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Consolidated Finance Corporation v. Kent Moulton, dba South Davis Camper Sales, and Mid-Century Insurance Company, A Foreign Corporation : Brief of Respondent Mid-Century Insurance Company

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CONSOLIDATED FINANCE CORPORATION,
Plaintiff and Appellant,

vs.

KENT MOULTON, dba SOUTH DAVIS CAMPER SALES, and MID-CENTURY INSURANCE COMPANY, a foreign corporation,
Defendants and Respondents.

Case No. 12266

BRIEF OF RESPONDENT MID-CENTURY INSURANCE COMPANY

Appeal from the Third Judicial District Court
For the County of Salt Lake
Honorable Stewart M. Hanson, *Judge*

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (Continued

AUTHORITIES

STATUTES

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CONSOLIDATED FINANCE CORPORATION,
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STATEMENT OF CASE

This is an action brought by the plaintiff against the defendant Kent Moulton, a licensed used motor vehicle dealer, and the defendant Mid-Century Insurance Company, his bonding company, to recover the balance allegedly due on the sale of a used trailer. The action against the bonding company is brought under Section 41-3-16, Utah Code Annotated 1953, which provides in part that applicants for a dealer's license shall conduct their business without fraud or fraudulent representation, and Section 41-3-18, Utah Code Annotated 1953, which provides that any person who suffers loss because of fraud or

fraudulent representation on the part of a licensed dealer may recover from the dealer's surety.

DISPOSITION IN LOWER COURT

After a full hearing on the merits, the trial court granted defendants' Motions To Dismiss the plaintiff's Complaint upon the ground that the debt of the defendant Kent Moulton had been discharged in bankruptcy subsequent to the sale of the trailer and that the plaintiff had failed to show that defendant Kent Moulton was guilty of any fraud or fraudulent representation which was the cause of any loss sustained by the plaintiff which would support a judgment against the bonding company.

RELIEF SOUGHT ON APPEAL

Respondent Mid-Century Insurance Company seeks an affirmance of the trial court's granting of its Motion To Dismiss.

STATEMENT OF FACTS

Respondent Mid-Century Insurance Company agrees with only part of the facts as presented by the appellant, and believes that some of the facts stated in Appellant's Brief are not facts but are mere conclusions or opinions. We, therefore, feel it proper to review the evidence upon which the trial court based its decision.

In March of 1967 Clyde Allen, an officer of Consolidated Finance Corporation, asked Kent Moulton to go to Pioche, Nevada and to pick up a repossessed trailer (R. 40, 41, 69). Moulton was then doing

business as South Davis Camper Sales Company, but has since declared bankruptcy. After retrieving the trailer Moulton suggested that since he was in the business of selling trailers the trailer should be left on his lot for sale, and Allen agreed (R. 69, 70).

Sometime in May, 1967 the defendant Kent Moulton contacted Mr. Allen, whereupon the following occurred:

"Q. Sometime toward in May he came down, or around the first part of May he came down and said he had a sale for the trailer, is that correct?

A. Well, I would think that he probably called me on it at that time. I called him intermittently concerning the trailer.

Q. Well then at one time, whether he called you by phone or otherwise, he did tell you he could sell the trailer?

A. Right.

Q. And he needed the title to the vehicle?

A. This is correct.

Q. And you had the title then in your possession?

A. Right.

Q. So he came out to Tooele, as I understand it, and picked up the title?

A. This is memory on how it transacted. I was reminded that possibly my brother might have taken it up to him on a trip up there, but I don't recall it.

Q. At any rate, at the time you surrendered

the title to him he didn't pay you in money or give you the $4,700.00 check?

A. This is right.

Q. And so at that time you were simply trusting him with the title to the vehicle on his representation that he had a sale for it?

A. This is correct.

Q. And you don't know whether you took the title to him or your brother took the title?

A. I am sure I didn't go up with it. I don't remember exactly how he got it. As I recall he said he needed it in a hurry and he was going up to Ogden to consummate the deal, and I just don't remember. I am sure I would have done it the fastest way possible.

Q. Now, the balance shown on your contract with Mr. Blanton was $5,963.00, or around that sum, and the amount we have been talking about is $4,700.00. Did you agree you would let him have the trailer for $4,700.00?

