

1957

Walter Anderson v. Arthur Hardman dba Hardman Auto Sales et al : Brief of Respondent

Utah Supreme Court

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Case No. 8580

**IN THE SUPREME COURT
of the
STATE OF UTAH**

WALTER ANDERSON,

Plaintiff and Respondent,

—VS.—

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

Defendants and Appellants.

FILED
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Clock, Supreme Court, Utah

BRIEF OF RESPONDENT

RAWLINGS, WALLACE,
ROBERTS & BLACK
RICH, ELTON & MANGUM

Counsel for Respondent

530 Judge Building
Salt Lake City, Utah

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WALTER ANDERSON,

Plaintiff and Respondent,

—vs.—

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

Defendants and Appellants.

Case No.
8580

BRIEF OF RESPONDENT

(Numbers in parentheses refer to pages of the record. The parties will be referred to here as they appeared in the trial court.)

PRELIMINARY STATEMENT

This is an appeal by the defendant Hardman from a judgment rendered against him and one Child in favor of Walter Anderson in the sum of \$5,632.00. The case arose out of a head-on collision between two cars on the Saltair Highway approximately 8 miles west of Salt Lake City, Utah, on December 20, 1954. This case is one

of five brought by the five individuals who were in a west bound automobile driven by George Williams, An east bound pick up truck driven by defendant Nathan Child was on the wrong side of the road and collided with the west bound automobile. The plaintiffs in these cases have contended that Child was either the agent or servant of Hardman or that Hardman and Child were engaged in a joint enterprise and hence the negligence of Child should be imputed to Hardman and he thereby became liable for any damages suffered. All five cases have been tried and the following verdicts have been obtained: Walter Anderson \$4,632.00; Administrator of C. Tennyson Johnson, \$43,628.23; George Williams, \$78,055.00; Administratrix of George Smith, \$30,725.32; Elwin V. Millward, \$8,197.79. The first three of these cases are now in various stages of appeal and the last two cases are before the District Court on Motions subsequent to verdict.

STATEMENT OF FACTS

We do not believe the statement of facts contained in the Brief of Appellant is adequate in that it does not present a complete picture of the testimony as developed at the trial.

Defendant Hardman operated a used car lot at Sunset, Utah (91). Defendant Child was in the market for a pick up truck and defendant Hardman had located one in Tooele which he thought might be acceptable to Child (92). On the morning of December 20, 1955, Hardman and Child left Sunset, Utah, for Tooele, Utah, for the

purpose of examining this pickup truck (79). They left in a wrecker truck owned by Hardman and apparently employed by him in his used car and garage business (79).

Upon arrival at Tooele and the Barrus Motor Company, the pickup truck was examined and Child indicated that it was acceptable to him (84). When questioned about the price, Child testified (80) :

“Q. The price had not been agreed upon while you were in Tooele, had it?

Mr. Hanson: Just a moment, which price do you mean?

Mr. Roberts: The price he was going to pay for it.

Mr. Hanson: You mean with—

Mr. Roberts: That Mr. Child was going to pay to Mr. Hardman.

Mr. Hanson: All right.

A. Well, it was partly agreed upon; yes, sir.

Q. Had it been actually agreed upon?

A. Well, not that I remember.”

On cross examination of Child by Hardman’s attorney, he testified as follows (85, 86-87) :

“Q. Now, when—you expected, as soon as you got home, you would pay him \$500 cash that you had at home; didn’t you?

A. Yes, sir.

Q. And the balance of 150 would be payable in ninety days, so that he would give you credit for it; isn’t that right?

A. I don't remember that.

Q. You sure about that?

A. I don't remember that; it could have been.

* * * *

Q. Let's see if you could. Now, do you remember of telling your attorneys in substance—and I wouldn't expect you to recall the exact words—the following: 'The International had Hardman's dealer's plates on it—

A. Yes, sir, had Hardman's.

Q. Just wait until I finish reading this, and tell me whether you remember this: '—There was no conversation between Hardman and I about what we would do when we got back to Hardman's place, but I feel sure he would probably have typed up "stickers" and I would have driven the International on home. I had \$500 cash at home that I would have turned over to Hardman at the first opportunity along with the '41 Ford. He was going to give me credit for \$150 payable in about 90 days.' Do you recall that as being your understanding you had with him?

A. Yes, I do now.

Q. So, the price you agreed on was \$650 for this vehicle?

A. Yes, that's right."

The Barrus Motor, the seller of the pickup truck to Hardman, delivered to him a bill of sale and a certificate of title but not the certificate of registration (92); none of these documents was delivered to defendant Child (93).

