

1957

# Willard R. Wood v. Strevell-Paterson Hardware Co. : Brief of Respondent

Utah Supreme Court

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Thomas & Armstrong; Edward M. Garrett; Attorneys for Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH UNIVERSITY UTAH

SEP 10 1957

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WILLARD R. WOOD,  
*Plaintiff and Respondent,*

—vs.—

STREVELL-PATERSON HARDWARE  
COMPANY, a corporation,  
*Defendant and Appellant.*

Case No.  
8632

RESPONDENT'S BRIEF

FILED  
MAY 25 1957

Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT of the STATE OF UTAH

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WILLARD R. WOOD,  
*Plaintiff and Respondent,*  
—vs.—  
STREVELL-PATERSON HARDWARE  
COMPANY, a corporation,  
*Defendant and Appellant.*

Case No.  
8632

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

This action arises out of a motor vehicle collision which occurred on the 13th day of October, 1954, about 9:00 P.M. near the Saltair cutoff on U.S. Highway No. 40 West of the Salt Lake City Airport. Both drivers were alone in their vehicles and were killed as a result of the collision.

The action was commenced by Mr. Wood to recover damages from Appellant, for the destruction of one of the vehicles involved, which at the time was being operated by one, Richard E. Gore, Mr. Wood's employee. (It was stipulated at the time of trial that the value of Respondent's vehicle was \$1,700.00.)

On the day in question, Mr. Wayne N. Stoker, who was an employee of Appellant, had been out toward Dugway, Utah and had called on Mr. Howard Rich, who operated an establishment about 10 miles this side of Dugway, Utah and had taken an order for merchandise from Mr. Rich. Mr. Stoker was returning to Salt Lake City at the time of the accident.

The facts found at the scene of the accident show that the collision occurred at a point at least three feet into the lane of travel of the vehicle owned by Mr. Wood, Respondent.

The two issues in the case before the trial court were whether Mr. Stoker was within the course and scope of his employ for Appellant at the time of the accident and whether he was negligent. The trial court found both issues in favor of respondent and entered judgment accordingly.

A further consideration of the facts will be undertaken in the points of argument.

## STATEMENT OF POINTS

### POINT I.

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT MUST BE AFFIRMED, IF SUPPORTED BY SUFFICIENT EVIDENCE.

### POINT II.

WAYNE N. STOKER WAS WITHIN THE COURSE AND SCOPE OF HIS EMPLOY FOR APPELLANT AT THE TIME OF THE COLLISION.

### POINT III.

WAYNE N. STOKER, THE AGENT FOR APPELLANT, WAS NEGLIGENT, AND SUCH NEGLIGENCE CAUSED THE COLLISION.

## ARGUMENT

### POINT I.

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT MUST BE AFFIRMED, IF SUPPORTED BY SUFFICIENT EVIDENCE.

The sole contention of appellant is that the findings and judgment of the trial court (sitting without a jury) are not supported by sufficient evidence. However, Appellant, in its brief, is asking this court to reconsider *all* the evidence and inferences arising therefrom in its favor and to reach a conclusion contrary to that of the trial court.

The familiar rule which must govern this appeal is stated in 5 C.J.S., Appeal and Error, P. 699.

“In connection with the above question (evidence to support or overturn findings) the appellate court’s function is limited to an examination of the record to ascertain if sufficient evidence exists to justify the findings. If this is found, the examination of the appellate court ceases. It will give no regard to rules as to the sufficiency of evidence to establish a state of facts contrary to those found, nor will it, in accordance with rule stated *infra* Sec. 1658, concern itself with the question of where the preponderance of the evidence may lie, although, if the preponderance of the evidence supports the findings, it is even more clear

that they should not be disturbed.

“Under the rules set forth in subsection c above, the appellate court in determining the sufficiency of the evidence to support the findings will indulge in every presumption in their favor, and give due weight to the trial court’s superior advantages in passing on the facts, and judging the credibility of the witnesses.