A. The agreement was he could sell it for whatever he wanted.
THE COURT: For whatever he wanted, or could he get?
THE WITNESS: For whatever he could get, but the price that he arrived at was to take care of his trip down to pick the trailer up and net me $4,700.00.

Q. (By Mr. Hanson) So from the sale of the vehicle he was to take his expenses for his trip down to get the trailer and then pay you $4,700.00?

A. Right.

Q. Now, at the time you surrendered the title to him he could have sold the trailer and not paid you anything, is that correct?

A. Well, this is correct.

Q. I mean, he at that point had the power to dispose of the trailer as he saw fit, and you had no security left, is that correct?

A. This would have been true.

Q. In effect, what you were doing was trusting him to pay you $4,700.00?

A. Well, it works out to that. I mean, I didn't have any other choice maybe.

Q. You were anxious to get rid of this trailer?

A. I was very anxious to close the account and get the money, right.

Q. So at the time you received the check of $4,700.00 through the mail on May 26th the man already owed you $4,700.00?

A. This is true.

Q. You did not part with the title of this vehicle on any theory or any idea that the check was either bad or good, did you?

A. Say that again?

Q. Well, let's put it this way. You had already surrendered the title when you received the check?

A. This is right.

Q. So whether the check was good or bad you didn't part with any consideration or any-

thing at the time you received the $4,700.-00 checks?

A. I had already parted with the consideration, this is right.

Q. You had already turned the title over to him?

A. Already given him the title, right." (R. 70, 71, 72)

The defendant Kent Moulton was successful in negotiating a sale of the trailer for $5,000.00, although there appears to be some question as to just when that sale took place. He testified that the sale of the trailer took place in March of 1967, but further testified that the sale did not take place until after the discussion in May with Mr. Allen, at which time Mr. Allen had stated he wanted $4,700.00 for the trailer (R. 83). He further testified that Clyde Allen's brother brought him the title along with the other warranty papers at least a month before he sold the trailer (R. 83, 84). Moreover, he testified that the trailer sat in his yard prior to his selling it for two to three months (R. 41, 80), which would make the sale sometime in May or June of 1967.

On May 26, 1967 at Moulton's office in Bountiful, Utah Kent Moulton delivered to Clyde Allen a check for $4,700.00 (Ex. 2-P, R. 80,81). Kent Moulton testified that "I told Clyde the check wasn't any good and he said he needed it to close his books to satisfy his people, and I would make it good as soon as I could" (R. 81). That check was returned unpaid,

and on June 26, 1967 defendant Kent Moulton forwarded a second check to Mr. Allen (R. 65,81). Again Mr. Moulton testified that Mr. Allen stated he was closing his books and needed something to close his books. This check was also returned unpaid (Ex. 6-P, R. 65). Thereafter Mr. Moulton continued to make payments on the account down to a balance of $2,-206.60 (R. 68).

In his business as a camper dealer the defendant Moulton maintained a "floor planning" arrangement with South Davis Security Bank, which in May of 1967 fluctuated between $17,000 and $24,000. He also had a checking account with the same Bank which was maintained separately from the floor planning arrangement (R. 50). When items which were floor planned were sold the money would be put into the checking account and then would be transferred to pay off loans due under the floor planning arrangement, so that both separate accounts were used in financing the operation of defendant Moulton (R. 49, 50). The Bank would, on occasion, have to wait for one check to clear before another one could clear, and the waiting period was usually limited to three or four days before checks would be returned for insufficient funds (R. 54, 56). The checking account referred to is the same account on which the two checks for $4,700.00 (Ex. 2-P and 6-P) were drawn.

On May 25, 1967 there was $5,608.18 in the checking account; and on part of May 26, 1967 (the day on which the first check for $4,700.00 was

drawn) there was $8,284.80 on deposit (Ex. 3-P, R. 48). However, when that check was presented for payment on June 6, 1967 (R. 54) there were not sufficient funds in the Bank (Ex. 4-P) to pay the check. Again, on June 26, 1967 (at the time the second $4,700.00 check was drawn) there was $5,067.11 in the checking account. But again when the check was presented for payment it was returned for insufficient funds.