Both Child and Hardman specifically testified the transaction was to be completed when they returned to Hardman's place of business at Sunset, Utah (80, 93). As a matter of fact, Hardman had not intended to deliver the papers until he had obtained the certificate of registration which had not been produced by Barrus Motor Company (99). He reaffirmed that all of these matters were to be disposed of upon return to Sunset (99).

Hardman also picked up at the Barrus Motor Company a jeep which he attached to his wrecker truck for return to Sunset (204). He and Child talked about the return trip to Sunset and who was to drive each of the trucks. Child testified (81):

“Q. Was there any conversation about who was to drive the pickup?

A. I was to drive the pickup 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 pickup 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.”

Also, there was discussion between these parties concerning the manner in which the truck was to be driven.

Child testified in this regard as follows (81, 87):

“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.

* * * *

Q. And do you recall telling Mr. Hardman, as you left, or got ready to leave the Barrus Motor Company, that you would drive the pickup truck, or you would follow him home, and he replied that, generally, one car would pass the other car occasionally, so you would both know that everything was okay?

A. Yes, sir.

* * * *

Q. Do you remember telling Mr. Hardman that you would follow him in the pickup 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.”

As a matter of fact, the defendants drove in the manner suggested by Hardman (82). When they started

from Tooele, Hardman was in the lead. At Handy Corner Hardman stopped and so did Child. Child passed Hardman and then Hardman passed Child. At the time of the collision here involved, Child was making his second pass as contemplated under the agreement between the two of them (82, 209, 210).

Another thing of importance is the fact that Hardman's dealers plates were placed on the truck for the return trip. Hardman towed a Willys jeep with his wrecker truck (204).

There can be no question concerning the fact that Child was negligent in the manner in which he drove the pick up truck. There was testimony to the effect that as he passed the Hardman wrecker truck moving in an easterly direction, there were at least three cars in the immediate vicinity travelling in a westerly direction. It was necessary for the first car to move off on the shoulder of the road. The second car also moved off and was hit a glancing blow by the pickup truck and the Williams automobile was the third and a head-on collision resulted.

On this appeal it is unnecessary to go into the details of this evidence concerning the question of Child's negligence. The only substantial question concerns the liability of Hardman for the negligence of Child.

We will answer the arguments of defendant Hardman in the order presented in his brief.

STATEMENT OF POINTS

POINT I

DEFENDANT CHILD WAS DRIVING THE PICKUP TRUCK AT THE TIME OF THE COLLISION AS THE AGENT OR SERVANT OF DEFENDANT HARDMAN OR WHILE ACTING PURSUANT TO A JOINT ENTERPRISE BETWEEN SAID DEFENDANTS.

POINT II

THE COURT COMMITTED NO PREJUDICIAL ERROR IN THE INSTRUCTIONS GIVEN OR IN REFUSAL OF DEFENDANT HARDMAN'S REQUESTED INSTRUCTIONS.

ARGUMENT

POINT I

DEFENDANT CHILD WAS DRIVING THE PICKUP TRUCK AT THE TIME OF THE COLLISION AS THE AGENT OR SERVANT OF DEFENDANT HARDMAN OR WHILE ACTING PURSUANT TO A JOINT ENTERPRISE BETWEEN SAID DEFENDANTS.

The burden of defendant Hardman's first point is that there was insufficient evidence to support the finding that Hardman was responsible for Child's negligence. He claims there was no evidence of a relationship of master or servant, or principal and agent between Hardman and Child.

It is respectfully submitted that the testimony concerning this subject requires a finding that Hardman was responsible for the manner in which Child drove the pickup truck on the occasion of the collision. The

testimony on this subject is uncontradicted and we believe the question is one of law to be determined by the court, and Child's negligence should be imputed to Hardman.