“When considering whether the findings have proper evidentiary support, the appellate court will eliminate from consideration all incompetent and immaterial evidence, and consider only the evidence most favorable to the successful party, including all reasonable inferences which might have been drawn therefrom, which will be construed most strongly in favor of the judgment.”

See also *Seamons v. Anderson*, 252 P.2d 209. (Utah), one of numerous Utah decisions, on this point.

“The primary assignment of error by all parties is in respect to the court’s findings of fact. Hence, if there is any competent evidence supporting such findings, we cannot disturb them.”

The two issues in this case which are again attacked by appellant on appeal must be considered within the framework of the foregoing rule.

## POINT II.

WAYNE N. STOKER WAS WITHIN THE COURSE AND SCOPE OF HIS EMPLOY FOR APPELLANT AT THE TIME OF THE COLLISION.

Appellant is asking this court to reconsider *all* of the evidence and inferences arising therefrom touching



on the question of agency, and make a finding contrary to that of the trial court. This court need only consider whether the finding of the trial court is supported by sufficient evidence.

Sufficient evidence will be found in the testimony of two witnesses: Mr. Howard Rich and Mr. Lawrence W. Mansell.

Mr. Howard Rich is the owner and proprietor of a roadside establishment known as Los Ricos Station on the highway to Dugway, Utah (R. 19). He has been so engaged since 1948. He had known Mr. Wayne N. Stoker for approximately four years prior to the collision resulting in his death and knew that he was a salesman for appellant, Strevell-Paterson Hardware Company. During this four year period Mr. Stoker called at his place of business two or three times per month. On most occasions he would give Mr. Stoker an order for merchandise, consisting of sporting goods (guns and ammunition). This merchandise would subsequently be shipped to him by appellant (R. 20).

Testifying further, Mr. Rich stated that on October 13, 1954 (the day of the accident) Mr. Stoker called at his place of business at approximately 4:00 P.M. (R. 20). Mr. Rich placed an order with him for ammunition and one 12 gauge shot-gun. In addition, he gave Mr. Stoker \$57.00 in cash for a K-22 revolver which Mr. Stoker had helped sell to a customer of Mr. Rich. (The cash was never recovered.) Mr. Stoker left Los Ricos Station shortly after 5:00 P.M. [Counsel stipulated that

thereafter Mr. Stoker stopped for dinner at another roadside diner called "Penny's" which is on the road toward Tooele, Utah and Salt Lake City (R. 8).] The following day Mr. Rich learned of Mr. Stoker's death and called appellant concerning his order. He restated his order to appellant; (the identical merchandise ordered from Mr. Stoker) the order was filled and the merchandise shipped to him (R. 20, 21, and Ex. 5).

These facts testified to by Mr. Rich were not, in any material respect, controverted by appellant.

Mr. Lawrence W. Mansell—Treasurer of Appellant—then testified. Wayne N. Stoker had been employed by appellant as a salesman since 1948. His specific instructions were to call on government installations in the State of Utah. (Dugway, Tooele Ordnance, Clearfield Naval Supply, etc.) He was paid a monthly salary. It was, of course, necessary that he use an automobile in his employment and for this purpose he used his private vehicle. At the end of each bi-monthly pay period he would submit a regular expense form for mileage, which was based on the number of miles from the office of appellant in Salt Lake City to his points of call and return (R. 42, 43). He was, therefore, paid for the use of his automobile.

Mr. Mansell stated further, that although Mr. Stoker's specific instructions were to call on United States government installations, nonetheless, *any other business which Mr. Stoker obtained would be accepted by his employer* (R. 48). (Later testifying, Mr. Kuhre,

salesmanager of appellant, stated that their records showed six orders from Mr. Rich during 1954, prior to the order given Mr. Stoker on the 13th of October, 1954.)

2 *Am. Jur., Agency*, Section 101

“The liability of the principal for the acts and contracts of his agent is not limited to such acts and contracts of the agent as are expressly authorized, necessarily implied from express authority, or otherwise actually conferred by implication from the acts and conduct of the principal. All such acts and contracts of the agent as are within the apparent scope of the authority conferred on him, although no actual authority to do such acts or to make such contracts has been conferred, are also binding upon the principal.”