Based on the foregoing evidence the Court in its Memorandum Decision found:

> "1. That it clearly appears to the Court that the relationship between the plaintiff and Defendant Moulton was one of a seller and purchaser.
>
> "2. That the Defendant Moulton apparently made some effort to pay the agreed sale price reducing the amount thereof to approximately half of the agreed amount, the payments thereon being over some period of time.
>
> "3. That the title was delivered to the Defendant Moulton, the plaintiff, of course, knowing that with the title of possession in Moulton that a sale could be made.
>
> "4. That although the Defendant Moulton received the full sale price there was no clear and convincing evidence that there was any intention upon the part of Moulton to defraud or cheat the plaintiff, which would be contradicted by his paying half of the sale price, and further by his efforts and attempts to pay the balance." (R. 30, 31)

ARGUMENT

POINT I

THERE WAS COMPETENT EVIDENCE PRESENTED UPON WHICH THE TRIAL COURT COULD FIND IN FAVOR OF THE BONDING COMPANY AND AGAINST THE APPELLANT

The plaintiff's main thrust in this action was against the Bonding Company. While the theory of this case against the defendant Kent Moulton is not made clear either from the trial of the action or its Brief filed herein, we suppose the plaintiff relied on the same claim of fraud to overcome the effect of the defendant Moulton's subsequent discharge in bankruptcy as it did in asserting a claim against the bonding company, Mid-Century Insurance Company.

The sections of Utah Code Annotated 1953, as amended, on which it apparently relied read in part as follows:

> "41-3-16 . . . Before any new motor vehicle dealer's license or used motor vehicle dealer's license shall be issued by the administrator to any applicant therefor the said applicant shall procure and file with the administrator a good and sufficient bond in the amount of $5,000.00 with corporate surety thereon, . . . and conditioned that said applicant shall conduct his business as a dealer without fraud or fraudulent representation, and without the violation of any of the provisions of this act."
>
> "41-3-18 . . . If any person shall suffer any loss or damage by reason of fraud, fraudulent representation or violation of any of the provisions of this act by a licensed dealer or

> one of his salesmen, . . . such person shall have a right of action against such dealer, and/or the automobile salesman guilty of the fraud, fraudulent representation or violation of any of the provisions of this act, and/or the sureties upon their respective bonds."

It should be emphasized at the outset that the only question on appeal is whether there was evidence presented upon which the trial court could find in favor of the bonding company and against the appellant. The question is not whether any member of this Court, sitting as a trier of fact in this case, would have reached the same conclusion the trial court reached, but whether there is any competent evidence to support the conclusion arrived at by that court. This Court has stated on numerous occasions that findings of fact made by the trial court will not be disturbed so long as they are supported by substantial evidence. Therefore, the findings of the lower court must be affirmed unless there was not reasonable basis in the evidence on which the court could fairly and rationally have thought the requisite proof was met. *Lowe vs. Rosenlof*, 12 Utah 2d 190, 364 P. 2d 418 (1961); *Child vs. Child*, 8 Utah 2d 261, 332 P. 2d 981 (1958).

The foregoing standard for appellate review was applied in the following fraud cases, where, as in the present case, the trial judge was required to make a finding of fact: *Lock vs. Lock*, 8 Ariz. App. 133, 444 P. 2d 163 (1968); *Cullison vs. Pride O'Texas Citrus Association*, 88 Ariz. 257, 355 P. 2d 898

(1960); *Wright vs. Rogers*, 172 Cal. 2d 349, 342 P. 2d 447, 455 (1959); *Nalbandian vs. Byron Jackson Pumps, Inc.*, 97 Ariz. 280, 399 P. 2d 681, 686 (1965); *Prudential Insurance Company vs. Anaya*, 78 N.M. 101, 428 P. 2d 640, 643 (1967).

On page 7 of its Brief the appellant asserts that it is undisputed and admitted by the defendant Moulton that he sold the trailer and collected $5,000.00 on the sale price in March of 1967 and that he failed to disclose this fact to the plaintiff's agent until some two months later when he gave them a check for $4,-700.00. This claim is refuted by the testimony of the plaintiff's witness, Clyde J. Allen, who testified that he sent Mr. Moulton out in March to get the repossessed trailer (R.69) and that the trailer was in defendant Moulton's possession for p r o b a b l y two months before he had a sale for it (R. 41). Mr. Allen further testified that when the defendant Moulton called him in May relative to getting title to the vehicle, and prior to the time the $4,700.00 check was given, he informed Mr. Allen that he had a sale for the trailer (R. 70) but that at that time nothing was said about how much Kent Moulton was selling the trailer for, only that the plaintiff wanted a net of $4,-700.00 for the trailer (R. 70, 71, 72). Although Kent Moulton did testify at one point that he sold the trailer in March of 1967 (R. 82), he further testified that he had the trailer in his possession for two to three months prior to selling it (R. 80). He denied that he got $5,000.00 for the trailer in March and never

