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Haskell N. Bates v. Jimmie Simpson et al : Brief of Defendant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HASKELL N. BATES,
Plaintiff and Respondent,

— vs. —

JIMMIE SIMPSON,
Defendant,

W. J. SAUNDERS,
*Defendant, Cross-complainant
and Respondent,*

THE EMPLOYERS' LIABILITY
ASSURANCE CORPORATION,
LTD., a corporation,
*Defendant, Cross-complainant
and Appellant.*

No. 7686

BRIEF OF DEFENDANT

CROSS-COMPLAINANT AND APPELLANT,

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.

FILED **McKAY, BURTON, McMILLAN**
and RICHARDS,

AUG 10 1951

Clerk, Supreme Court, Utah

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Cross-Complainant and
Appellant, The Employers'
Liability Assurance Cor-
poration, Ltd.*

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No. 7686

BRIEF OF DEFENDANT

**CROSS-COMPLAINANT AND APPELLANT,
THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.**

STATEMENT OF FACTS

The defendant Bonding Company seeks by this appeal to reverse the District Court's refusal to require W. J. Saunders to pay the loss suffered by plaintiff Bates by reason of Saunders' failure to deliver title to the car which Saunders sold to Bates, and the Court's refusal to hold Saunders on his agreement to indemnify

the defendant Bonding Company, together with other error hereinafter pointed out.

In 1949 Jimmie Simpson and W. J. Saunders commenced operating a used car lot at 999 South State Street, Salt Lake City, Utah. (R. 151) Arrangements for the rental of the lot were made by Simpson with the owner of the property, the Utah Motor Parks, for both Simpson and Saunders. (R. 151) Simpson and Saunders each paid his share of the rent; they shared the telephone, shared the furnishings and the building that was moved on to the property. The building was located in the center of the lot and the cars were displayed on the lot. Across the top of the building was a large sign through the center of which ran the words "Used Cars", and at one end appeared the name of "Saunders" and at the other end of the sign appeared the name of "Simpson". (R. 127) Saunders and Simpson had each secured a license from the State of Utah as a used car dealer, and each had secured and furnished a bond from the defendant The Employers' Liability Assurance Corporation, Ltd.

The plaintiff came to the lot to look at cars on November 5, 1949, and met the defendant Jimmie Simpson, and after trying out a 1947 Chevrolet Sedan, signed a used car order which appears as Exhibit A. (R. 77) This order was never signed by any person as dealer or seller. This 1947 Chevrolet sedan had been brought to Salt Lake by Simpson under consignment from Brokaw-Bauer, an automobile company in Los Angeles, Cali-

fornia. The title was to be forwarded to the Continental Bank by Brokaw-Bauer and to be picked up under a draft at the bank by Simpson. (Exhibit 11) The car had been placed on the lot and had been there for some several days prior to the visit by Bates.

There was no statement made by Simpson to Bates as to who owned the automobile, but as stated by Bates, Simpson told him that title to the car would be retained by the finance company until Bates had paid out the purchase price. (R. 110) Bates stated that Simpson told him that Bates could drive the car on the California license plates which it carried for three weeks, and that Simpson would take care of the transfer of the plates and the registration of the car. Bates turned in an automobile for which he was given credit in the sum of \$500.00, and on the 5th of November, 1949, he endorsed the title to the automobile turned in to Simpson and left the car at the lot.

At the time of this transaction Simpson told Bates that he did not know just where the car would be financed; that his partner and finance man Bill Saunders at that time was out on a pheasant hunt, and that that matter would have to be handled at a later date. (R. 77-80) Upon Bates' return to the lot sometime during the following week, he was advised by Simpson that Saunders had financed the deal through Strevell-Paterson Finance Company. (R. 84) At the time of the transaction on November 5th, Simpson wrote out in longhand a copy of Exhibit 1, which carries the same information

according to the witness Bates, as contained in Exhibit 1, other than that the seller was left blank in the copy given Bates. Bates claims to have lost that copy; nevertheless, Bates signed Exhibit 1 in original and three copies, and other than for Bates' signature, Exhibit 1 was entirely blank and unfilled. (R. 80)

Upon Saunders' return from the pheasant hunt the deal with Bates was presented to Saunders by Simpson with the request that Saunders assist Simpson in his effort to secure financing through Strevell-Paterson Finance Company. At that time Simpson had a credit report on Bates and went over the entire transaction with Saunders, giving him the information on Bates and the transaction as heretofore set forth. Saunders had previously known of this car having been brought to the lot from California by Simpson, and was aware of the car's condition and its worth. Saunders was also advised that title to the car was held by Brokaw-Bauer in California, and could not be obtained until a draft had been paid for the car at Continental Bank. (R. 202) The draft from Brokaw-Bauer was not forwarded to the Continental Bank until November 25, 1951. (See Exhibit 11.)

Saunders took the four blank title retaining contracts to Strevell-Paterson Finance Company, together with the used car order (Exhibit A), and presented these documents, together with the credit rating on Bates, to Mr. Minson of Strevell-Paterson Finance Company. Minson filled in the contract (Exhibit B and

Exhibit 1) from the information on the used car order, and Saunders signed the purchase agreement as the Seller-Dealer. (R. 247) This took place on November 15, 1949, and a copy of the agreement was shortly thereafter mailed to Bates and he received it sometime between the 17th and 20th days of November, 1949.

Thereafter Bates made three payments of \$66.00 each to Strevell-Paterson Company in accordance with the provisions of the contract. (Ex. 9) Strevell-Paterson Company, on November 15, 1949, gave to Saunders its check in the sum of \$900.00, the balance owing by Bates. Saunders cashed that check and gave to Jimmie Simpson his check for \$870.10, with the endorsement on the check, "Payment in full for 1947 Chevrolet Sedan, Motor No. N 172835". (Exhibit 7) Simpson then went to the Continental Bank to secure the title to the 1947 Chevrolet and the draft and the title were not then at the bank, and he returned and reported this fact to Saunders. (R. 214) Saunders then had Simpson execute Exhibit 6, being an assignment of the automobile to Saunders.

