

1957

## Ida M. Johnson v. Arthur Hardman : Brief of Respondent

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Rich, Elton & Mangum; Counsel for Respondent;

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Case No. 8647

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

AUG 23 1957

IDA M. JOHNSON, Administratrix  
of the Estate of C. TENNYSON  
JOHNSON, deceased,  
*Plaintiff and Respondent,*

Clerk, Supreme Court, Utah

—vs.—

ARTHUR HARDMAN, dba HARD-  
MAN AUTO SALES,  
*Defendant and Appellant.*

BRIEF OF RESPONDENT

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# IN THE SUPREME COURT of the STATE OF UTAH

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IDA M. JOHNSON, Administratrix  
of the Estate of C. TENNYSON  
JOHNSON, deceased,  
*Plaintiff and Respondent,*

—vs.—

ARTHUR HARDMAN, dba HARD-  
MAN AUTO SALES,  
*Defendant and Appellant.*

Case No. 8647

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## BRIEF OF RESPONDENT

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

## STATEMENT OF THE CASE

This is the second in a series of five cases which were tried before the District Court of the Third Judicial District involving a head-on collision which occurred on December 20, 1954. The defendant Nathan Child was driving a 1951 International pickup truck east on highway 40, 10 miles west of Salt Lake City, when it collided with an automobile in which the deceased, C. Tennyson Johnson, was a passenger. The liability of defendant Hardman was based upon the fact that de-

fendant Child was his agent and servant and was on a joint venture with him. Verdict and Judgment were rendered in favor of plaintiff against both defendants Hardman and Child in the sum of \$43,628.23.

The first case in this group to reach this Court was *Anderson vs. Hardman*, No. 8580, the opinion in which case has been rendered but has not been reported either in the Pacific Reporter or the Utah Reports.

The facts in the Anderson case and the present case are the same. It clearly appears that the truck driven by Child belonged to Hardman and was being driven in furtherance of Hardman's business as a used car dealer. Hardman testified that he did not intend to transfer title until he arrived at Sunset (37, 38) and stated that when they reached there the papers completing the deal, including a conditional sales contract, would be signed (44). He further testified that when they left Tooele there had been no discussion about whether there would be a provision for attorneys fees, about the form of the note or contract or about whether title would be retained by Hardman (46, 48, 49).

We submit that the opinion in *Anderson vs. Hardman* has resolved the issues in this case in favor of respondent and against appellant.

The Statement of Facts contained in the brief of appellant Hardman is inaccurate and does not fairly set forth the evidence. However, we do not feel it neces-

sary to make a Statement of Facts because the statement of facts contained in the Anderson opinion accurately sets forth the testimony and a reading of that opinion will supply the Statement of Facts in the present case.

We will meet each of the points raised by appellant in the order in which he sets them forth in his brief.

## STATEMENT OF POINTS

### POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT DEFENDANT NATHAN CHILD WAS THE AGENT OR SERVANT OF DEFENDANT HARDMAN OR HIS JOINT VENTURER AND DEFENDANT HARDMAN IS LIABLE FOR THE NEGLIGENCE OF DEFENDANT CHILD AS A MATTER OF LAW.

### POINT II.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS ON THE LAW OF THE CASE.

## ARGUMENT

### POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT DEFENDANT NATHAN CHILD WAS THE AGENT OR SERVANT OF DEFENDANT HARDMAN OR HIS JOINT VENTURER AND DEFENDANT HARDMAN IS LIABLE FOR THE NEGLIGENCE OF DEFENDANT CHILD AS A MATTER OF LAW.

We submit that this Court in *Anderson vs. Hardman* has ruled as a matter of law that defendant Hardman is responsible for the negligence of defendant Child and is liable for any damages proximately caused by such negligence. This Court states:

“The basic question on appeal is whether or not under the facts the conceded negligence of defendant Child can be imputed to the defendant Hardman under one of the following theories, to-wit:

- (a) Child was the employee of Hardman.
- (b) Child was Hardman’s agent.
- (c) Child and Hardman were engaged in a joint enterprise.

There is no substantial conflict in the evidence; and the facts concerning the relation between Hardman and Child are uncontroverted. The question is what conclusion of law must be drawn from the evidence.”

This Court then went on to hold that the evidence established that the title to the truck had not passed from Hardman to Child and that Child and Hardman were acting in furtherance of the business of Hardman in effecting a sale of the truck to Child. The trip from Tooele to Sunset was in furtherance of Hardman’s business and was for the purpose of completing the sale.

Since the uncontroverted evidence establishes this there can be no question but that Hardman is responsible as a matter of law for the negligence of defendant

Child. We submit that this determination disposes of the case and the Judgment should be affirmed.

## POINT II.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS ON THE LAW OF THE CASE.

The defendant finds fault with the instructions of the trial court. These questioned instructions relate entirely to the relationship between Hardman and Child. Inasmuch as that relationship was established by uncontroverted evidence and as a matter of law defendant Hardman is responsible for Child's negligence, the Court need not consider these instructions.