paid the plaintiff until May (R. 82). He further testified that he had the title to the trailer (which he received from Mr. Allen) at least a month before the sale (R. 83) and that he did not conclude the sale until after the discussion with Mr. Allen in which Mr. Allen said the finance company wanted $4,700.00 (R. 84, 85).

The assertion is further made that defendant Moulton delivered a check on May 26, 1967, or shortly thereafter, bearing the date of May 26, 1967, at a time when he did not have money available in the bank to pay the check. The record is that for at least a part of the day of May 26, 1967 Moulton had a balance of $8,284.80 (R. 48). The record further indicates that in May of 1967, in addition to the checking account, defendant Moulton had a financing arrangement with the Bank upon which the check was drawn by which he had been extended credit fluctuating between $17,000 and $24,000 in May of 1967 (R. 49).

The appellant further makes the assertion on page 8 of its Brief that the defendant Moulton was guilty of embezzlement as defined by 76-17-5, Utah Code Annotated 1953, as amended, which states:

> "Every person intrusted with any property as bailee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, is guilty of embezzlement."

The fallacy with this argument is that it misconstrues the arrangement between the plaintiff and the defendant Moulton. According to the plaintiff's witness, Clyde Allen, the defendant Moulton at the time he got the title to the trailer told him that he had a sale for the trailer. Nothing was said, according to Mr. Allen, about the amount of the sale. The only thing that was said was that the plaintiff had to realize $4,700.00 on the trailer. Upon the assumption that the defendant Moulton was willing to pay the plaintiff $4,700.00 for the trailer, Mr. Allen parted with the title to the trailer. Defendant Moulton was at that point free to sell the trailer for whatever sum he could realize out of the trailer, be that $5,000.00 or some other figure. The purport of that agreement, as found by the trial court, was that the plaintiff agreed to sell the trailer to Kent Moulton for the sum of $4,700.00 and that Moulton was thereafter free to resell the trailer for any figure that he might choose. The evidence further indicates, as found by the court, that the title was delivered to the defendant Moulton, the plaintiff knowing that with the title of possession in Moulton a sale could be made.

It has been universally held that

> ". . . when dealings between two persons create a relation of debtor and creditor, a failure of one of the parties to pay over money does not constitute the crime of embezzlement." 26 Am. Jur. 2d, Embezzlement, Section 17, at page 567.

State vs. Clayton, 80 Utah 557, 15 P. 2d 1057 (1932);

Cottrell vs. Grand Union Tea Company, 5 Utah 2d 187, 299 P. 2d 622, 625 (1956); *Kelly vs. People*, 402 P. 2d 934, 936 (1965).

In the *Clayton* case a woman by the name of Smith transacted all of her business pertaining to a certain parcel of real estate for a period of four or five years with a certain real estate company on an open or running account, with credits being made for moneys received and debits being made for moneys paid out. The defendants, who were officers of the company during the course of these transactions, had received moneys which were to be applied to the payment of an outstanding mortgage. The company became insolvent and ceased to do business. The defendants were accused of embezzlement on the theory that they had used the money which should have been applied on the mortgage for other corporate purposes and that they had fraudulently converted moneys belonging to another. In reversing the lower court convictions, this Court pointed out that

> ". . . the dealings had by Mrs. Smith with the real estate company created but the relation of debtor and creditor and not one of trust in the sense required to constitute an embezzlement or a breach thereof. And, since the monies held by the real estate company were not acquired or held in virtue of such a trust relation, no offense of embezzlement was committed by a failure or neglect to pay the monies over.
>
> . . .
>
> "So far as concerns the offense of embez-

> zlement or other crime, the situation is no different because the company thereafter failed in business and was unable to meet its obligation." 15 P. 2d at page 1062.