The testimony shows that Saunders had an avenue of credit established at Strevell-Paterson, and by reason of that credit was able to do financing with that Company. Simpson had his credit established with the Capitol Finance Company and was able by reason of that credit to do his financing through Capitol. However, Saunders could not deal at Capitol and Simpson could not deal at Strevell-Paterson. (R. 157) At the

time of this transaction, Simpson advised Saunders that Capitol was unable to give him financing because their money was out on small loans as it was nearing the Christmas season, and he asked Saunders to help him by getting the contract financed through Strevell-Pater-son. Simpson and Saunders agreed that Saunders should receive the \$70.00 reserve for his part in securing this financing. (R. 157)

Saunders contacted Simpson at several intervals between November 15, 1949, and January 7, 1950, and during which two-month period Simpson at all times indicated he would get the title from the bank. Saunders at no time attempted to secure the title himself from the bank and at all times indicated he was satisfied to rely upon the assurance of Simpson that Simpson would get the title. Neither did Saunders at any time attempt to register the car at the State Capitol. Bates last saw Simpson December 17th at the used car lot, at which time Simpson indicated to Bates that he would get him the plates to the car in just a few days, and Saunders last saw Simpson January 7, 1950.

The Brokaw-Bauer people commenced an action in the Third District Court in Utah, by which proceeding they picked up the 1947 Chevrolet Sedan automobile from Bates.

Saunders and Simpson, during the several months that they had been together, had joined in several joint ventures, one of them being a trip to Nevada and Cali-

fornia in which they picked up a number of cars and brought them back to Salt Lake City, where they were sold and the profits and expenses shared. (R. 202) They had on other occasions joined in the financing of "deals" for each other the same as on the Bates transaction. (R. 202)

Simpson was not served in this case and the Court tried the case without Simpson as a party. Judgment was given the plaintiff Bates for the value of the car he turned in, together with attorney's fees and costs in defending the Brokaw-Bauer action for a total judgment of \$933.52, and the Court dismissed Bates' action against Saunders. The Court gave Saunders judgment against the Bonding Company for \$867.75. The judgment of Saunders was made up of the sums charged against his account by Strevell-Paterson in the amount aforesaid. However, the District Court refused to take into consideration the fact that Saunders had retained out of the check to Simpson the sum of \$29.90 for which credit was never given. The Court dismissed the cross-complaint of the Bonding Company against Saunders.

STATEMENT OF POINTS RELIED UPON
POINT NO. I.

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT SAUNDERS WAS LIABLE TO BATES AS A CO-TORTFEASOR WITH SIMPSON.

(a) *The sale to Bates was a joint venture participated in by Simpson and Saunders. Both Simpson and Saunders received bene fits by reason of the transaction.*

(b) *Saunders, with all the knowledge of facts in Simpson's possession, made the same representations to Bates as did Simpson.*

(c) *Saunders violated the statutes of the State of Utah in the same manner and to the same extent as did Simpson.*

POINT NO. II.

THE COURT ERRED IN FAILING TO FIND AS A FACT AND CONCLUDE AS A MATTER OF LAW THAT SAUNDERS' UNLAWFUL CONDUCT PRECLUDED HIM FROM MAINTAINING AN ACTION AGAINST HIS CO-TORTFEASOR, SIMPSON.

(a) *Saunders is precluded from maintaining an action against Simpson by virtue of Section 57-6-5, Utah Code Annotated, 1943, as amended.*

(b) *The law leaves the wrongdoer where it finds him.*

POINT NO. III.

THE COURT ERRED IN FAILING TO FIND AS A FACT AND CONCLUDE AS A MATTER OF LAW THAT SAUNDERS WAS BY CONTRACT, ACT AND REPRESENTATION PRIMARILY LIABLE FOR ANY LOSS SUFFERED BY BATES.

POINT NO. IV.

THE COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS A CONTRACT BETWEEN BATES AND SIMPSON FOR THE PURCHASE AND SALE OF THE 1947 CHEVROLET IN QUESTION.

(a) *The only contract in existence concerning the said automobile was between Bates as the buyer and Saunders as seller.*

(b) *The parol evidence rule prohibits the introduction of evidence to vary the terms and to substitute the parties of written instruments.*

(c) *Saunders is estopped to deny that he was the seller of the automobile to Bates in view of his express representations to Bates and to Strevell-Paterson Finance Company.*

(d) *If there was no joint venture, Simpson was not liable to Bates.*

POINT NO. V.

THE COURT ERRED IN CONCLUDING THAT SIMPSON WAS LIABLE TO SAUNDERS FOR VIOLATION OF THE ACT.

(a) *The Court erred in finding that Simpson sold Saunders a contract, since Simpson did not have a contract with Bates.*

(b) *No statutory liability exists as to the sale of a contract as distinguished from the sale of an automobile.*

POINT NO. VI.

THE COURT ERRED IN FAILING TO GIVE DEFENDANT EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, CREDIT AS AGAINST SAUNDERS FOR \$29.90 PAID TO SAUNDERS FOR THE PURPOSE OF OBTAINING LICENSE PLATES AND PAYING SALES TAX.

POINT NO. VII.

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT SAUNDERS IS LIABLE TO EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., FOR ALL AMOUNTS AWARDED TO BATES AGAINST SAUNDERS AND/OR SIMPSON IN THIS TRANSACTION ON THE BOND APPLICATION AGREEMENT BETWEEN SAUNDERS AND EMPLOYERS.

POINT NO. VIII.

THE COURT ERRED IN FAILING TO MAKE FINDINGS OF FACT AS TO THE ALLEGATION OF THE COMPLAINT OF BATES AND THE CROSS-COMPLAINT OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., AGAINST DEFENDANT AND CROSS-DEFENDANT SAUNDERS.

ARGUMENT

POINT NO. I.

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT SAUNDERS WAS LIABLE TO BATES AS A CO-TORTFEASOR WITH SIMPSON.

(a) The sale to Bates was a joint venture participated in by Simpson and Saunders. Both Simpson and Saunders received bene fits by reason of the transaction.