There can be no question that the trip to and from Tooele was made in the interests of the business of Hardman as a used car salesman. It will not do to say that this was a trip in the interest of the buyer Child. One might as well say that the operation of a department store is the business of the customers. True, the customer gets some advantage, but from a legal standpoint the business is that of the seller. Hardman's business was conducted at Sunset, Utah, not Tooele, Utah. From the evidence it is clear that both parties contemplated that the transaction was to be completed upon their return to Sunset and not before. It is an easy matter to determine the position Hardman would have taken at Tooele if Child had said the car was his and he was on his way to California with it. The business of selling cars contemplates an eventual contract, contemplates the transfer of title and the making out of the necessary papers to effect those objects. We recognize that under the Uniform Sales Act if everything has been performed in connection with the sales contract except the payment of the purchase price, ownership is presumed to pass. We, however, do not have that situation in the case at bar. There were a number of things yet to be done. In the first instance, when Child was examined he did not remember that the purchase price had been actually agreed upon. He was shown a statement he had signed and made to his attorney in which he had stated the price

was to be \$500 down and the balance of \$150 payable in *about* 90 days. In the sale of automobiles on credit, written contracts are ordinarily executed by the parties. The form or provisions of a written contract had not been determined. While it appears from this statement that the price of the pickup truck was to be \$650 plus a second hand car owned by Child, yet the time of payment or the amount of interest to be paid had not been determined. Nothing was said about the insurance that was to be carried either by Child or Hardman in connection with this transaction. Apparently no determination had been made as to whether or not a conditional sales contract would be the type of instrument which would be executed to reflect the final terms of the sale. Nothing had been determined as to the provisions of any such contract to be made.

From these considerations it can be immediately seen why it was that the parties did not believe the transaction was complete, but that all matters relating to a final disposition of the sale was to be determined after the parties returned to Sunset, Utah. Another thing of importance is the fact that the pickup, at the time of the collision, carried on it the dealer plates of Hardman which, under the statute, indicated that the automobile still belonged to Hardman (section 41-1-90, Utah Code Annotated, 1953).

We submit that under this testimony, a finding is required that defendant Hardman was the owner of the pickup truck at the time of the collision.

Under the statutes of the State of Utah no title had passed. Section 41-1-72 Utah Code Annotated 1953 provides as follows:

“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 been made and title thereto 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 41-1-77.”

The latter section referred to provides as follows (41-1-77):

“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 the certificate of title thereto properly endorsed to the purchaser or transferee shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another.”

None of the cases cited by defendant Hardman on this subject of transfer of title or ownership, relate to a situation similar to the one at bar. All of his cases are ones which involve a situation between the parties to the contract of sale or involve a question of estoppel.

For instance in *Jones v. C. I. Trust*, 64 Utah 151, 228 Pac. 896 (1924), the basis of the decision was one of estoppel. The plaintiff purchased an automobile from the floor of an automobile sales company. The defendant company financing the automobile sought to assert its

security title. The court stated the defendant was estopped from asserting its title to the automobile for the reason that it had permitted the sales company to display this car for sale knowing that prospective purchasers might buy the same without any knowledge that someone else held the title. Also, in the Jones case the transaction between the sales company and plaintiff was a cash transaction. The parties did not contemplate there would be an extension of credit for any part of the purchase price. Under those circumstances no contract in the future could be anticipated. An unconditional contract for sale of the automobile had been entered into and title was held to pass upon the tender of the balance of the purchase price. The parties intended that it would be a cash transaction.

Davis v. Semloh Hotel, Inc., 86 Utah 318, 44 P.2d 689, is not in point because upon the discharge of the employee the employee immediately became liable for the purchase price of the stock which was fixed by the contract. Here, again, the parties did not contemplate any future execution of a contract or a determination of an extension of time for payment of price. It was to be a cash transaction.

Jackson v. James, 97 Utah 41, 89 P. 2d 235, (1939) was a case involving a gift. The Court held there was ample evidence to support a finding that the automobile had been delivered to the defendant. The Court reviewed many of the sections relating to passage of title and concluded as follows:

“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.*”

From this quotation and particularly from the part in italics it is clear that the Court was not speaking of a case or a situation where the matter of liability for personal injuries was involved. The Court recognizes the statutory requirements was material in cases where liability for damages was involved. In this chapter the Legislature is speaking of ownership of a motor vehicle. In these questions relating to responsibility for damages, the question of ownership is of great importance in arriving at a conclusion as to who is liable for the injuries and damages sustained in automobile collisions. Section 41-1-77, *supra*, conclusively establishes that in this type of case ownership does not pass until the possession of the motor vehicle has been delivered *and* the certificate of registration and the certificate of title properly endorsed have also been delivered to the transferee. Then, and then only, can a seller claim he is no longer the owner of a car and relieved from liability for damages from the negligent operation thereof. Unless this is the

meaning to be given this statute there is no purpose for its existence. We again submit that under the plain wording of the Legislative enactments, the defendant Hardman was still the owner of the pickup truck being driven by defendant Child.

Utah cases support Plaintiff's position that title or ownership had not passed to Child.