2 *Am. Jur., Agency*, Sec. 104.

“The apparent authority of the agent is the same, and is based upon the same elements as the authority created by the estoppel of the principal to deny the agent’s authority; that is to say, the two are correlative, inasmuch as the principal is estopped to deny the authority of the agent because he has permitted the appearance of authority in the agent, thereby justifying the third party in relying upon the same as though it were the authority actually conferred upon the agent.”

Appellant cannot accept the benefits of prior orders from Mr. Rich and then deny the authority of the agent on the order taken on the day of the accident when it is called upon to account to a third party.

These facts are established: Mr. Stoker was employed on salary by appellant to call on government installations; he was authorized to use an automobile in his work and paid mileage between Salt Lake City to his points of call and return; he was in the habit of calling on Mr. Rich and soliciting business for his employer (six orders in 1954); an order was taken from Mr. Rich on the day of the accident; the identical order was phoned to appellant by Mr. Rich on the day following the accident; Mr. Stoker was returning to Salt Lake City when the accident occurred. (This fact will be fully discussed under Point II.)

Appellant, for the most part, concedes these facts, with the exception, they say, that the testimony of Mr. Rich as to the order given Mr. Stoker, is "hard to believe." Also, appellant says that nothing is known of the whereabouts of Mr. Stoker prior to 4:00 P.M. on the day of accident and, therefore, the fact that he solicited from and received an order from Mr. Rich is insufficient to bring him within the course of his employment. First, appellant is in a much better position to know the whereabouts of its agent than is respondent. If there was evidence that would take him out of the course of his employment, I am sure that they would have produced it before the trial court. Second, the order placed by Mr. Rich amounted to \$257.00 including the cash given for the K-22 revolver. Certainly appellant cannot claim that they did not receive an economic gain from that transaction; and clearly, this single transaction is sufficient to place the agent within the course of his employment.

The facts contained in the record are consistent with the general rule governing a case where the employee is driving his own car. 5A *Am. Jur., Automobiles*, Sec. 653.

“On the question of the liability of an employer for negligence of his employee while operating a motor vehicle in the course of his employment, the question of who owned the automobile involved in the accident ordinarily is not material, if its use is authorized by the employer. While the fact that an employee uses his own automobile in the business of the employer does not make the latter liable under the doctrine of respondeat superior for injuries inflicted by such employee in the operation of the automobile, if the circumstances involved in the case are consistent with, or require, the inference that the activity in which the servant was engaged at the time of the tort complained of, and in which he was using his own car or one which he had hired, was within the scope of his employment, the person injured may recover from the employer, if the servant’s use of the automobile or other vehicle was authorized, either expressly or impliedly, \*\*\*”

For a discussion of a situation involving an insurance agent operating over a somewhat extended area in his own automobile, see the Utah case of *Chatelain v. Thackeray*, 100 P.2d 191 (Utah).

“Thackeray was not using an automobile for his ‘own personal convenience and comfort,’ as was said of the agent in *American National Insurance Company v. Kennedy*, supra (101 S.W. 2d 827), he was using it in the vital pursuit of not only his own, but appellant’s business, and he was under appellant’s control, not only as to the results to be obtained from that pursuit, but,



impliedly at least, as to the means whereby he obtained them."

Under the facts and circumstances of that case, Thackeray was determined to be the agent of the defendant insurance company.

It is to be noted, also, that appellant does not claim that Mr. Stoker had abandoned his employment after he left the place of business of Mr. Rich or deviated from his route and consequently respondent will not devote argument to that point. It will suffice to point out that once the relation of agency is shown it is presumed to continue until the contrary is shown. *Wigmore on Evidence*, Third Ed., Sec. 2530. In this case, Mr. Stoker would be the agent within the course and scope of his employ from Salt Lake City to his points of call and return. On the day in question, he was shown to be in the course and scope of his employ at the place of business of Mr. Rich. This would continue until his return to Salt Lake City, absent evidence to the contrary. No such evidence was presented by appellant.