On November 5, 1949, at the used car lot, Simpson told Bates that Bill Saunders was his partner; that they would finance the car at one of two finance companies, either Strevell-Paterson or Capitol Finance (R. 84). On November 7th Simpson again told Bates that Saunders, his partner and finance man, was away hunting and the financing would be taken care of when he returned. (R. 83)

Subsequent to November 7th, but during the week following November 5th, Bates contacted Simpson again

and he was told by Simpson that his partner Bill Saunders had got the car financed through Strevell-Paterson. At Page 85 of the record, Bates states that when he got the signed contract showing Saunders as the seller, he presumed everything was all right, because Simpson had told him before that Bill Saunders had got it financed through Strevell-Paterson and he "couldn't see anything wrong with it".

At Page 110 of the record Bates states that no mention was made as to who the dealer would be. The only discussion was as to the finance company and that it would be one of two finance companies, and in answer to the question:

"Q. Did he say that it might be either himself or Saunders that would be the dealer?

he replied:

A. Well, that was later. He didn't say anything about who might be. He told me later that Saunders was his partner and he had got it through Strevell-Paterson."

Page 111:

"Q. Weren't you concerned at all when you bought a car from—thought you had bought a car from Simpson and the contract came out that you had bought it from Saunders?

A. Well, the two names was on the place there. I couldn't see anything wrong with it."

In January, 1950, Bates went to Blair Motor Company to locate Saunders, and when Bates drove up Saun-

ders walked out to him and said: "I'll bet you're looking for me", and in answer to the question: "You're positive that Saunders came up to you and knew who you were?" Bates answered, "A. Well, it appeared that way."

Saunders' own explanation appears on R. 154 as follows:

"Q. Were you on the used car lot at 999 South State?

A. Oh, yes.

Q. On or about November of 1949? .

A. Oh, yes.

Q. Now, when this contract was brought to you, was there any signature on the lines 'Seller-Dealer', 'Title', or 'Dealer's Address'?

A. No.

Q. Now, what was the purpose of you taking the position of the seller of this automobile to Mr. Bates?

A. Well, Strevell-Paterson didn't do business with Jimmie Simpson. In order for me to get it financed I had to sign it.

Q. In other words, Strevell-Paterson wouldn't finance this unless you were the seller?

A. That's correct.

Q. They wouldn't extend credit to Simpson?

A. They done no dealings with Simpson.

Q. Now what then was the purpose of your signing on the line, 'Seller-Dealer' other than to enable you to go to the Strevell-

Paterson and represent that you were the one that sold the car to Bates?

A. Well, in order to cash the contract."

On Page 155 of the transcript:

"Q. Now what consideration did you get out of it?

A. Well, Strevell-Paterson paid me a reserve of \$70.00 for bringing them that contract."

On Page 157 of the transcript:

"Q. Now it was the \$70.00 that brought you into this deal; the chance to pick up \$70.00, wasn't it?

A. Yes.

Q. He (Simpson) came down and told you he couldn't get it financed at Capitol, didn't he?

A. That's right.

Q. And wanted you to lend your aid in getting it financed?

A. That's right."

Page 158 of the transcript:

"Q. But you were the one that represented that you owned the car and you were selling and that the title was coming out to you?

A. I guaranteed it, yes.

Q. No, but that you had the title as seller?

A. Yes, that's right.

Q. So you were the one that had to get that title then, weren't you?

A. Uh uh.

At Page 195 of the transcript appears the following:

“Q. Had Simpson ever helped you out at Capitol on a deal like this?

A. Possibly.

Q. Definitely he did, didn't he?

A. Well, I don't know the case, but it's possible. He bought the car from me and sold it.”

As to the transaction between Simpson and Saunders, the story appears on Pages 202 and immediately following of the transcript as follows:

“Q. What authority did you have to do that? (Insert Saunders' name as seller.)

A. Well, I had his okey on it.

Q. If you had his okey tell me where you got that okey and what was said.

A. Well, he gave it to me.

Q. Now, what was said in this conversation between you and Simpson?

A. Well, he called me up and I went down and he asked me if I would cash it. I looked over the credit rating; I knew the car, I knew what he was talking about.

Q. He showed you the contracts, Exhibit 1 and Exhibit B, didn't he?

A. In blank. All he had was pages signed.

- Q. And so you wanted to know something about the deal, didn't you?
- A. Naturally.
- Q. So you found out at that time some of the facts concerning the car, didn't you?
- A. Oh, who was purchasing it, yes, and the amount.
- Q. Now you had already known that the car had come from California, from Brokaw-Bauer?
- A. Yes.
- Q. As the result of Simpson's trip to California?
- A. Yes.
- Q. The same kind of a trip that you and Simpson had been on in July of the same year, a trip to buy cars?
- A. I went on one trip to California, yes.
- Q. Then you knew that the title of the car was with a draft at the Continental Bank?
- A. When?
- Q. When you were talking with Simpson on or about the 15th of November?
- A. Yes.
- Q. He told you all about that?
- A. Yes, sir.
- Q. He showed you, did he show you the order?
- A. Yes.
- Q. Under which the car had been purchased by Bates?

- A. Yes, sir.
- Q. He told you all of the circumstances concerning the sale and the transfer to Bates?
- A. Yes.
- Q. He told you a little about Bates' background?
- A. Well, it was all in writing. I could see it and read it for myself.
- Q. You told him the car could be operated on California plates?
- A. He didn't tell me until a few days later.
- Q. You were to see that the title was transferred up to the State Capitol because you were to pay the tax?
- A. Very true.
- Q. And that was because you had assumed the position of seller?
- A. I don't know about that.
- Q. Did you inquire whether it had been properly registered in any way at the State Capitol before you placed your name as the seller on this contract?
- A. No.
- Q. Was anything said about who would get the reserve?
- A. *Well, it was understood I would get it if I done it for him. Strevel-Paterson certainly wouldn't.*
- Q. *If you did this for Simpson, then you would get the reserve?*
- A. *Strevel-Paterson would pay me.*

Q. So actually what this deal was, was purely an arrangement between you and Simpson whereby you would both get a profit out of the sale of this car to Bates?

A. Well, Simpson wouldn't pay me the profit.

Q. No, each one of you would get your profit by selling this car to Bates?

A. I would make \$70.00 if he had been all right.

At Page 211 of the transcript:

“Q. Who gave you the authority to put your name in as seller?