The same conclusions were reached in the case of *Cottrell vs. Grand Union Tea Company, supra.* In that case the defendant was a salesman. It was the practice for salemen to collect money on their routes, from which they were permitted to deduct items of expense (including the amount they had earned as salary from the company) as shown by a voucher (yellow sheet) which the company furnished them, and remit the remainder to the company. They deposited the funds in their own bank accounts and remitted to the company by check. It was also shown that on prior occasions the defendant had remitted checks for different amounts than the exact figures owing to the company and that the company had made no objection to this procedure. The court said that this created a debtor and creditor relationship, and went on to say

> "Under the relationship of debtor and creditor, rather than agent and principal, in which the agent is in possession of particular funds belonging to the principal, embezzlement would not lie. The money in question would not be 'the property of another' within the meaning of our statute." 299 P. 2d at page 625, citing Utah Code Annotated, Section 76-17-7 (1953).

Furthermore, the record is lacking in evidence that the defendant intended to defraud the plaintiff.

He did not fail to disclose to the plaintiff that he had a sale for the trailer, nor did he at any time deny that he was indebted to the plaintiff for the $4,700.00 which he had agreed to pay. There was conflicting testimony as to whether Consolidated had ever made arrangements with Moulton to pay off the balance due in installments. Clyde Allen testified that there were no arrangements for credit, but Kent Moulton stated that he and Allen had talked about putting the remainder on a contract but that nothing was ever done about a contract (R. 43, 81). Nevertheless, the defendant Moulton did pay and the plaintiff Consolidated did in fact accept $2,493.40 from Moulton in installment payments on the account, and plaintiff cannot in good faith assert otherwise.

The plaintiff's claim that the defendant Kent Moulton perpetrated a fraud upon the plaintiff in this case is reduced down to the fact that the defendant Moulton gave the plaintiff two checks for $4,700.00 which were returned for insufficient funds. This evidence alone is insufficient to prove fraud under the bonding statute.

The case of *Phoenix Auto Auction vs. State Automobile Insurance*, 86 Ariz. 337, 346 P. 2d 146 (1959) is directly in point. There a car dealer purchased an automobile at an auction and gave a $1,500.00 check for the purchase price, which check was returned for insufficient funds. The dealer had purchased 25 or 30 cars before from the auction without any problem. Evidence produced at the trial revealed

that there were sufficient funds to cover the check only on July 25, and the period from August 11 to August 15. The Arizona statute under which the action was commenced is not worded the same as the Utah statute in that an "unlawful act" rather than a "fraudulent representation" is required in Arizona. But in evaluating the statute the Arizona court made the same inquiry as that made by the trial court in the present case,

> "Whether there was an intent to defraud on the part of (the dealer)." 346 P. 2d at 148.

The court held that the dealer did not intend to defraud the seller simply because he drew an insufficient funds check.

> "Appellant contends that the act of . . . drawing the $1,500.00 check on July 14, not only falls within the definition of 'unlawful act' but is sufficient to constitute a criminal violation of A.R.S. Section 13-316, 'drawing defraud; etc.' It is asserted that the trial court could correctly reach only one conclusion from the facts as stated. We disagree. The trier of fact must needs have decided as a factual question, 'was there an intent to defraud?'
>
> "It is useless to summarize appellant's arguments leading to the conclusion that such an intent existed. The question is not whether any member of this court, sitting as a trier of fact in this case, would have reached the same conclusion the trial court reached, but whether there is any competent evidence to support the conclusion arrived at by that court. We hold

the record contains evidence to support the implied finding of the trial court.

> "The burden of proving an intent to defraud was on the appellant. The trial court from the evidence could reasonably conclude that appellant had not carried that burden and that (defendants) merely breached their contract with appellant, and that therefore, (defendants) were liable for the sum of $1,500.00; but since there was nothing more than a breach of contract, appellee surety was not liable under its bond." Id. at 148, 149.