The facts amply sustain the finding of the lower court that Mr. Stoker was in the course and scope of his employ for appellant at the time of the accident.

### POINT III.

WAYNE N. STOKER, THE AGENT FOR APPELLANT, WAS NEGLIGENT, AND SUCH NEGLIGENCE CAUSED THE COLLISION.

At the outset, it must be pointed out that certain statements contained in appellant's brief concerning the lack of evidence as to which direction each vehicle was traveling are not borne out by the record.

Appellant states, "Actually, there is no concrete evidence to establish in which direction either car was traveling."

"Actually, the physical evidence would more forcibly point to the conclusion that Gore was traveling easterly and Stoker westerly since the vehicles were facing generally in such direction after the impact."

"As heretofore pointed out there is a total lack of direct evidence of the manner or direction in which Wayne N. Stoker drove his automobile prior to the collision. \*\*\*"

On the 22nd day of August, 1956, respondent served upon appellant the following request for admissions pursuant to rule 36, *U.R.C.P.*:

"That at the time and place of the automobile accident referred to in Paragraph 1 of Plaintiff's complaint, Wayne N. Stoker was operating a De Soto sedan, traveling in an easterly direction toward Salt Lake City on U.S. Highway No. 40 and that at the time and place aforesaid the plaintiff's agent Richard E. Gore was operating a 1953 Plymouth Station Wagon, traveling in a westerly direction from Salt Lake City on U.S. Highway No. 40."

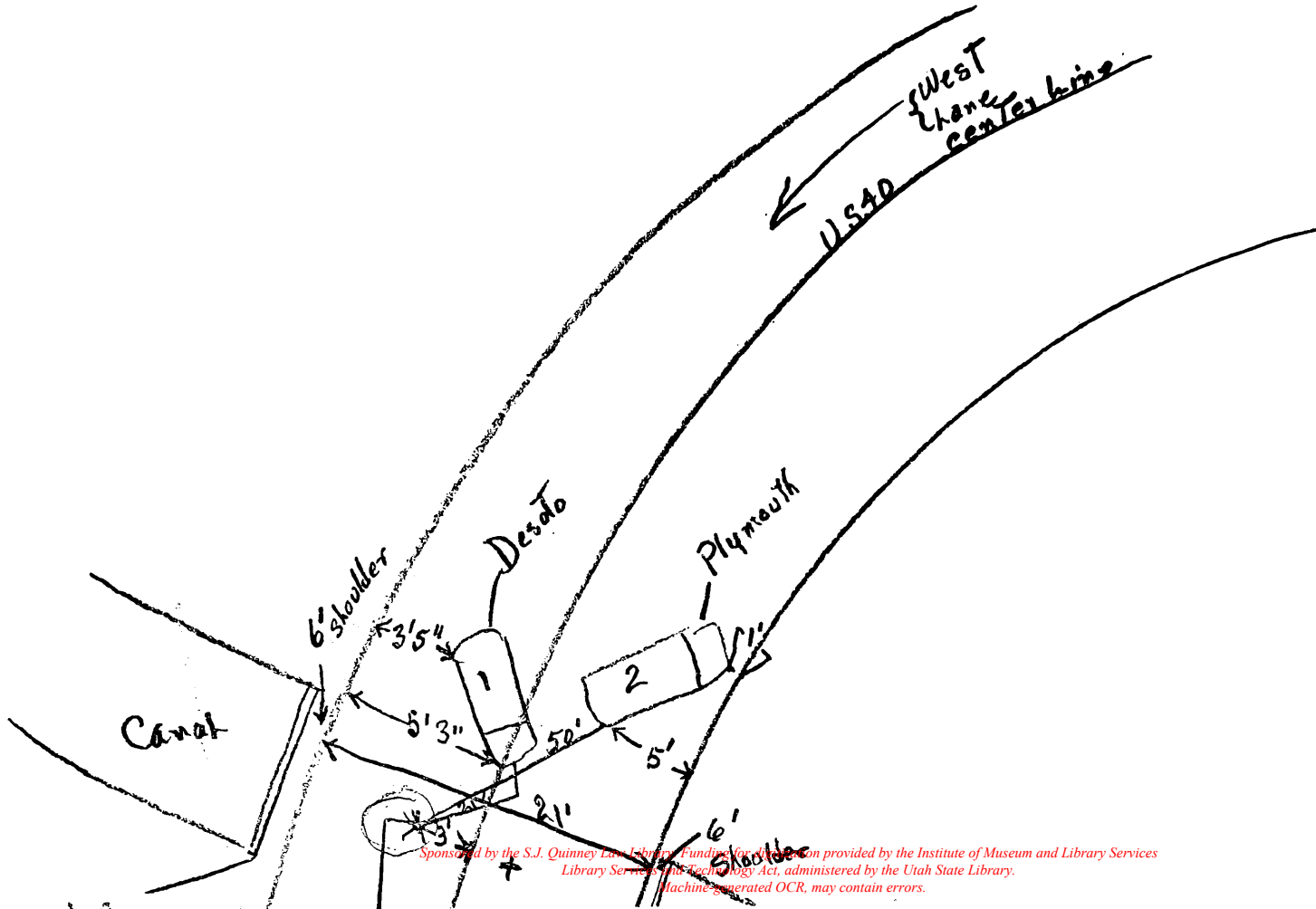
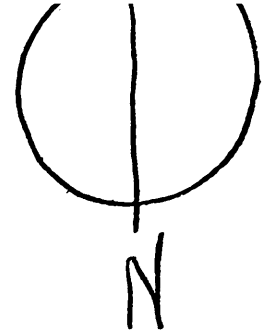
To this request appellant served a reply on the 13th day of September, 1956, stating:

