute was probably adopted from California which has an “ownership liability law,” providing that the owner of a vehicle is liable for injury or damage up to the sum of \$5,000.00, resulting from the negligence of another in driving the automobile. It was designed to relieve the vendor from the liability imposed by this statute, which has not been adopted in Utah. This position and the holding of *Jones v. C. I. Trust Company*, supra, was reaffirmed in the latter case of *Heaston v. Martinez*, 3 Utah (2) 259, 282 P. (2) 833, where our court again recognizes that the

delivery of the certificate of title properly endorsed is not essential to a valid sale of an automobile. In that case wholesale automobile dealers in New Mexico and Colorado sold automobiles to a licensed used automobile dealer in Utah, who gave drafts to the wholesale dealers and foreign certificates of title showing the wholesale dealers to be the owners were attached to the drafts as security, and the used automobile dealer transported the automobile to his used automobile lot and sold them in the usual course of business for a valuable consideration, without ever having paid the drafts and without receiving certificate of title. It was held that the wholesale dealers were estopped to assert their title to the automobiles in replevin actions against the purchaser. The plaintiffs in that case relied upon the same section, now Section 41-1-72, but the Supreme Court held that the section was not applicable and that the buyers from the used car lot dealer secured a valid title.

We anticipate that plaintiff will contend that Hardman attempted to exercise control over the manner in which Child drove the vehicle because of statements before leaving Tooele to the effect that they should pass one another occasionally on the return trip, so that if either had trouble the other would be apprised of it.

The first witness, Mr. Child, who was called by plaintiff's counsel under Rule 43 (b), testified in that examination as follows:

"Q. You and he talked about the trip going back, is that right? I mean, while you were there in Tooele, you talked about going back to Sunset?

"A. Yes, sir.

"Q. Were you going to stop in Salt Lake?

"A. There was nothing mentioned of stopping at Salt Lake.

"Q. Did he say that you could drive the pick-up?

* * * *

"Q. Was there any conversation about who was to drive the pick-up?

"A. I was to drive the pick-up and he was to drive his wrecker truck.

Q. Who was present at the time that was said?

"A. Well, nobody but Mr. Hardman and I, that I can remember of.

"Q. And who said it; did he say it or did you?

"A. Well, he says, 'You drive the pick-up, and I'll drive the other truck.'

"Q. And the 'other truck,' did that have also—that had a jeep attached to it that he was taking up to Sunset?

"A. Yes, sir.

"Q. And did he also say to you that he thought that what you should do was to keep passing each other so both of you would know that each of you was all right, and your car was all right?

"A. Yes, sir." (R. 80-81)

On cross-examination of Child by defendant Hardman's counsel, he testified as follows:

"Q. Do you remember telling Mr. Hardman that you would follow him in the pick-up truck?

"A. Yes, sir.

"Q. And you recall him saying, in substance, that, generally, on those trips, you would pass each other, so, if there was anything wrong with either car, the other one would know about it?

"A. Yes, sir." (R. 87)

Hardman testified on cross-examination by plaintiff's counsel as follows:

"Q. As I understand it, before you had left the place down there at Barrus Motor Company in Tooele, you agreed you would keep in contact with each other as you go along the highway?

"A. No, sir.

"Q. Hadn't you told Mr. Child that you would continue passing one another, so that you would know that you were all right?

"A. No, sir; I suggested that we did that at times.

"Q. Well, then, did you say to him, 'That is what we will do'?

"A. No, sir.

"Q. Well, did you have a conversation with him about that subject?

"A. Yes, sir.

"Q. Where?

"A. Before we started.

“Q. Who was present?

“A. That, I couldn’t answer.

“Q. What was said?

“A. I suggested we pass one another occasionally — or that we did pass one another occasionally when we were out on trips of this order.

“Q. And did you say anything about stopping at the junction there between the road that goes to Grantsville and Tooele?