In *Hi-Way Motor Co. v. Service Motor Co.*, 68 Utah 65, 249 P. 133 (1926) the action was apparently for conversion and breach of contract. Plaintiff was a dealer in Star motor cars and defendant a dealer in Fords. Jensen owned a used Ford. In negotiations between Jensen and plaintiff it was agreed that plaintiff would allow Jensen \$175 for his Ford on a new Star the price of which was \$995. If plaintiff sold the Ford for more than \$175 then Jensen was to get credit for the full amount received therefor. In a conversation between Jensen and plaintiff's manager it was stated Jensen was to pay the difference between the price of the Star and the \$175 or price received for the Ford whichever was greater. Jensen stated it would crowd him to pay cash although he could pay most of the difference in cash. The manager told him plaintiff could handle his note and it could be settled at the time the Star sedan was delivered. The Ford was delivered to plaintiff, it found a purchaser and was holding it until three wooden wheels could be installed. At this time defendant, who had made a trade with Jensen, obtained possession of the used Ford. The trial court held as a matter of law title had not

passed to plaintiff. This was affirmed on appeal and this court stated:

“It is no doubt true that, unless the minds of Hyrum Jensen and the manager of appellant had fully met respecting all of the essential terms of the alleged contract for the sale of the Ford sedan and the purchase of the Star sedan, the alleged contract failed of consummation, and hence appellant cannot recover damages for a breach thereof, nor can it sustain an action of trover for the value of the old Ford sedan. It certainly is true that:

“‘In order that there may be an agreement, the parties must have a distinct intention common to both and without doubt or difference. Until all understanding alike there can be no assent, and, therefore, no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all terms.’: 13 C. J. 263, Sec. 48.

“Further:

“‘Where the parties have left an essential part of the agreement for future determination, it is no doubt correct to say that the contract is not completed.’ 6 R.C.L. p. 643, Sec. 59.

“It seems entirely unnecessary to multiply authority upon a proposition so elementary as the one here in question, and we shall refrain from doing so. To the mind of the writer it is perfectly clear that no binding contract existed between Hyrum Jensen and the appellant.

* * * * *

“For example, the question of how much of the purchase price of the Star sedan Jensen should

pay in cash, how much should be settled by the execution of a note, and the length of time the note should run, were all left for future determination. All of these constituted essential elements, and until fully agreed upon by both parties either one had the right to refuse the terms of payment which might be proposed by the other; hence, the contract was incomplete and unenforceable. Nor does the fact that Jensen left the old Ford sedan with appellant to be sold by it and the proceeds of the sale accounted for to Jensen alter the legal effect of the transaction. Nor did it vest the title of the car in appellant. Such was not the intention of the parties and such was not the legal effect of the transaction as it then stood."

We submit that under the authority of this case title or ownership of the pickup truck had not passed from Hardman to Child.

In *Stewart v. Commercial Ins. Co.*, 114 Utah 278, 198 P. 2d 467 (1948) this Court held *Jackson v. James*, supra, inapplicable and that in the absence of a completed agreement title would not pass.

In *Schwartz v. White*, 80 Utah 150, 13 P. 2d 643 (1932) it was held that plaintiff acquired no title because he had not received the certificate of registration required by Section 41-1-72, Utah Code Annotated, 1953. See also *Traders General Ins. Co., v. Pacific Employees Ins. Co.*, 130 Cal. App. 2d 158, 278 P. 2d 493.

In none of the above cases was a situation presented where the contest was between the parties to the alleged contract. They all present situations where third parties are involved just as in the case at bar.

Plaintiff contends that as a matter of law, defendant Child was the servant, or agent, of defendant Hardman, or at least they were engaged in a joint enterprise in connection with returning the pickup truck to Sunset, Utah.

The return of the pickup truck to Sunset was a part of the business of Hardman. He was in the used car business and a part of that business would contemplate the completion of the sale and the receipt of the money for the pickup truck. Hence, in the consummation of this transaction connected with his business, it was necessary that the car be returned to Sunset, Utah, to accomplish the ultimate purpose of the transaction. As established above, the ownership of the truck remained in Hardman during this period of time. He was the one who made the determination that Child should drive the pickup truck. If he had asked one of the employees of the Barrus Motor Company to drive this truck, certainly Child could have made no objection to it. That employee of Barrus would then have become the employee of Hardman, for whose acts Hardman would have been responsible. It was merely a fortuitous circumstance that Child was present and available to conveniently drive the pickup truck to the destination required by Hardman's business. True it is that Hardman was not in the truck at the time of the collision, but he was in the immediate presence of the truck at all times and through his suggestion was in a position to control the driving of the truck. Before these parties left Tooele it was his suggestion that they continue to pass each other.