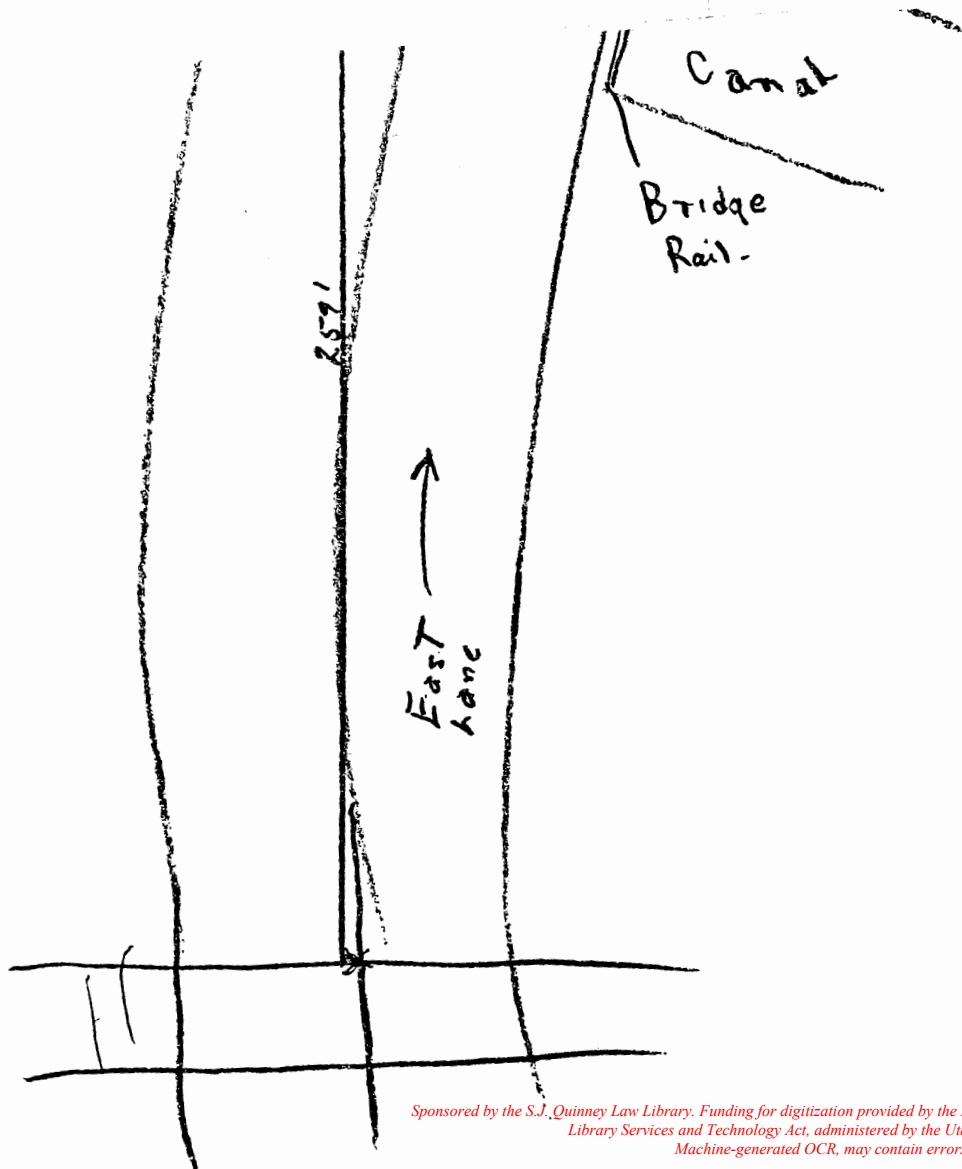
“Defendant admits the statements contained in paragraph 2 of said Request for Admissions.” (Paragraph 2 is the statement quoted above.)