“A. Not that I recall.” (R. 208)

There is nothing inconsistent in the foregoing testimony with Child’s ownership and control of the pickup truck. It is significant that when Hardman did not give any instructions to Child about stopping at Mills Junction (R. 208) Childs stopped behind him of his own volition and not in compliance with a signal from Hardman (R. 82). While they were stopped Hardman did not examine the vehicle Child was driving (R. 209). Nor did he talk to Child about the route they would follow on the return trip (R. 213). Hardman checked to see if the cables on the vehicle he was towing were in order while at Mills Junction (R. 205). Hardman did not purchase the gasoline for the pickup (R. 414). In common every day experience, when persons are driving separate vehicles some distance to a common destination, it is not unusual for them to keep in touch with each other as a precautionary measure so that one can assist the other if the need arises. However, such an arrangement does not necessarily mean that either has the right to control the manner in which the other drives his particular vehicle.

The evidence seems clear that there was a completed transfer of the International Pickup to Child from Hardman before the accident, and because of that sale Hardman had no right of control over the automobile, nor did he attempt to exercise control over the manner in which Child drove it. That by reason thereof, there can be no imputation of any negligence on the part of Child to Hardman, however, anticipating arguments of Court, let us assume that the sale was not complete when Hardman and Child left Tooele, and that Child's category was that of a prospective purchaser of the pickup. In this connection it should be noted that Child at the time of the accident had exclusive possession and control of the vehicle. This being true, the general rule as announced in an annotation on the dealer's liability for the negligent operation of a car by a prospective purchaser found at 31 *A. L. R.* (2) 1445 applies. That general rule is announced as follows:

“Two basic rules regarding the liability of an automobile dealer for the negligent operation by a prospective purchaser, or one acting for him, of a car owned by the dealer, appear immediately from the most cursory inspection of the cases. The first of these is that the dealer is not liable if the negligent operation occurs while the purchaser, or the person acting in his stead, is driving the car unaccompanied by the dealer or any representative of the dealer. In such cases, it is generally said that the relationship of master and servant or principal and agent does not exist between the dealer and the driver. The relationship is said to be, instead, one of bailment, with resulting applicability of the rule

that a bailor (i.e., the dealer) is not liable for the negligence of his bailee (i.e., the prospective purchaser). As stated by one court, when a prospective purchaser 'accepts the use of a car in such circumstances, he acts solely for his own benefit. His object is to satisfy himself as to the quality of the car in which he is interested. He is no more the agent of the seller than is the man who tests the weight of a piece of goods the agent of his tailor or the man who thumps a melon the agent of the grocer. In each case the test may result indirectly in benefiting the seller, but this benefit is merely a coincidence entirely unrelated to the purpose of the tester.' "

This rule appears to be generally accepted and is supported by cases cited from a substantial number (seventeen) of states.

It may be assumed that plaintiff will argue that Hardman and Child were engaged in a joint venture and, therefore, the negligence of Child may be imputed to Hardman. They are expected to assert that the two parties had a common destination and Hardman was the owner of the vehicle.

In the case of *Derrick vs. Salt Lake & Ogden Ry. Co.*, 50 Utah 573, 168 P. 335, the plaintiff brought an action against the defendant railway company for personal injuries resulting from a crossing accident. The undisputed evidence showed that plaintiff and the owner of the automobile had agreed upon a trip in which they were to share expenses equally. This court in holding that it was error to instruct that plaintiff was a passenger because he was a joint adventurer said:

“* * * The undisputed evidence shows that the automobile trip was a joint affair in which Merritt and plaintiff were mutually and equally interested, and in which their rights to direct and govern the conduct of each other in relation thereto were coextensive. Each had a voice and the right to be heard in regard to the details of the trip. Merritt testified that ‘the arrangements were equal; that is, they were mutual among us all.’ He further testified: ‘When we started we had agreed to take lots of time and not drive fast. We discussed this on the way out,’ and that ‘it was clearly understood’ that each would pay his share of the expenses of the trip. Plaintiff testified that costs of the trip included gasoline, oil, tires, ‘wear and tear on the car, and other expenses connected with the trip.’

“The contractual relations of plaintiff and his traveling companions were substantially the same as they would have been if they jointly hired an automobile with which to make the trip, with the understanding that they would jointly pay the expenses and mutually and concurrently direct the journey and the details thereof. The trip was therefore a joint enterprise in which these parties had a community of interest and in which they all equally had a voice and a right to be heard respecting the details of the journey. Under these circumstances the negligence of Merritt in the management of the automobile at the time of the collision was imputed to plaintiff.”