As a matter of fact it was in the very act of passing in connection with this suggestion that this collision occurred. Under the cases, all that need be established is that the alleged master or principal had the right to control. Here Hardman not only had the right to control the manner of driving, but he in fact did partially control the manner of driving.

In 60 C.J.S. 1086, Motor Vehicles, Section 436, the rule is stated as follows:

“* * * Thus one driving the owner’s car at his request and for his purposes is the owners servant, or agent.”

See *Cannon v. Dupree*, (Tex.) 294 S.W. 298; *Manint v. Nugent* (La.) 142 So. 201; *Andres v. Cox*, 223 Mo. App. 1139, 23 S.W. 2d 1066. In *Winkelstein v. Solitare*, 129 N.J.L. 38, 27 A. 2d 868, plaintiff was injured when a passenger shut the door of the automobile at the request of the defendant owner. A directed verdict for defendant was reversed.

In the *Cannon* case, *supra*, defendant owner asked her brother to drive her automobile and then got in another car. Defendant was held responsible for the negligence of her brother. The blood relationship was not relied upon as bringing about this result. The court stated:

“When he was directed to assume, and was intrusted with control of the automobile as a driver, he was, for all purposes, of a driver, her representative or special servant in legal view; and if careless, and injury resulted to occupant of the car, the owner was liable to the same extent as if he were the regularly employed driver. The

driving was an act incident to the service, and such special service was done by Mr. Taylor for the benefit of the owner of the automobile *** As a general rule, authority may be conferred by one person upon another to do specially an act for him without any agreement to compensate him and without any binding undertaking on the part of such latter person to execute the authority (2 C.J. 420)."

We agree with the quotations from Restatement of the law of Agency, but submit that the evidence introduced in this case brings it within the principles laid down in those quotations and establishes the existence of the relationship between Hardman and Child.

The case of *Oberhansley vs. Travelers Insurance Company*, 5 Utah 15, 295 P. 2d 1093 (1956) cited by defendant is not in point. The issue to be determined was whether or not plaintiff was an employee in the orthodox sense under the Workmen's Compensation Act. Plaintiff there had recovered a judgment against the Pearce Auto Mart for personal injuries sustained while he was riding in a car driven by LaMar Pearce, the president of that company. He was unable to collect the judgment because of the insolvency of Pearce and his Auto Mart. Plaintiff then brought an action upon a liability policy issued by defendant to the Pearce Auto Mart and it was in force at the time of the accident. The defendant contended plaintiff was an employee of the Auto Mart and hence was under the provisions of the Workmen's Compensation Act, in which event he was explicitly excluded under the terms of the policy. The Auto Mart maintained Workmen's Compensation

insurance, but plaintiff had never been reported as an employee on any reports concerning employees. Parts of the opinion would seem to indicate that plaintiff may have been driving the car. The introductory remarks in the opinion state explicitly that he was not, but was merely a passenger in the car. Under all of the evidence the trial court had made the finding that he was not an employee under the evidence produced. This Court simply held the evidence supported that finding. Certainly this case does not support Hardman's contention that he, as a matter of law, was entitled to a directed verdict on the question of his responsibility. We submit that this case is not analogous to the case at bar, the granting of a directed verdict was not involved.

Dowsett vs. Dowsett, 116 Utah 12, 207 P. 2d 809, is another authority relied upon by defendant Hardman. Defendant there was stationed at an army camp in Texas and telephoned his wife in Holladay, Utah, informing her that he had obtained living quarters and wanted her to come and stay with him and bring his car. Since she could not drive the car and his mother and father could, he suggested she ask his mother and father to drive the car and bring her along. This they consented to do. The Dowsetts and a friend started on the trip. The father drove and the mother, who was plaintiff in the case, sat in the front seat. The wife of defendant and the friend sat in the back seat. The father, blinded by the sun, drove the car off the road, injuring plaintiff. The court granted a directed verdict on the ground that plaintiff was a fellow servant of the driver and hence

the driver's negligence was also her negligence and therefore she could not recover. On appeal, plaintiff contended they were not fellow servants and there was no contract of employment between defendant and plaintiff and the driver. Plaintiff contended the relationship was consensual and not based on contract and defendant had no right to control the driver of the car as to how the car was to be driven or as to what route was to be taken. Defendant conceded there was no right of control. Under these contentions it was admitted by the parties there was no right of control and hence a directed verdict would necessarily follow. This result is directly attributable to the contentions made by the respective parties. Also, in the Dowsett case, there was no question that the parties were in the transaction of any business of any one of them. In the case at bar the parties were in the process of completing a transaction within the confines of the automobile sales business conducted by defendant Hardman.