A. Simpson.

Q. Now what was said about it?

A. Well, that he couldn't cash the contract with his finance company and if I would do it he would appreciate it very much. I had no reason to distrust Simpson. You don't think for a minute I would have passed that money over if I had any alarm over the deal.

Q. Well, you had been in on these deals all the way along, you had full confidence in him?

A. I trusted Simpson.

Q. *So that once again by entering into this contract with Bates, you yourself had made the same representation that you would get the title so that it could be financed?*

A. *I would have if Simpson hadn't defaulted on his end of it.*

Q. *So that representation is the same to Bates, isn't it?*

A. *Yes, sir.”*

At Page 218:

“Q. Now, Mr. Saunders, you knew that \$870.00 wouldn’t pay the balance on the draft at the bank at the time you turned it over to Simpson?

A. Certainly.

Q. You knew that Simpson had to get some more money to pay that?

A. Certainly.

Q. So you merely relied upon Simpson’s credit to go up and get the draft from the bank?

A. Certainly.

Q. *In fact, you were leaving this whole thing to Simpson and you were acting merely for the purpose of lending your credit? This was still Simpson’s deal?*

A. *That’s right.”*

At Page 219 of the transcript:

“Q. *But at any rate on January 5, 1950, you were still having full trust and confidence in Simpson?*

A. *Well, certainly.*

Q. *Had there been anything said or indicated by Simpson at any time up until then that he was not going to get this title?*

A. *I should say not.*

Q. Now if you were to get the license plates and arrange for the transfer did you have delivered to you an application signed by Bates for that transfer?

A. Yes.”

At Page 246 of the transcript Mr. Minson, the car finance agent for Strevell-Paterson, in answer to questions by Saunders’ attorney, testified as follows:

“Q. But, Mr. Minson, if Mr. Saunders brought this in with Haskell N. Bates’ signature—I refer to Exhibit 1—the rest of the document blank, *and he had with him the document which shows as the purchase order which goes with the sale* and he was willing to sign this and signed it in your presence and you would loan him money on it, wouldn’t you?

A. That’s right.

Q. In fact, that is what has happened in this case, isn’t it?

A. That is correct.”

On Page 247 Mr. Minson states:

“Q. Did you see Mr. Saunders when he brought the document into you.

A. *Yes, I filled out the transaction and issued the check.*

Q. Now as to the arrangement between Simpson and Saunders, you don’t know whether they split commissions on deals or not, do you?

A. I don’t know.

Q. You don’t know whether they shared expenses on the lot, do you?

A. Mr. Saunders said they did. Told us they did.”

Simpson represented and held out Saunders as his partner and finance man, and told Bates that the car would be financed by his partner. The two were on the same lot; their names were on a common sign, advertising their business; they shared their expenses; they had previously shared on a similar transaction in bringing cars from California; they assisted each other in their financing, and in the Bates transaction, the deal, though still Simpson's, was arranged so as to give Saunders at least \$70.00 of the profit on the sale and financing. The inescapable conclusion must be that Saunders acted as and was in fact a partner, or at least a joint venturer or actor with Simpson in consummating this transaction.

Saunders knew that neither he nor Simpson had the title when he signed the contract to Bates and when he sold the contract to Strevell-Paterson. On that date he knew that neither the title nor the draft was at the Continental Bank. On that date he knew it would be several days before that title would be delivered. On that date he knew that Simpson, like himself, must secure additional money from some source to meet the draft at the bank. With equal knowledge of all of the facts he made the same representation to Bates that Simpson had made, and in addition had made the same representation as to title to Strevell-Paterson by inserting his name as seller into the contract. The facts are clear that Saunders joined with Simpson in a misrepresentation of this transaction to both Bates and Strevell-Paterson in order to secure the money on the Bates contract, and assumed equally

with Simpson the obligation to deliver title to Bates, as required by Section 57-6-5, U.C.A., 1943.

The law is clear that one whose conduct is a substantial contribution to the damage or loss suffered is liable to the same extent as a joint tortfeasor. The facts of this case establish Saunders and Simpson as joint tortfeasors, but the law does not require that we need go that far in establishing the relationship to hold Saunders for his acts, if such acts constitute a substantial contribution to the loss.

Section 879 of the *Restatement of the Law of Torts* is as follows:

“Except as stated in Section 881, each of two persons who is independently guilty of tortious conduct, which is a substantial factor in causing a harm to another, is liable for the entire harm, in the absence of a superseding cause.”

“Comment:

“(a) A person whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result. Nor are the damages against him diminished. This is true where both are simultaneously negligent, and also where the act of one either occurs, or takes harmful effect after that of another. It is immaterial that as between the two, one of them was primarily at fault causing the harm, or that the other upon payment of damages, would have indemnity against him. It is also immaterial that the conduct of one was seriously wrongful, while the conduct of the other was merely negligent, or,

indeed, blameless. Likewise it is immaterial that the liability of one is based upon common-law rules, while that of the other is based upon a statute." *Restatement of the Law of Torts*, Vol. 5, P. 446.

Section 876 of the *Restatement of Law of Torts* is as follows:

"For harm resulting to a third person from the tortious conduct of another, a person is liable if he * * *

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so as to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

The comment upon Clause (c) is as follows:

"Where a person personally participates in causing a particular result in accordance with an agreement with another, he is responsible for the result of the united effort if his act, considered by itself, constitutes a breach of duty *and is a substantial factor in causing the result*, irrespective of his knowledge that his act or the act of the other is tortious." (emphasis supplied.)

See *Restatement of Torts*, Vol. 4, Pages 435, 436, 439.

In the case at bar it is undisputed that Saunders' conduct was a substantial factor in the accomplishment of the sale to Bates. Two factors were necessary to

complete that sale. The first was a customer ready, willing and able to purchase the 1947 Chevrolet automobile. That customer was produced by Simpson in the person of Bates. The second Factor was the obtaining of the financing necessary to complete the transaction. This factor could not be produced by Simpson and it was necessary for Saunders to participate to obtain it. Saunders represented to Strevell-Paterson Finance Company and to Bates that he, Saunders, was the seller of the automobile and the owner of it. There can be no doubt, therefore, that the lending of his name as seller by Saunders was an essential factor in the accomplishment of the sale. It certainly was a "substantial factor" within the meaning of the law as stated by the editors of the Restatement.