Plaintiff and appellant cites the case of *Commercial Insurance Company of Newark, New Jersey vs. Watson*, 261 F. 2d 143 (10 Cir.). An analysis of the facts in that case as set out in the plaintiff's Brief on page 10 will show that the course of conduct complained of on the part of the dealer in that case went far beyond simply writing a check for insufficient funds to pay an obligation which was admittedly owing. In that case the dealer, Powell, represented to Import, a wholesale dealer in foreign automobiles, that he had a sale for a Volkswagen and induced Import to give him possession of it and to deposit the title papers in the Los Alamos branch of a Santa Fe Bank with a sight draft for the purchase price in the sum of $1,625.00. The title papers so deposited consisted of an assignment from the original nonresident owner by power of attorney to Import's Manager, and a reassignment of title by registered dealer from Import to Powell's Downtown Auto Sales at Santa Fe. When the sight draft was not paid, Powell

instructed Import to draw another draft for the amount of the purchase price, with title attached, on another bank where he usually did business, and through which he would "floor-plan" the car. Import finally instructed the bank to release title to Powell without payment of the draft, but to return the attached power of attorney. In a subsequent telephone conversation, Import complained of nonreceipt of payment and Powell professed not to understand why payment had not been made by the bank, and said that he would go to the bank and see what was up. Several days later, Powell sold the automobile and delivered the certificate of title and a bill of sale. The purchaser of the automobile from Powell was unable to secure transfer of the title because of the absence of the power of attorney from the original owner. Import then delivered the power of attorney to clear the title and took an assignment of the purchaser's claim against Powell.

As stated by the court in its opinion, Powell was guilty of fraud in a number of respects,

> ". . . in obtaining possession of the automobile and then title for the ostensible purpose of 'floor-planning' the car at a bank, when considered in the light of his later professions not to know why payment had not been made by the bank, though he had not negotiated the agreed financing, certainly indicate an intent to defraud his seller. Indeed, it was quite sufficient to justify the court's finding of fraudulent conduct." 261 F. 2d at 445.

Although it is not pointed out in the opinion, it further appears that Powell sold the car to a purchaser even though at the time he was unable to deliver title to the automobile and that Import subsequently delivered the power of attorney to clear the title and took an assignment of the purchaser's claim. It is noteworthy that nothing is said in the entire case about issuing a check against insufficient funds.

The Utah Bonding Statute was intended to assure against losses based on fraud, fraudulent misrepresentations or violation of the motor vehicle statutes. It was not, however, intended to guarantee that an automobile dealer would pay his debts or simply to protect the creditors of an automobile dealer. Despite appellant's insistence that the drawing of a check on insufficient funds should constitute a per se violation of the Bonding Statute, no authority for such an assertion is cited, and such assertion is directly opposed to the laws of this state and other jurisdictions. The trial court's findings in this case are, in our opinion, supported by the preponderance of the evidence. At least, there is no evidence from which it should be held that the trial judge was compelled to find otherwise.

POINT II.

THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFF FAILED TO PRODUCE CLEAR AND CONVINCING EVIDENCE OF FRAUD

In the second point of its argument the plain-

tiff and appellant makes the assertion that the trial court misconceived the nature of the fraud required to support a judgment for the plaintiff. Such an assertion proceeds on the premise that the plaintiff sustained his burden of proof that the defendant Moulton was guilty of fraud, however plaintiff and appellant may define that term, which the defendants and respondents deny as pointed out in the argument in the foregoing part of this Brief. Plaintiff and appellant then set out some general definitions of the term "fraud," with which we do not disagree.

Plaintiff cites the case of *Lawrence vs. Ward*, 5 Utah 2d 257, 300 P. 2d 619. In that case the fraudulent acts complained of, in the language of the court, arose out of two transactions. In the first,

> "Ward, being in financial difficulty, sold a 1954 Cadillac and delivered title to the buyer. He then represented himself to the agent of the bank as the owner and mortgaged the car, receiving a check for $2500, which was cashed and collected. He was unable to pay the promissory note and the bank claims that its loss was occasioned by the fraudulent representations of a licensed dealer and should be recoverable against his bond." 5 Utah 2d at 261.

The court agreed in this instance, and also in the second instance where

> "One Dalton purchased a 1954 Chevrolet from United Auto Sales and executed his note to the Sandy City Bank. A check, payable to Dalton and United Auto Sales jointly, was sent to the company by the bank and later cash-

> ed and collected. When the company was unable to deliver title, Dalton refused to pay on the note because his endorsement on the check was a forgery. The trial court gave judgment for the bank against Ward and Selleneit since they had received the proceeds of the check. A forgery likewise falls within the protection of the bond and it is immaterial that the bank carried insurance against forgery." Id at 262.