Thus, the direction in which each vehicle was traveling was established by admission.

Both drivers were killed in the collision and there were no eye witnesses. The facts constituting negligence on the part of Mr. Stoker are based on the physical evidence found at the scene of the accident. Testimony as to this evidence was given by Mr. A. H. Nordgren, a Salt Lake County Deputy Sheriff from Magna, Utah. He received a call to investigate this accident at about 9:00 P.M., October 13, 1954. How long before that the accident occurred is not known. When he arrived on the scene he found that each vehicle was severely damaged on the front end indicating that the vehicles had met head-on. He also found that the accident occurred in the westbound lane of traffic, (the lane occupied by Mr. Gore, respondent's agent) thus showing that the vehicle operated by Mr. Stoker, appellant's agent, had crossed to the left of the center line of the highway before the accident. The point of impact was determined by locating debris and gouge marks on the roadway. (See Ex. 8, which is reproduced herein.) The debris and gouge marks commenced three feet into the lane occupied by respondent's vehicle and continued further over toward the shoulder. Considering the fact that the vehicles met head-on at a 180° angle, it is clear that the Stoker vehicle was at least three feet into the lane occupied by respondent's vehicle at the point of impact (R. 53-59, and Ex. 8).







Appellant apparently concedes that their agent was on the wrong side of the road and that under such circumstances a presumption of negligence arises by reason of certain Utah decisions.

*Richards v. Palace Laundry*, 186 P. 439 (Utah);

*Staton v. Western Macaroni Mfg. Co.*, 174 P. 821 (Utah);

*Morrison v. Perry*, 140 P.2d 772 (Utah).

However, appellant claims that such a presumption does not apply to this case by reason of this court's ruling in *Fretz v. Anderson*, 300 P. 2d 642. First of all, that action could not have been brought except for the recent statute (U.C.A. 1953, 78-11-12) providing for the survival of a cause of action against the personal representative of a deceased wrongdoer. The case at bar was not brought under that statute. This action is against an employer on the theory of *respondeat superior*. The employer is liable jointly and severally with the agent. 57 C.J.S., *Master and Servant*, Sec. 579.