We desire that the Court understand our position is that there was a joint adventure, a common enterprise, participated in and benefited by Simpson and Saunders, and that the law of joint venture, therefore, is applicable. However, even if it should be determined that there was no technical joint venture, under the principle stated in the Restatement of the Law of Torts herein enumerated, Saunders was liable to Bates for his actions in participating in the result. His conduct was "a substantial factor in causing the result" in any instance, and Judge Van Cott erred in failing to so find.

(b) Saunders, with all the knowledge of facts in Simpson's possession, made the same representations to Bates as did Simpson.

The Court found that defendant Simpson (R. 42) “falsely and fraudulently, with intent to deceive and defraud plaintiff, misrepresented to plaintiff: (1) That he had good title to a certain 1947 Fleetline Chevrolet Automobile, motor No. N-172835 CAL with the right to sell same to plaintiff; (2) that said defendant would obtain registration of title and license plates for said automobile for plaintiff; (3) that the finance company through which he would finance plaintiff’s contract of purchase would hold title to said automobile until paid for.”

The Court further found that Simpson represented to plaintiff that “W. J. Saunders was said Jimmie Simpson’s finance man and was said Simpson’s partner and that as said Jimmie Simpson’s finance man and partner, W. J. Saunders would finance said automobile with Strevell-Paterson Finance Company”, and “that the only reason said Jimmie Simpson had not obtained license plates on said automobile for plaintiff was because said Jimmie Simpson had been so busy.” (Findings of Fact Nos. 3, 4 and 5; R. 42.)

The Court found that the representations that Simpson would obtain registration of title and license plates and the finance company through which he would finance plaintiff’s contract “were false representations of said Jimmie Simpson’s intentions and plans, said Jimmie Simpson did not then intend, and never has intended to carry out said representations. (R. 42.)

The portion of the Court's finding as to non-existence of intentions is absolutely unsupported by the evidence. The record is completely devoid of any evidence to support a finding that Simpson did not intend to comply with the promises when made; in fact, the evidence is to the contrary. Simpson went down to the Continental Bank, Central Branch, to pay the amount of the draft, when Saunders gave the check on November 15, 1949, and before the draft had arrived from Los Angeles. (R. 214) How can it be said that he did not intend to pay the draft and pick up the title and obtain registration of title and plates when he attempted to perform these very acts within a day or two after the promises were made?

The intentions of an actor can only be determined by what he says and what he does at the time the intentions were relevant. It is submitted that there was not even an attempt by plaintiff to prove the intentions of Simpson at the time the contract was entered into and the statements made. The only evidence on the subject is that he made a trip to the bank to pay the draft and pick up the title, as herein stated.

In the case of *Nielson v. Leamington Mines & Exploration Corp.*, 87 Utah 69, 48 Pac. (2d) 439, the Court expressly held that non-performance of a promise alone is not evidence of fraud. The Court said:

“To predicate a cause of action in fraud upon a failure to perform a promise, there must be an

intention on the part of the promisor at the time of making the promise not to perform it.

‘If the promise is made in good faith when the contract is entered into there is no fraud, though the promisor subsequently changes his mind and fails or refuses to perform.’ 12 R. C. L. 262; *Hull v. Flinders*, 83 Utah 158, 27 P. (2d) 56. Nonperformance of the promise alone is not evidence of fraud. 12 R. C. L. 255.’

The other findings of the Court were that Simpson represented that he had title to the automobile; that Saunders was Simpson’s finance man and partner; that Strevell-Paterson would act as finance company, and that the only reason Simpson had not picked up the plates was because he had been so busy. The latter of these is obviously irrelevant and immaterial in this matter because it occurred after the purported sale and was not in any way an inducement, or intended as an inducement, to obtain the sale. Any wrongful act of Simpson’s was prior to that time. Moreover, there is nothing to support the finding that this latter allegation, if made, was not true. Certainly there is nothing about it that would support an action for fraud or deceit if this representation was standing alone.

Strevell-Paterson did act as the finance company, and there is no justification, therefore, for the Court finding as it did in Findings Nos. 7 and 8 (R. 32-43) that this representation was not true. All the plaintiff’s evidence and all the evidence in the case shows that Strevell-Paterson did act as finance company. Likewise, what can be claimed for the representation that Saun-

ders was Simpson's finance man and partner? The fact is that Saunders did lend his name in this very transaction as seller and dealer. He was the joint venturer in the transaction. He did obtain the financing. He was Simpson's finance man and partner as far as this transaction is concerned. Moreover, the record is devoid of evidence that plaintiff relied upon this representation when he got the contract from Strevell-Paterson showing Saunders as the seller; he was satisfied with it. Plaintiff was not interested particularly whether he was buying this automobile from Saunders or Simpson or John Doe, or any other person who may have left the automobile on the lot. (R. 85, 86-88, 89)

What representation did Simpson make to Bates in which Saunders did not join and participate? If the representation was that Simpson had good title to the Chevrolet, it cannot be said that Bates relied upon it because when the contract came showing that the owner was Saunders, Bates accepted it and was satisfied with it. If the representation was that Saunders had good title to the automobile, Saunders made that representation himself by signing Exhibit 1 as seller. The statements with reference to registration, the finance company and the obtaining of license plates were made by Saunders to the same extent and in the same way they were made by Simpson when Saunders signed the purchase contract, Exhibit 1.

There is no question as to the legal principle that even if Saunders had not been liable in his own right

and for his own participation in any misrepresentations to Bates, he is liable for his ratification of Simpson's statements.

“Liability in tort may be predicated upon the ratification of a wrongful act after it is done, where the act benefited, or was done in the interest of, the person adopting the same, and was ratified with full knowledge of the facts. The liability in such case is joint and several.”

52 Am. Juris., P. 455, Sec. 115.

It is apparent that the Trial Judge simply brushed over the law of deceit and fraud in an effort to hold the Bonding Company liable, without permitting it to recover against the real tortfeasors on its indemnity agreement. In every relevant matter Saunders made the same representation, had the same intention, was aware of the same facts and was guilty of the same misconduct as was Simpson. Failure of the Court so to find is clearly reversible error.