Defendant Hardman also seeks to bring this case within the rule of a prospective purchaser as exemplified by the annotation 31 A.L.R. 2d 1445. That rule is stated as follows at page 1450 of the annotation

“An automobile dealer is not liable for injuries or damage resulting from negligence in the operation of the dealer's car by a prospective purchaser *who is seeking to determine whether he will purchase such a car from the dealer.*”

There is no evidence in this case that Child was testing or trying out the car to determine whether he

would purchase it. The evidence without dispute shows he was driving the car to Sunset as part and parcel of defendant Hardman's used car business. There the transaction was to be completed.

Under the evidence we submit it is clear that Child was driving Hardman's truck at his request and for his purposes. But if the view is taken that Child had an interest in returning the car to Sunset to complete the transaction then the least that can be said is that they were engaged in a joint enterprise in that each had a joint right of control.

At the time they were in the process of completing a sale and purchase of the truck involved, they were both interested in getting it to Sunset, to Hardman's place of business.

As stated in *Fox vs. Lavender*, 89 Ut. 115, 56 P., 2d 1049, the nature of the thing to be accomplished makes the trip itself a part of that purpose.

At page 23 of his brief Hardman puts plaintiff's case inaccurately. He states the basis of plaintiff's contention in this regard is that the parties had a common destination. Hardman was the owner of the truck. As shown above this trip and the driving of the truck was part and parcel of the negotiations which were taking place between the parties. The contract was to be completely formed after arrival at Sunset. Hence the necessity of the trip.

Hardman not only had a right of control but he exercised it in telling Child to drive the truck and that

they should pass each other. This course of conduct was followed on the trip. By this method the truck was kept in a position where Hardman could observe the course it took and the way it was driven. While Hardman was not physically present in the truck he nevertheless was in the immediate vicinity of the truck and could have stopped it at any time. As a matter of fact on the occasion when Hardman stopped, Child also stopped.

Hardman in his brief assumes that defendant would also have to claim Child would be responsible for any negligence of Hardman in driving the wrecker truck. This shows a misconception of plaintiff's contention. The only truck which both had an interest in getting to Sunset was the pickup truck driven by Child. That was the only truck involved in the proposed sale. Hence that was the only truck in the joint enterprise. That Hardman was driving another truck for his own purposes was not a part of the joint undertaking. Getting the truck to Sunset was the joint enterprise not getting Hardman there.

Hardman lays great stress on the fact that there was no participation by him in the expenses of the trip. If the truck was his, the gas was his and was being used. Child contributed his time and effort.

We respectfully submit that Hardman was responsible as a matter of law for the negligence of Child and certainly Hardman was not entitled to a directed verdict on that subject.

POINT II

THE COURT COMMITTED NO PREJUDICIAL ERROR IN THE INSTRUCTIONS GIVEN OR IN REFUSAL OF DEFENDANT HARDMAN'S REQUESTED INSTRUCTIONS.

Defendant Hardman under this point in his brief has set forth various instructions given by the trial court, and instructions requested by him which were refused, claiming the trial court committed prejudicial error in connection therewith. We will take each of these contentions made by defendant Hardman in the order in which he has presented them in his brief and answer the criticism which he levels against the court's instructions and the refusal to grant his requests.

TRIAL COURT'S INSTRUCTION NO. 19

Defendant Hardman contends the trial court erred in giving subdivision (a) and (b) of Instruction No. 19.

If plaintiff is correct in his contentions under Point I then no error was committed in giving these subdivisions for the reason that ownership and responsibility of Hardman should have been determined as a matter of law by the trial court against defendant Hardman and so the jury could have found only in favor of plaintiff on these issues.

We also submit it was proper for the trial court to use the simple term "owner" and let the jury make its determination on that instruction. In any event if defendant Hardman desired a more explicit and enlarged definition of owner and ownership it was incumbent

upon him to make a proper request embodying the desired elements. As will hereafter appear this he did not do. Defendant Hardman does not contend this instruction was an incorrect statement of law but merely that there should be more of it.