Furthermore, this action is one for property damage. As this court stated in its decision on rehearing of *Fretz v. Anderson*, 308 P. 2d 948 (Utah) the statute (survival of actions for injury and death against the personal representative of a deceased wrongdoer) does not control a claim for property damage.

Let us for the moment examine the content and meaning of this presumption. In *Morrison v. Perry*, 140 P.2d 772, this court said,

“Defendant in his brief says that it is true that when a collision occurs on the defendant’s wrong side of the road a presumption of negligence arises in the absence of evidence explaining why his car was on the wrong side of the road. Defendant then vigorously argues that the moment an explanation is offered, the presumption ceases and does not longer exist. This is true, but the evidence upon which the presumption was based remains in the case and is to be considered by the jury, unless there is no conflict between such evidence and the explanatory evidence.” (Citing cases.)

See also 9 *Wigmore on Evidence*, Third Edition, Section 2491.

In the absence of explanatory evidence, this presumption satisfies the plaintiff’s burden of proof and will sustain a finding in his favor. In the case at bar, no explanatory evidence was offered by appellant and the court found that appellant’s agent was negligent in being on the wrong side of the road.

Now assume for some legal reason (there was no explanatory evidence) that the presumption is not available to the respondent. Still, as the court said in *Morrison v. Perry*, supra, the facts giving rise to the presumption remain in the case, the weight and sufficiency to be determined by the trier of fact.

In this case the fact remains that appellant’s agent was on the wrong side of the road when the accident happened. And as this court said in *Horsley v. Robinson*, 186 P. 2d 592, (Utah) at page 599,

“This is a finding of negligence from the surrounding facts and circumstances and not merely from the happening of the accident alone. It is universally recognized that negligence may be inferred from the happening of the accident and the surrounding facts and circumstances where the facts are such as to reasonably justify such inference even though there is no direct testimony to establish the exact grounds of negligence which caused the accident.”

Therefore, even if the presumption of negligence were removed from the case, still from the facts of the accident, negligence may be inferred by the trier of fact. In this case, that finding is sufficient by reason of the fact that clearly the agent of appellant was entirely on the wrong side of the road when the accident happened. Further, as Professor Wigmore states in Section 3491, *supra*, this presumption is a presumption of fact and not law and therefore not a true presumption at all. The term presumption has been applied by the use of inexact terminology. What it is, is a factual situation which by reason of experience carries to a conclusion and “conviction of mind” with compelling force. This, I venture, is exactly the process by which the trial court reached its finding. Based, as shown, upon sufficient evidence.

Appellant’s argument that they are not responsible for their agents being on the wrong side of the road because of this court’s ruling in *Fretz v. Anderson*, *supra*, is without merit. Carried to its extreme, it would mean that in a case where both drivers are killed and there are no eye witnesses there could be no recovery. Such a universal proposition will not stand the test of logic and reason.

One other proposition of appellant merits comment. They place great stress on the testimony of an insurance investigator for appellant's insurer to the effect that vehicles traveling east on U.S. Highway No. 40 were deflected into the opposing lane of traffic by a depression in the highway at the railroad tracks which were about 250 feet west of the scene of the accident.

Sheriff Nordgren, a disinterested witness, testified that he had traveled the same highway at speeds of up to 70 mph and had no difficulty in negotiating this curve (R. 67).

In view of this conflicting testimony, the finding of the trial court against appellant, is conclusive.

## CONCLUSION

Appellant has asked in its brief for this court to re-examine all of the facts in this case, draw therefrom inferences in its favor, and reach a result contrary to that of the trial court. The theory of appellant's appeal, however, is that there is insufficient evidence to justify the findings and judgment.

Under that theory, this court need only determine, indeed may only determine, whether there is evidence in the record to support the findings and judgment of the trial court.

The facts are without material dispute and are sufficient (more, they preponderate) to show that appellant's agent was within the course and scope of his em-

ploy at the time of this collision and the collision was caused by his negligence.

The findings and judgment of the trial court should be affirmed.

Respectfully submitted,

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