(c) Saunders violated the statutes of the State of Utah in the same manner and to the same extent as did Simpson.

The Court found:

“That the defendant, Jimmie Simpson violated the laws of the State of Utah in that he failed to register said used motor vehicle which was brought into the state for the purpose of resale, within ten days; failed to take out a bond on such vehicle to protect the purchaser against loss of title; failed to obtain a certificate of title

from the state tax commission within forty-eight hours after sale of said vehicle; failed to transfer any title or interest or certificate of registration to plaintiff or the company financing such transaction as transferee of said motor vehicle; failed to give notice of such transfer to the Motor Vehicle Division of the Utah State Tax Commission; and sold plaintiff a used motor vehicle to which said Jimmie Simpson had no right, title or interest in or to." (Finding of Fact No. 12; R. 43-44.)

It has been heretofore pointed out that Simpson and Saunders were joint venturers in the sale of the automobile to Bates, and that Saunders was the actual seller by virtue of the sales contract (Exhibit 1). He was also the dealer, as indicated in said contract. By reason of his being a joint venturer, and being the actual seller-dealer, the same obligations devolved on him as on Simpson. While Simpson physically drove the automobile into the state, Saunders was a real party in interest. Certainly insofar as the statute confers any rights upon the buyer, the proximate cause to plaintiff was as much Saunders' violation of the statute in his failure to perform the obligations thereby created as Simpson's failure to comply and perform.

This defendant does not admit that the statute referred to confers any private right on the plaintiff, or that the violation of the statute was the proximate cause of any damage to plaintiff. However, Saunders and Simpson were guilty of the same violation to the same extent and in the same manner. Here again, the Court glossed over the rights of the Bonding Company by

holding one of the tortfeasors liable and not the other, so that the Bonding Company could not protect itself upon its indemnity agreement.

POINT NO. II.

THE COURT ERRED IN FAILING TO FIND AS A FACT AND CONCLUDE AS A MATTER OF LAW THAT SAUNDERS' UNLAWFUL CONDUCT PRECLUDED HIM FROM MAINTAINING AN ACTION AGAINST HIS CO-TORTFEASOR, SIMPSON.

(a) *Saunders is precluded from maintaining an action against Simpson by virtue of Section 57-6-5, Utah Code Annotated, 1943, as amended.*

Section 57-6-5 of the Utah Code Annotated, 1943, provides as follows:

“Every person, firm, or corporation upon the sale and delivery of any used or second-hand motor vehicle shall within forty-eight hours thereof deliver to the vendee, and endorsed” (apparently should be “endorse”) “according to law, a certificate of title, issued for said vehicle by the state tax commission.”

Section 57-6-6 provides:

“No action or right of action to recover any such motor vehicle, or any part of the selling price thereof, shall be maintained in the courts of this state by any such dealer or vendor, his successors or assigns, in any case wherein such vendor or dealer shall have failed to comply with the terms and provisions of this act, and such

vendor or dealer, upon conviction of the violation of any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than \$299 or by imprisonment for not more than six months in the county jail, or both such fine and imprisonment.”

(b) *The law leaves the wrongdoer where it finds him.*

As heretofore stated, Simpson and Saunders are guilty of the same unlawful acts, both as to misrepresentation and violation of the statutory obligations respecting sellers of used motor vehicles. In this action Saunders is in the position of attempting to recover from his conspirator as a result of what Saunders claims to be the neglect of the conspirator to carry out his part of the unlawful bargain. It is as though one thief was attempting to recover from his partner in crime one-half of the ill-gotten gain.

The principle is fundamental that the law will not permit itself to be used to aid a wrongdoer in the perpetuation of his wrong or to recover against a co-wrongdoer. The failure of the Trial Court to apply this principle to the case at bar was erroneous. Saunders is in no position to complain of Simpson by reason of his own conduct and his conspiracy with Simpson in the very wrong for which he attempts to recover.

POINT NO. III.

THE COURT ERRED IN FAILING TO FIND AS A FACT AND CONCLUDE AS A MATTER OF LAW THAT SAUNDERS WAS BY CONTRACT, ACT AND REPRESENTATION PRIMARILY LIABLE FOR ANY LOSS SUFFERED BY BATES.

As pointed out in Point No. I of this brief, the liability of Simpson was predicated upon two theories. The first was a theory of fraud and misrepresentation; the second was violation of the Utah statute requiring the seller to furnish the buyer with a certificate of title within forty-eight hours and requiring the seller to perform certain other acts incident to the delivery of title and obtaining registration.

The Trial Judge erroneously found and concluded that Saunders had no duty to perform any of the acts required by the statute, and that he was guilty of no fraud. However, not only was he a co-tortfeasor with Simpson, but his own testimony is that as between himself and Simpson he was primarily obligated to obtain the registration of the automobile and deliver the certificate of title. Saunders' testimony on this matter is in part as follows: (R. 207)

“Q. Let me ask you one other question, then, along that line. You have already told the Court that there was an amount that you retained to get license plates and to pay the sales tax?

A. Correct.

Q. So you were to see that the license plates were secured?

A. True.

Q. Because you kept the money?

A. True.

Q. You were to see that the title was transferred up to the State Capitol because you were to pay the tax?

A. Very true.

Q. And that was because you had assumed the position of seller?

A. I don't know about that." * * *

At Page 208:

"Q. But Simpson would still be the one to get the plates to Bates, wouldn't he?

A. No, I would."

Of course, as a matter of law, when Saunders signed Exhibit 1 as seller and dealer he assumed the responsibility of seller and dealer, and cannot be heard now to say that there was some other arrangement.

The question of estoppel and contract are treated under Point IV of this brief. At this time it is simply brought to the Court's attention that Saunders' own testimony is to the effect that his understanding with Simpson was that he was to assume the responsibility of seller. Bates was to look to him for performance and delivery of title. Obviously the Trial Judge erred in failing to find that Saunders was liable to Bates as a primary party or at all.

POINT NO. IV.

THE COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS A CONTRACT BETWEEN BATES AND SIMPSON FOR THE PURCHASE AND SALE OF THE 1947 CHEVROLET IN QUESTION.