As can be seen in these two cases, the fraudulent or unlawful acts of the dealer consisted of representing himself to be the owner of an automobile which he did not own and which he had already sold, and in receiving the proceeds of a forged check. The facts of that case are clearly distinguishable from the facts of the case at hand. Defendant Moulton in this case made no misrepresentations to the plaintiff. He simply obtained title to the trailer by promising to pay the sum of $4,700.00 to the plaintiff. The evidence indicates that at the time he clearly intended to live up to that promise. In the course of attempting to live up to that promise he did give the plaintiff checks which proved to be drawn against insufficient funds. These checks, it should be noted, were not given at the time title was turned over to the defendant Moulton. As indicated by the appellant's own witness, the plaintiff simply trusted the defendant Moulton to pay the $4,700.00.

The court did define the plaintiff's burden of proof in the *Lawrence* case, supra, saying on page 261 of the Utah Reports

> ". . . plaintiff must prove a material, false representation, an intention that the representation should be acted on in the manner contemplated; the hearer's ignorance of the falsity of the statement, his reliance upon it, his right to rely and his proximate injury . . ."

Plaintiff cites the Arizona case of *Commercial Standard Insurance Co. vs. West*, 74 Ariz. 359, 249 P. 2d 830. This case was cited in the case of *Lawrence vs Ward* in support of the court's holding in *Lawrence vs. Ward* that the mortgagee who recovered judgment against a dealer for fraud was also entitled to judgment against the bonding company. The facts indicate that the plaintiff, a licensed dealer, sold two cars to buyers who signed Conditional Sales Contracts as "purchasers." The plaintiff did not sign as the "seller," although he was the true owner. The plaintiff delivered the Sales Contracts to the defendant, also a licensed dealer, who signed them as "seller." The defendant then assigned the contracts to a bank and collected the proceeds, which he converted. The trial court found that the defendant had violated the provisions of the Arizona bonding statute in that he had engaged in an "unlawful act" by converting the money. The trial court, sitting without a jury, found that the defendant had fraudulently converted the plaintiff's money, and the bonding company appealed.

The defendant's "unlawful act" was not questioned on appeal, and the only issue was whether the defendant was acting as a "dealer" as required by

the statute. The Arizona Supreme Court affirmed the trial court's findings, pointing out that the statute was broad enough to cover all unlawfull activities engaged in by a licensed dealer. Although the court did not go into detail as to how the defendant had converted the money, it appears that his fraudulent conduct was more or less unquestioned. Apparently there was no evidence that the defendant attempted to pay back any of the money or that he exercised any good faith in the transaction.

Likewise the case cited by the plaintiff of *State ex rel MacNaughton vs. New Amsterdam Cas. Co.*, 1 Wis. 2d 494, 85 N.W. 2d 337 is not in point. In that case, as pointed out by the plaintiff's Brief, a customer of a used car lot left his automobile to be sold. The dealer, without his knowledge or consent, mortgaged the car to a finance company and subsequently sold the car after a bond covering the operation expired. There appeared to be no contest that the action of the dealer in mortgaging the car which he did not own was fraudulent. The defense proceeded on the ground that the innocent purchaser of the automobile did not sustain a loss until the sale of the automobile, which was after the bond of the dealer had expired.

By relying on cases in which the trial court's findings of fraud were affirmed, the appellant reveals its failure to properly characterize the issue on appeal. Indeed, the appellant has overlooked numerous cases, including the *Phoenix Auto Auction* case, supra, which are directly in point and which may be

relied upon as holding directly against its position in the present appeal. In *Butte Motor Company vs. Strand*, 225 Ore. 317, 358 P. 2d 279 (1960), the plaintiff, a dealer engaged in the automobile business in Butte, Montana, brought cars to be sold on the defendant's used car lot in Salem, Oregon. The defendant sold the cars and gave the plaintiff two checks, both of which were returned for insufficient funds. Moreover, the defendant never did pay for the cars but used the proceeds for other purposes because he was in financial difficulty. The Oregon bonding statute is worded so that the dealers are required to "conduct (their) business as a dealer without fraud or fraudulent representation and without violating any of the provisions of this chapter." 358 P. 2d at 280, citing O.R.S. Section 481.310. The plaintiff based his claims solely on the theory that the defendant's conduct in failing to pay for the cars when they were sold amounted to fraud as that term is used in the statute.