In order to make a complete answer to appellant's brief we, nevertheless, will consider the claimed errors. This Court in the Anderson opinion did not set forth in detail the claimed errors in instructions. It merely stated:

“Nor do we find any prejudicial error in any instruction given by the court or in the refusal to give any requested instruction.”

A perusal of the briefs in that case shows the same type of error was claimed there as here and this Court determined the instructions were without prejudicial error. Hence, we submit that the Anderson case is also authority for the proposition that the instructions in this case are correct.



## INSTRUCTION NO. 10

This instruction attempted to define and set forth the issues as reflected by the pleadings of the parties. While there is no statement by the trial court expressly saying that the defendant Hardman denied the agency relationship between Hardman and Child, it is pointed out that the defendants in their answers deny they were negligent. It is to be noted that the defendant Hardman in his answer (7) did not specifically deny the agency but merely set forth a general denial.

This instruction did not purport to set forth the elements that plaintiff would have to prove in order to recover judgment. This matter was fully covered by Instructions No. 12 and 13 and plaintiff was thereby required to prove agency. Certainly everyone connected with the case knew without any doubt that Hardman contended he was not responsible for the actions of Child.

We submit that there was no prejudicial error committed in giving this instruction and the jury was fully informed that it would be necessary for them to find by a preponderance of the evidence the essential elements necessary to make out the relationship between Hardman and Child which would result in the responsibility of Hardman for the negligence of Child.

## INSTRUCTIONS NO. 12 and 13

These two instructions are the ones which set forth the elements necessary for plaintiff to prove in order

to permit the jury to return a verdict against defendant Hardman, once the negligence of Child was established.

Instruction No. 12 relates to the question of whether or not title had passed to the defendant Child. This instruction is defendant Hardman's Requested Instruction No. 8 with two modifications made by the trial court in order that it might correctly reflect the law and its application to the case at bar. In it the jury is told if title had passed then Hardman would not be liable. This instruction, as well as instruction No. 13, stated that if the contract between the parties had not been agreed upon in all its terms then title could not pass.

We submit that this is the well recognized rule in the law of sales.

See *Hi-Way Motor Co. vs. Service Motor Co.*, 68 Utah 65, 249 P. 133 (1936) wherein the court in holding that there had been no completed contract and hence title could not pass stated as follows:

"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."

Criticism is levelled at the portion of the instruction wherein the jury is told that if it found defendant Hardman delivered the truck to Child without any intention to retain any further interest in said truck, then Hardman was not responsible for its operation. Counsel says that the jury might have believed that Hardman retained a seller's lien or "a friendly interest." We submit that there was no mention of either type of interest in this case. No mention or contention was made that a seller's lien existed. The simple proposition before the court and jury was whether Hardman intended to turn over completely and absolutely his property interest in the truck. If he did not, then title had not passed.

The next proposition to be decided by the jury was whether or not defendant Child was driving this truck for and on behalf of defendant Hardman. If this second element also existed, the plaintiff would be entitled to recover from Hardman as well as Child.

Under Instruction No. 13 it was necessary for plaintiff to establish this element in order for the jury to return a verdict in favor of plaintiff. If the jury found that Hardman requested Child to drive the pickup truck to Sunset where the contract would be finally determined, then Hardman would be responsible. In other words, it

was necessary for the jury to find that Hardman requested that the truck be driven to the place where the parties would consummate their contract which would be in furtherance of the business of defendant Hardman.

From these instructions it becomes evident that defendant's claim that his theory of defense was not presented cannot stand. Plaintiff was required to prove both passage of title and agency under the trial court's instructions. See JIFU 10.6 and 10.7.

This case has nothing to do with a conditional sales contract or dealer's "stickers." No completed contract was ever entered into. It may be that when the parties arrived at Sunset a conditional sales contract would have been executed (44).

There is no issue in this case about the effect of the relationship of conditional vendor and vendee on the question of liability. Defendant Hardman did not place stickers on the car. He placed his own dealer's plates thereon. There is certainly a substantial distinction between stickers and dealers' license plates.

We submit there is no error in any of the instructions given. Plaintiff's theory of the case was fully outlined to the jury and it was required to find all of the essential elements necessary to find liability against defendant Hardman, including the elements of passage of title and agency.

## CONCLUSION

The facts in this case concerning the relationship of defendant Hardman and defendant Child are uncontroverted. There is no dispute in the evidence on this subject and we believe the determination of the existence of this relationship is one of law to be determined by the court. We submit that the relationship of agency or master and servant exists in this case as a matter of law as has already been held by this Court in *Anderson vs. Hardman*, supra, and upon this ground alone the judgment should be affirmed.

Also, there was no prejudicial error in any of the instructions.

We submit the judgment of the trial court in favor of plaintiff and against defendant should be affirmed.

Respectfully submitted,

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