(a) The only contract in existence concerning the said automobile was between Bates as the buyer and Saunders as seller.

Bates first came into the used car lot at 999 South State Street on November 5, 1949. At that time, after looking at several automobiles and trying out the Chevrolet in question, he signed the used car order (Exhibit A) and the purchase contract (Exhibit 1). He says he also signed an application for registration at that time, but this document, if it existed, was never introduced in evidence. Exhibit A was filled out by Simpson but the name of the seller was not filled in. Several copies of Exhibit 1 were signed in blank. (R. 77, 79, 80) The name of the seller likewise was not filled in on Exhibit 1. At that time there was no completed contract for the sale of the automobile. The effect of Bates' signature on these documents was to *make an offer* for the purchase of the automobile on the terms and for the amount indicated in the document. The offer had not been accepted by the seller and there was no contract in existence. Simpson did not have a contract with Bates but he only had an offer as a used car dealer from Bates to purchase the automobile for the sum indicated therein.

Simpson took this offer to Saunders with the request that Saunders sign as seller, so that the deal could be financed through Strevell-Paterson. Saunders agreed to this arrangement and took Exhibit 1 to Strevell-Paterson Company and there filled in his name as seller and his address. He left all but one copy at Strevell. About a week later Bates got a copy of Exhibit 1 through the mail, with Saunders' name and address filled in as seller. (R. 80) The contract, then, was between Saunders and Bates, and this was the only contract for the sale of the automobile that was in existence.

Despite these facts, the Court found that Simpson sold to Bates the automobile in question. (Findings Nos. 11 and 12; R. 40) The Court definitely found that Simpson was the seller to Bates and that he undertook the obligation as seller.

Bates was not concerned at the time he executed Exhibit A and Exhibit 1 as to the identity of the seller. When he received Exhibit 1 in the mail, with the name of Saunders filled in, he accepted it without question and without reservation. In the course of the direct examination his counsel asked him:

“Q. What did you think when this purchase agreement was returned to you under the signature, W. J. Saunders?

A. Well, he told me before that Bill Saunders had got it financed through Strevell-Paterson and I thought everything was okeh. I couldn't see anything wrong with it.

Q. What were your understandings of a finance company before financing a car?

A. Well, I thought they had to have the title and registration before they put the money out on it.

Q. And did you think a finance company would finance an automobile before it had the title?

A. I did not.” (R. 85-86)

Bates further testified that he thought Simpson had authority to sell the car since the car was on the lot, and that when he received the papers back from Strevel-Paterson Company the seller had furnished title and registration to the Company. (R. 88-89)

On cross-examination Bates detailed the fact that Exhibit 1 and Exhibit B, which is a carbon copy of Exhibit A, were signed in blank. None of the information was on the sales contract except Bates’ signature. Bates was asked on cross-examination:

“Q. Now what did you ask Mr. Simpson about who you were buying the car from? What was said about who would be the dealer?

A. It wasn’t dealer mentioned there. He mentioned the finance company; that they would either be one of either finance companies. He didn’t say who was going to be dealer on it.

Q. Did he say that it might be either himself or Saunders that would be the dealer?

A. Well, that was later. He didn’t say anything about who might be. He told me later that

Saunders was his partner and he had got it through Strevell-Paterson.

Q. And that Saunders would be the one that would sign as seller?

A. He didn't say anything about it. He told me about a week later that Saunders had got it through Strevell-Paterson.

* * * *

Q. Now then, shortly thereafter you received Exhibit B through the mail, is that correct?

A. Two weeks after I bought the car.

Q. And did you notice at that time that Saunders was indicated as the one who was selling the car to you?

A. Yes, sir.

Q. And when you saw Simpson, on the 17th of November, did you say anything to Simpson then as to why Saunders was the one who was selling you the car?

A. No, I didn't say anything. I didn't think there was nothing wrong with the transaction at all. I didn't feel like bringing it up. I was wondering about the plates, though.

Q. Weren't you concerned at all when you bought a car from—thought you had bought a car from Simpson and the contract came out that you had bought it from Saunders?

A. Well, the two names was on the place there. I couldn't see anything wrong with it." (R. 110-111.)

Bates was content to deal with Simpson as salesman. He did not care who the seller of the automobile

was. He authorized Simpson to obtain the seller's signature, to accept the offer which he had made as buyer.

Even though it be assumed that there was a contract between Bates and Simpson and that Bates thought he was going to get the title from Simpson as seller, when he received the completed contract in the mail and failed to object to Saunders as seller, he accepted the alteration and was bound by the terms of the altered contract. At no time from the moment he received the completed contract in the mail until now has Bates ever objected to Saunders being named as the seller of the automobile. If there has been an alteration, Bates has assented to it.

In Williston on Contracts, Rev. Ed., Vol. 6, Par. 1896, at Page 5319, it is stated:

“If the writing is unsealed and the statute of frauds inapplicable, an authorized alteration is binding upon both parties, and the altered form of the contract, not the original form, will be enforced.”

At Page 5320 of the same paragraph it is stated:

“Ratification, subsequent to the alteration, has as full an effect as authority originally granted, and ratification may be shown by any conduct from which assent can fairly be implied. It has been well said, ‘The rule is just and supported by the authorities that where a document has been altered and notice of such alteration is brought to the attention of the parties affected, it is their duty to disallow it at once, or within a

reasonable time after learning thereof, or they are bound by the document as altered.' ”

In Paragraph 1897 in the same volume of Williston, at Page 5321 it is stated:

“A redelivery, therefore, of a sealed instrument by the obligor after it has been altered will make it binding in its altered form.”

Section 437 of Volume 2 of the Restatement of Law on Contracts, is in part as follows:

“437. EFFECT OF ASSENT TO OR FORGIVENESS OF ALTERATION.

If a material and fraudulent alteration is made by one party to a written contract or memorandum, and the other party, with knowledge of the facts, manifests

- (a) assent to the altered terms, the manifestation operates as an acceptance of an offer to substitute for the original contract or memorandum an agreement in the altered form;
- (b) a willingness to excuse the alteration or to remain subject to the duties that would exist under the contract if it were unaltered, the manifestations revives the contract in its original form.