Subdivision (b) was also a correct statement of the law and an adequate statement of the controlling principles of law. If the jury found that Child was driving the truck as the agent and employee of and on behalf of and for the benefit of Hardman and not on his own behalf or for a purpose of his own, it must follow that Hardman had the right to control Child in his manner of driving. This same instruction was given and approved in *Maberto vs. Wolfe*, 106 Cal. App. 202, 289 P. 218 at 220.

Certainly the evidence discussed under Point I would at least justify submission of these issues to the jury.

HARDMAN'S REQUESTED INSTRUCTION NO. 6

(A)

Defendant Hardman concedes that this requested instruction does not correctly follow the evidence introduced, (Appellant's Brief, page 32). There was no testimony in the case that the entire purchase price was to be paid upon the return to Sunset by the delivery of an old car for a credit of \$100.00 and the payment of \$500.00 in cash or otherwise. This portion of the instruction assumes there was to be a cash or completed transaction when the only testimony introduced contemplated

an extension of credit in connection with the purchase of this truck.

At first Child testified the price had been partly agreed upon but he did not remember that it had actually been agreed upon (80). Then on cross examination by his co-defendant's counsel Child was read a statement he had made to his own attorney to the effect that he had \$500 cash at home he would have turned over to Hardman along with a 1941 Ford, and that Hardman was going to give him credit for \$150 payable in *about* 90 days (86). Child then testified he remembered the statement and the price agreed upon was \$650.00 (87). Even this testimony to a leading question was inaccurate because there was also involved the delivery of a Ford car.

This discrepancy alone justified refusal of this instruction. The penciled notations on the original request (33) establish that this was at least one of the reasons the trial court refused the instruction. He has placed a question mark just to the right of the inaccurate statement. At the end of the instruction he has placed the words "not factually right."

This request has the further fault that it does not correctly state the law. Disregarding for the moment the Statutes on passage of title and ownership found in the Motor Vehicle Code, title passes when the parties intend that it should. This request states that unless a different intention appears title passes when the contract of purchase is made. Under section 60-2-3, Utah

Code Annotated, 1953, this is not true unless there is an *unconditional* contract of purchase. The evidence established there was not such a contract. The parties contemplated completing the transaction or deal when they returned to Sunset (80, 93). The contract had not been completed. No written contract had been made or agreed upon. No time had been fixed for extension of credit. The form of the contract whether conditional sale or otherwise had not been determined. Subjects such as interest and insurance had not been fixed. These are matters universally and necessarily involved in transactions of this kind where credit is extended. This was not a cash transaction.

After the first sentence the request abandons any need for the jury to find the intention of the parties. This last portion of the request would have informed the jury that if it found Child after an inspection of the truck expressed satisfaction with it, said he would buy it for \$650.00 and Hardman paid Barrus for the truck and delivered it to Child, then Child and not Hardman would be the owner. This would not conclusively establish an intention by both parties that title should pass in view of the testimony by both that the deal was not to be completed until the return to Sunset and in view of the further fact this was not to be a cash transaction but would involve an extension of credit with the various terms which would have to be agreed upon before there would come into existence an unconditional or completed contract of sale.

When the requirements of sections 41-1-71 and 77 are considered the requested instruction is obviously an incorrect statement. Also the use of Hardman's plates was at least evidence that the parties intended that Hardman should remain the owner until Sunset was reached.

HARDMAN'S REQUESTED INSTRUCTIONS NUMBERS 6 and 6(C)

These requests express various notions on what should be found to impute Child's negligence to Hardman. On each instruction the trial court noted that the matter was given in another way, or in another instruction, (31, 35). We submit the matter herein requested was adequately covered by Instruction No. 19 subdivision(b).

Here again, under Point I, no error was committed because defendant Hardman would be responsible as a matter of law for Child's negligence.

HARDMAN'S REQUESTED INSTRUCTION NO. 6 (B)

This has the same inaccuracies as noted in Hardman's Request No. 6 (A), supra. It presupposes evidence that Child was to pay the purchase price on arrival at Sunset. This was not to be a cash transaction. This request also inaccurately states the law for the reason that the jury under this request is not required to consider the intention of the parties on the question of when

title passed. The same arguments made concerning Hardman's requested Instruction No. 6 (A) are applicable here.

HARDMAN'S REQUESTED INSTRUCTION NO. 7 (A)

By this instruction defendant Hardman sought to raise an issue covering the situation where a prospective purchaser is driving an automobile. As indicated by the trial court in his notation on the original request (36) "Not given-outside issues and evidence." Defendant Hardman's contention was that Child was driving his own car for his own purposes. Plaintiff's position was that Child was driving Hardman's truck in furtherance of Hardman's business.