See also the case of *Forley vs. Gallagher*, 55 Utah 298, 185 P. 77, in which it was held that a joint enterprise between the driver and the occupants of the car did not exist for the reason that the occupants had nothing

whatever to do with the control or management of the automobile.

The basis for a joint venture existing between parties is contractual and for the driving of an automobile to be part of the venture, the automobile must be used in furtherance of the business objective provided for in the contractual arrangement.

This Court in the case of *Bates vs. Simpson*, (Utah) 239 P. 2d 749, 121 Utah 165, which involved the question of whether two used car dealers who shared a lot, the building thereon and its furnishings and the use of the telephone were joint adventurers, said:

“* * * We have frequently announced in this court that ‘joint adventure is in the nature of partnership,’ *Wasatch Livestock Loan Co. v. Lewis & Sharp*, 84 Utah 347, 35 P. 2d 835; *Kau-mans v. White Star Gas & Oil Co.*, 92 Utah 24, 63 P. 2d 231. To establish a joint adventure there must be an agreement, express or implied, for the sharing of profits, 30 Am. Jur. p. 682.”

This rule is applicable to this situation. The fact that an automobile accident is involved should make no difference.

The case of *Fox vs. Lavender*, *supra*, involved an action brought against a wife riding in an automobile owned by the husband and wife for injuries arising out of an accident which occurred while the automobile was being driven by the husband on an errand for the wife. Even under those facts the court held that the question of whether or not the wife was responsible was for the injury, and in so holding said “That the fact that the

wife was a joint owner, or the fact that the husband and wife had a common destination, did not in and of itself make it a joint venture."

The fact that Child and Hardman were not in joint possession of the automobile at the time of the accident is important in determining whether Hardman had the right to control the vehicle. Judge Wolfe in the *Fox vs. Lavender* opinion makes some further interesting comments on the law of joint venture. He quotes from *Coleman vs. Bent*, 100 Conn. 527, 124 Atl. 224:

"What sort of an arrangement will make the parties to it joint adventurers in the operation of a vehicle in which all are riding is well settled. A typical case is where two or more jointly hire a vehicle for their common purpose and agree that one of their number shall drive it. In such a case the possession of the vehicle is joint and each has an equal right to control its operation. The better considered cases hold that such common possession and common right of control, resulting in common responsibility for negligent failure to control are the earmarks of the legal relation of a joint adventure in the operation of a vehicle."

The *Restatement of the Law of Torts*, Vol. 2, Sec. 491, states the effect of joint enterprise on contributory negligence as follows:

"Any one of several persons engaged in an enterprise is barred from recovery against a negligent defendant by the contributory negligence of any other of them if the enterprise is so far joint that each member of the group is responsible to the third person injured by the negligence of fellow members."

Could it be contended reasonably that if the defendant Hardman had collided with the automobile in which the plaintiff was riding, that the defendant Child would have joint liability with Hardman for the operation of the latter's vehicle? The situation as shown by the evidence seems to compel a negative answer.

The transaction between Hardman and Child was complete before they left Tooele. The only further interest which Hardman had in the matter was to obtain his money from Child when they reached Sunset. The defendant Hardman had no control or right to control the actions of the defendant Child who had purchased the vehicle and was therefore the owner in possession of the same with the full right to control it. He was not an employee of Hardman and Hardman had no right to direct his activities. It is true they had agreed on a common destination, but this fact alone does not give rise to any relationship of principal and agent. Even if it is assumed the sale was not complete and that Hardman was still the owner of the vehicle, he would not be responsible for the actions of Child, either as a prospective purchaser or on some theory of joint venture, as the liability in either of these situations requires the physical presence of the owner of the vehicle in the vehicle being driven. Otherwise, the right of control over the actions of the person driving the automobile becomes a meaningless thing for the reason that the owner is in no position to exercise that right. It is true that in the case of master and servant the actions of the servant are those of the master even though the

master may not be present at the time the acts are performed, provided the servant is acting within the scope of his employment. This principle of law is not applicable to the situation of bailor and bailee, which is actually the relationship which existed here if the sale between Child and Hardman was not complete before commencing their return trip to Sunset.