The court expressly rejected this argument and held the defendant not liable, pointing out that the failure to perform a promise relating to future action or conduct does not constitute fraud within the meaning of the bonding statute. The court also emphasized that the promise to pay was not made in bad faith and that the findings of the trial court could not be disturbed as long as they were "supported by substantial evidence." 358 P. 2d at 281.

In *Warner Motor Company vs. Strand*, 225 Ore.

315, 358 P. 2d 282 (1960), a companion case to *Butte*, supra, an owner delivered his car to the dealer for sale. By agreement, the car was traded for four older models which were sold, but the owner of the original car received proceeds from only one of the four sales. The court held that there was no fraud or violation of the bonding statute on the grounds that the case was controlled by the opinion in the *Butte* case, supra.

The case of *Sterner vs. Lehmanowsky*, 173 Neb. 401, 113 N.W. 2d 588 (1962) is also in point. In that case two causes of action were brought by a small loan company against a car dealer. In the first cause of action the loan company gave the dealer a note, mortgage and certificate of title to repossess a car which had been purchased through the dealer. The dealer collected the amount due on the mortgage but did not remit it to the loan company. In the second cause of action the dealer was accused of (1) failing to return a repossessed car and (2) refusing to deliver insurance proceeds from a damaged vehicle. The trial court granted a directed verdict in favor of the bonding company, and the plaintiff appealed. The Nebraska bonding statute provided that ". . . the licensed dealer will fully indemnify any person by reason of any loss suffered because of . . . (e) any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle . . ." 113 N.W. 2d 592, citing Section 60-619, R.R.S. (1943).

The court held that the plaintiff's evidence fail-

ed to show willful fraud as required by the bonding statute:

> "We agree the bond does protect against willful fraud, but willful fraud is not proved by the mere failure to keep a promise or to pay a debt . . . We do not believe Lehmanowsky's failure to keep his promise to turn over the proceeds is a misappropriation within the terms of the bond in this record." Id. at 595.

In the present appeal the defendant Kent Moulton purchased a vehicle from Consolidated Finance Company for $4,700.00, which was later sold for $5,000.00. Because he was in financial difficulty, defendant Moulton was not able to pay the $4,700.00 in a lump sum, but he later, however, attempted to pay back the amount owed and did, in fact, remit $2,493.40. In light of this evidence the trial court properly found that defendant Moulton did not intend to defraud Consolidated Finance Company, even though checks which he issued were returned for insufficient funds. The trial court found that because defendant Moulton attempted to pay for the trailer in subsequent installments Consolidated had failed in its attempt to produce clear and convincing evidence of fraud. The trial court's findings are substantiated by competent evidence from the record, and it is respectfully submitted that these findings should be affirmed.

CONCLUSION

The trial court in this case found that the defendant Moulton in effect purchased a trailer from the plaintiff, Consolidated Finance Company, for the sum of $4,700.00, and upon his promise to pay said sum secured title to the trailer which he then sold to another purchaser. He thereafter paid the plaintiff some $2,493.40 of the agreed purchase price, leaving a balance owing to the plaintiff of $2,206.60. During the course of paying said obligation the defendant Moulton gave the plaintiff two checks in the amount of $4,700.00 which were not honored because of insufficient funds, although the evidence indicates that at least at some time there were sufficient funds in the bank upon which they were drawn to pay said checks had they been presented at that time. At the time the title to the trailer was delivered to the defendant Moulton, the plaintiff knew that defendant Moulton needed the title so that he could resell the trailer, which he subsequently did. In others words, he in no way misrepresentated his intentions. The plaintiff claims that the trial court's findings were not supported by the evidence or that they in and of themselves constitute evidence of fraud sufficient to entitle it to a judgment against the defendant Kent Moulton, who has subsequently taken out bankruptcy, and his bonding company. It is submitted that the court's findings were supported by sufficient competent evidence and that the plaintiff failed in its burden to show fraud on the part of the defendant Kent

Moulton upon which a judgment against the defendants and respondents in this case can be based. It is respectfully submitted, therefore, that the decision of the trial court should be affirmed.

Respectfully submitted,

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