The rule Hardman here sought to make applicable relates to a situation where the prospective purchaser is trying out or testing the car and exemplified by the annotation 31 A.L.R. 2d 1445 and there is no evidence making this rule applicable.

We submit Instruction No. 19 adequately covered the contentions of the parties. Point I herein also establishes there was no error in this refusal.

TRIAL COURT'S INSTRUCTION NO. 23

The complained of portion of this instruction on damages permitted the jury to take into consideration mental and physical pain and suffering which plaintiff might probably endure in the future.

Plaintiff suffered mutiple bruises and abrasions all over his body (167), fractured ribs from the third to the sixth on the left side (168) and which punctured his lung (169), a hematoma from his hip to his knee on the left leg (170) and a hematoma on his right shin (171).

Plaintiff was examined by Dr. Marion B. Noyes, his attending physician, just two days before the trial. At that time he found plaintiff still had some soreness in the left rib cage and in the left side. In the doctor's opinion, plaintiff "may have some residual soreness like any person will after a fractured or injured area" (172). He testified (173):

"Well, I don't expect it to last too long. I don't think there is any injury there that is going to be disabling from that standpoint, except residual soreness; some aching occasionally. Sometimes it varies with the weather and one thing and another, what they do. Any fracture does."

* * * * *

"He may have occasional aching and paining intermittently from time to time over the original injuries, but it is pretty hard for any person to prophesy on that."

Plaintiff in describing his present condition, described the mental effects from which he was suffering at the time of trial. He also testified his hip and chest still bothered him (187, 188).

From this evidence the jury could find that he would suffer some mental and physical pain in the future and should be able to take this into consideration in assessing damages. This condition would certainly not stop on the day of trial but would continue for some time in the future and the jury should be entitled to take this into consideration in determining the amount of damages to which plaintiff was entitled.

On the matter of loss of bodily function, it should be observed that the trial court eliminated from plaintiff's request No. 8 (23) consideration of loss of bodily function in assessing damages. Just who would tamper with the court's instructions is not disclosed. Certainly the trial judge, after eliminating this paragraph from plaintiff's request, would have eliminated any reference to this subject in the instructions given and he did this by placing an ink line through the portion of the instruction which mentioned bodily function. The record does not sustain defendant's assertion.

Instruction No. 21 (B) (apparently defendant Hardman's Request No. 9, see R. 58, the Court adding the word "permanent") instructed the jury there was no evidence of permanent loss of bodily function, or permanent disability. There was no error here.

TRIAL COURT'S INSTRUCTION NO. 14

By this instruction the jury was informed that if Child drove the truck when he knew, or in the exercise of

reasonable care should have known, there was some defect in the tire or tube which made driving on the highway dangerous to others, then he was negligent and if such negligence proximately caused injuries to plaintiff then a verdict should be returned for plaintiff and against Child (49).

Defendant Hardman in his cross-complaint against the Barrus Motor Company alleged that company was negligent in equipping the truck with a right rear tire and tube which it knew, or in the exercise of reasonable care should have known was defective and likely to fail and which caused Child to lose control of the truck (11). Defendant Hardman introduced testimony through his expert Robert M. Bletzacher, that the tire and tube were defective and had been for several miles before the collision (226-230).

Louise Boyer, a witness called by plaintiff, testified that she was driving an automobile in the same direction as Child and immediately behind him for some distance (143). As Child drove, his truck kept swerving to the right side of the road and on to the gravel shoulder (143). If the right rear tire were running low it would tend to pull truck in that direction. A jury could find this indicated something was wrong with the tire or tube and certainly should have given notice to Child that something was wrong well before the collision occurred. The giving of this instruction is supported by the evidence.

CONCLUSION

Defendant Hardman was conducting his used car business in effecting a sale, partially on credit, of a truck to defendant Child. He requested Child to drive the truck to Sunset, Utah, where the deal was to be completed. He suggested the manner of travel. We submit that under these circumstances defendant Hardman is responsible as a matter of law for any negligence of defendant Child.

In any event, the entire matter was submitted to the jury under proper instructions and it found for plaintiff.

We submit the judgment should be affirmed.

Respectfully submitted,

RAWLINGS, WALLACE,
ROBERTS & BLACK
By Brigham E. Roberts
RICH, ELTON & MANGUM
By Leonard W. Elton
Counsel for Respondent
530 Judge Building
Salt Lake City, Utah