The case of *Galarowicz vs. Ward*, 230 P. 2d 576, 119 Utah 611, again affirms the rule of the earlier Utah decisions that the ownership of an automobile by one person and use by another raises no presumption of agency even though the use is by members of the same family as the owner. Says the court:

“* * * Plaintiff asks that we reconsider the rule as it now exists in this state, that ownership of an automobile by one person and use by another raises no presumption of agency. In this regard, his counsel review for us the cases developing the rule and solicit its abrogation. See *Ferguson v. Winter*, 46 Utah 321, 150 P. 299; *McFarlane v. Winters*, 47 Utah 598, 155 P. 437, L.R.A. 1916D, 618; *Ferguson v. Reynolds*, 52 Utah 583, 176 P. 267 and *Saltas v. Affleck*, 99 Utah 65, 102 P. 2d 493, for cases developing this rule. The principle has been considered even more recently however, in the case of *Conklin v. Walsh*, 1948, 113 Utah 276, 193 P. 2d 437, 440.

“In this latter case, Dr. Conklin sued Walsh for damages to his automobile arising out of a collision between the Walsh car and the Conklin car, being driven by Mrs. Conklin. The trial court directed a verdict for the plaintiff and held that Mrs. Conklin was not the agent or servant of

her husband and therefore her negligence was not imputable to him. The court said: 'That there is no presumption of agency between husband and wife in the operation of an automobile merely because of the marriage relationship has been fully decided by this court in the case of Fox v. Lavender, 89 Utah 115, 56 P. 2d 1049 (1053), 109 A.L.R. 105.' The court then quotes from the Fox v. Lavender opinion, in part, as follows: '* * * The other line of authorities which hold that no presumption arises that the driver of the car is the agent of the owner where the owner is not present are found listed in Berry on Automobiles, supra, p. 1172, Sec. 1359, Utah falls within this class. (citing cases) In this jurisdiction this is the case even though a member of the family is driving. * * *' The court, in Conklin v. Walsh, then concluded: 'The fact that in this case the wife was in the act of taking the daughter to her music lesson at the time * * * does not establish agency between herself and her husband who was the owner of the car. Since the record discloses no other evidence of such a relationship, the trial judge when he determined that Mrs. Conklin was negligent correctly held that her negligence was not imputable to him.' "

It is submitted that the evidence on the relationship between Hardman and Child was undisputed and the question of whether Hardman was responsible for Child's negligence was for the court and not for the jury. That the plaintiff as a matter of law failed to sustain the burden of proving that Hardman was the agent or servant of the defendant Child.

POINT II.

THE COURT ERRED IN ITS INSTRUCTIONS BY SUBMITTING ISSUES TO THE JURY WHICH WERE NOT SUPPORTED BY THE EVIDENCE AND BY FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT HARDMAN'S THEORY OF THE CASE.

Number 19 of the Court's instructions to the jury reads as follows:

"No liability can be imposed upon defendant, Arthur Hardman, unless you shall find from a preponderance of the evidence:

"(a) That, at the time of the accident, Arthur Hardman was the owner of the pickup truck;

"(b) That Nathan Child was driving the truck as an agent or employee of Arthur Hardman, on behalf of and for the benefit of Arthur Hardman, and not on his own behalf or for purposes of his own;

"(c) That, in operating said truck, the defendant Child was negligent; and

"(d) That such negligence was the proximate cause of the accident.

"And, if you find from a preponderance of the evidence each of the above propositions (a), (b), (c), and (d), Arthur Hardman would be liable to the plaintiff, and you should so find.

"But, if you do not find each and all of said four propositions, then Arthur Hardman is not liable and your verdict should be in favor of defendant, Arthur Hardman, and against the plaintiff, 'No Cause of Action.'"

At the close of the evidence the defendant Hardman

excepted to this instruction upon the ground that there was no evidence to go to the jury on the issue of whether Hardman was responsible for the manner in which Child drove the vehicle or that the relationship of master and servant or principal and agent existed between the two. This exception was taken upon the grounds mentioned in the argument under Point I (R. 421-422). Defendant further excepted to the instruction upon the grounds that it permitted the jury to find whether Hardman was the owner of the pickup truck without defining for them, either in this instruction or elsewhere, the meaning of ownership as contemplated by law. Also, that in sub-paragraph (b) of the instruction the issue of whether or not Child was the agent of Hardman, upon the ground that there was no instruction in the finding or informing the jury of his Requested Instructions, neither of which were given by the court as requested or in substance even though the court's notes indicate that No. 6 was "covered another way," (R. 31) and No. 6C was "substance given" (R. 35).

Defendant Hardman's Requested Instruction No. 6A, which reads:

**"DEFENDANT HARDMAN'S REQUESTED
INSTRUCTION NO. 6A**

"You are instructed that under the law of this state title to personal property passes at the time the parties to the contract intend it to be transferred and unless a different intention appears title passes to a purchaser when the contract of purchase is made, and it is immaterial whether the time of payment or the time of de-

livery, or both, is postponed. If therefore, you find from the evidence that at Tooele, Utah, defendant Child, after an inspection of the truck at the Barrus Motor Company place of business, expressed his satisfaction with it and said he would buy it and would pay \$650 as the purchase price; that is to say, that he would deliver to Hardman an old car for a credit of \$100 and pay the balance of \$500 when the parties returned from Tooele to Sunset, Davis County; and if you further find that Hardman paid Barrus Motor Company of Tooele for the truck and delivered the same to Child pursuant to said agreement and that Child was driving the same at the time of the accident, then you are instructed that at the time of the accident Child and not Hardman was the owner of the car and Hardman was not responsible for its operation and your verdict should be for defendant Hardman."

sets out the law on the issue of whether the ownership or title to the automobile passed to Child based upon the defendant Hardman's theory of the case even though the evidence disclosed the purchase price was \$650 plus Child's old car, \$150 of which would have been payable in 90 days (R. 86-87).

The defendant Arthur Hardman requested the court to instruct the jury on the control factor in Instruction No. 6, which reads:

"INSTRUCTION NO. 6

"You are instructed that the negligence of a driver of an automobile cannot be imputed to another person, except in the case where the driver is the employee of such person, unless the other person is present at the time the negligent acts are committed and participates in or exercises control over the operation of the auto-

mobile or has the right to exercise such control even though he does not do so. This is true even if such other person is the owner of the automobile. If you find from the evidence in this case that the defendant Nathan Child was not an employee of Arthur Hardman and that prior to the accident in this case the defendant Hardman had surrendered the control and custody of the International pickup truck to the defendant Nathan Child and that the defendant Arthur Hardman exercised no control over or had no right to control the actions of the defendant Nathan Child, then the defendant Arthur Hardman cannot be held liable for the negligent actions of Nathan Child.

Requested only if No. 5 is refused.”
and Instruction No. 6C, which reads:

“DEFENDANT HARDMAN’S REQUESTED
INSTRUCTION NO. 6C

“You are instructed that whether one person is agent of another depends upon right of control of one over another, and if you find from the evidence that after delivering the truck to Child at Tooele Hardman had no control or right of control over the operation of the vehicle and that it was not being driven by Child for or on behalf of Hardman, then you are instructed that Child was not the agent of Hardman at the time of the accident and your verdict must be for the defendant Hardman.”

The defendant’s Requested Instruction No. 6C sets out the necessity for the element of control for the relationship of principal and agent to exist and No. 6B, which reads:

**“DEFENDANT HARDMAN’S REQUESTED
INSTRUCTION NO. 6B**

“You are instructed that there can be no liability on the part of defendant Hardman unless you find that at the time of the accident defendant Child was the agent of Hardman in operating the truck. Therefore, if you find that before leaving Tooele to return to Sunset, Hardman and Child had agreed upon the price Child was to pay for the truck and that Child had declared he would buy it, and if you further find that Hardman paid Barrus Motor Company for the truck and then delivered it to Child, who had agreed to pay for the truck upon arrival at Sunset, Davis County; and if you further find that the accident occurred while Child was driving the truck on the return trip to Sunset, then you are instructed that in operating said truck Child was not the agent of Hardman, and your verdict should be for defendant Hardman.”

applies to the evidence in accordance with the defendant Hardman’s theory of the case.

Instruction No. 7A, which reads:

**“DEFENDANT HARDMAN’S REQUESTED
INSTRUCTION NO. 7A**

“You are instructed that where the owner of a vehicle delivers it to a prospective purchaser who, unaccompanied by the seller, operates the same and negligently injures or causes damage to another person, the seller is not liable for the negligent act of such prospective purchaser. Therefore, if you find from the evidence that in driving the truck from Tooele defendant Child was merely a prospective purchaser thereof and

that Child was negligent in operating said truck, and if you further find that he was unaccompanied by defendant Hardman and that because of Child's negligence the plaintiff sustained damage, then you are instructed that such negligence of Child cannot be imputed to the defendant Hardman and your verdict should be for said defendant Hardman."

covers the issue of whether the owner of a vehicle is liable for the negligence of a prospective purchaser, which was an issue for the jury if the sale was not completed between Hardman and Child before they commenced the return trip from Tooele.

A consideration of the Court's Instructions as given and the failure to give the foregoing Requested Instructions of the defendant Hardman resulted in the jury not being instructed on his theory of the case.

This matter is controlled by the decision of this Court in *Startin vs. Madsen*, 120 Utah 631, 237 P. 2d 834, which reaffirmed the fundamental principle that it is the duty of the court to cover the theories of all parties in his instructions.

The court in his Instruction No. 23 instructed the jury as follows in the second paragraph thereof:

"In determining the amount of such damages, you are instructed that you should consider the pain and suffering that the plaintiff has endured, if any, both mental and physical, as a result of such negligence, ever since he sustained his injuries, and that he will probably endure in the future."

Defendant excepted to the last part of the last sentence in this paragraph upon the grounds that it was unsupported by the evidence in that there was no evidence that the plaintiff would experience pain and suffering in the future (R. 423). In fact, the evidence was to the effect that he had made a full recovery.

Defendant Hardman also excepted to submitting the issue of the loss of bodily function in the last paragraph of said instruction for the same reason. This phrase, which reads "loss of bodily function" (R. 423-424), is crossed out in Instruction 23, but it is defendant's recollection that the instruction was submitted to the jury in its entirety including the words "loss of bodily function." This instruction is contradictory to Instruction No. 21B and would certainly confuse a jury inasmuch as in the latter instruction the jury was told that there was no evidence that plaintiff had sustained permanent loss of bodily function. The giving of contradictory instructions is error. *Knold vs. Rio Grande Western Ry.*, 21 Utah 379, 60 P. 1021; *Jensen vs. Utah Ry.*, 72 Utah 366, 270 P. 349.

Defendant also excepted to the Court's Instruction No. 14 relating to the issue on whether or not the defendant Nathan Child was negligent in driving said pickup when he knew, or should have known, there was some defect in the tire and tubes, upon the grounds that there was no evidence to support the question of whether Child knew, or should have known, under the circumstances, that said defect existed before the accident and that considering said instruction in connection with

Court's Instruction No. 19, the issue is submitted as to whether Hardman was also responsible for any knowledge of Child of the defect existing in the truck (R. 421-422), and for the same reason Hardman excepted to the Court's Instruction No. 20 (R. 423).

It is often difficult for judges and lawyers to apply the law to fact situations involving questions of agency and master and servant, witness the plethora of conflicting decisions on the subjects in the various jurisdictions. How can a jury of laymen be expected to do so without adequate instruction on the nature and elements necessary to establish such relationships?

CONCLUSION

The defendant Hardman was not in the pickup truck. Child had accepted it, and Hardman's only concern was in receiving the purchase price or in arrangements for payment when they returned to Sunset. Therefore, the only theory upon which he could be held liable for Child's negligence would be under the doctrine of respondeat superior, which the evidence indisputably shows did not exist. The purchase price was agreed on before leaving Tooele and if the transaction is governed by the intention of Hardman and Child, the sale, other than payment, was complete at that time, and Hardman had no right to control the manner in which Child drove the vehicle. If not, Child's status was that of a prospective purchaser, and a bailee. However, the law in this state does not extend liability to an owner who does not have the right of control during the trip,

although he is interested in arrival at the ultimate destination. If we are correct in this proposition, error in the instruction is moot, in any event there is nothing further to add to our contentions that the instructions were erroneous.

We respectfully submit that the verdict in this case should be set aside and a judgment of No Cause of Action entered in favor of the defendant Arthur Hardman, or in the alternative, that he be granted a new trial.

Respectfully submitted,

HANSON & BALDWIN

*Attorneys for Defendant and
Appellant Arthur Hardman*