“Comment:

a. An alteration in a written contract authorized by a party thereto before the alteration is made cannot be fraudulent as to him. There will in effect be assent to the formation of a new contract containing all the terms of the earlier one except as the agreed alteration changes them.”

In the face of these facts and this authority, how could the trial court be justified in failing to find that the contract was between Bates and Saunders?

(b) The parol evidence rule prohibits the introduction of evidence to vary the terms and to substitute the parties to a written instrument.

As heretofore discussed, Bates received Exhibit 1, the purchase agreement, from Strevell-Paterson showing Saunders as the seller-dealer, and as testified by Bates, he knew and observed after receipt of Exhibit 1 from the Finance Company that Saunders was the seller-dealer. Thereafter he made three of the monthly payments called for under the agreement. As heretofore indicated, he had ratified and accepted the purchase agreement which he had signed in blank.

The plaintiff Bates had never attempted by his pleadings or otherwise to set aside the contract with Saunders and have it determined null and void, but in his action he attempted by his pleadings to hold Saunders on that contract. At the very beginning of Bates' testimony, at Page 73, the following questions and answers were made:

“Q. And did you talk to Jimmie Simpson?

A. Yes.

Q. Tell us what you said and what he said.

MR. BURTON: We object to this as being entirely hearsay as to the Employers Liability Corporation. May I ask one or two questions on voir dire?”

At Pages 74 and 75 Bates testified that Exhibit 1 was the contract under which he had made three payments to Strevell-Paterson. At Page 75 the following objection was then made:

“MR. BURTON: And we make the motion then, further at this time, that any statements made between Simpson or any conversation had with Simpson and this witness are hearsay and an attempt to vary the terms of a written contract and all of the terms of the contract are found in this Exhibit 1.”

On Page 76, after overruling the objection, the following discussion took place:

“MR. BURTON: Could our objection be understood as running to all of the conversation with Simpson?

THE COURT: Yes, it may.”

Exhibit 1 contains the provision: “This agreement constitutes the entire contract between the parties.” It is submitted, therefore, that as to the surety, Bates, by his actions in signing Exhibit 1 in blank, by thereafter accepting it, and thereafter by this action seeking to enforce that contract against Saunders, is precluded from attempting to vary the terms of that contract by parol, and the Court erred in admitting parol evidence to vary Exhibit 1. Especially is this true where, as heretofore pointed out, there was no fraud shown, nor was there any imposition upon Bates in the matter of filling in the blanks or securing the signature of Saunders. No such fraud is alleged or claimed by plaintiff. There is

no attempt on his part to show a contract for the purchase of the car other than as contained in Exhibit 1.

(c) Saunders is estopped to deny that he was the seller of the automobile to Bates in view of his express representations to Bates and to Strevell-Paterson Finance Company.

As heretofore pointed out, Saunders stated to Strevell-Paterson and to Bates by signing the purchase agreement that he was the seller of the automobile. Bates relied on the statement in making payments to Strevell. He further relied upon it in leaving the Ford which he traded in on the Chevrolet at the used car lot, and in treating the transaction as being completed. Bates believed Saunders was the seller. Strevell-Paterson relied on the representations in advancing the money to Simpson and in financing the transaction. All of the elements of estoppel are present. Saunders is in no position to refuse to respond to the obligation imposed by law upon him as seller.

POINT NO. V.

THE COURT ERRED IN CONCLUDING THAT SIMPSON WAS LIABLE TO SAUNDERS FOR VIOLATION OF THE ACT.

(a) The Court erred in finding that Simpson sold Saunders a contract, since Simpson did not have a contract with Bates.

This question has been discussed under Point No. IV, particularly subdivision (a) thereof, and no purpose will be served by restating the argument therein set out.

The Court found in the second set of findings presented by counsel for Saunders (Finding No. 4, R. 50) that Simpson sold a purchase agreement to Saunders. This is a fallacious theory, since in the first place Simpson did not have a contract with Bates to sell to anybody. All he had was an offer. In the second place, the sale of a contract, as much as the sale of any other valuable right or thing, is itself a contract and must be supported by consideration. Simpson paid no consideration to Saunders or Saunders to Simpson. Each was to benefit from the transaction, but Saunders was to be remunerated by Strevell-Paterson, while Simpson was to be paid by Bates. There was no transaction—certainly no misrepresentation—as such between Saunders and Simpson on which Simpson can be liable to Saunders.

(b) No statutory liability exists as to the sale of a contract as distinguished from the sale of an automobile.

The Court predicates liability by Simpson to Saunders upon the statute which requires persons who bring automobiles into the State of Utah for the purpose of transferring title to register such automobiles within a prescribed period of time. (Finding of Fact No. 12; R. 52; Conclusion of Law No. 2; R. 53) As heretofore pointed out, the appellant does not admit that this statute confers a private right upon any person, but if it does,

certainly the right can only be conferred upon the person who purchases an automobile. Neither did Saunders contend nor did the Trial Court find that Simpson sold Saunders an automobile. Just the reverse is true. Saunders contended and the Trial Court found that Simpson did not sell Saunders an automobile, but that Saunders purchased the contract. Saunders expressly denied in the record that he bought the car from Simpson. At Page 194 it is stated:

“Q. And that is what you did—you bought a car from Simpson as a matter of helping him get credit through Strevell-Paterson on financing?

A. No sir, no sir.”

If Saunders' theory was that Simpson assigned to him a valuable right which he had to require Bates to purchase the car and obtain the title from the Continental Bank by paying the draft, Saunders could not possibly recover, because as to this possibility there was no breach of any obligation, no misrepresentation, and no violation of any statute. Certainly the Court erred in stretching the statute to hold Simpson and the Bonding Company liable to Saunders for an imagined violation.

POINT NO. VI.

THE COURT ERRED IN FAILING TO GIVE DEFENDANT EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, CREDIT AS AGAINST SAUNDERS FOR \$29.90 PAID TO SAUN-

DERS FOR THE PURPOSE OF OBTAINING LICENSE PLATES AND PAYING SALES TAX.

The Court gave judgment to Saunders against Simpson in the amount of \$867.75. This was the sum that Strevell-Paterson Finance Company debited Saunders' account when the automobile was repossessed by Brokaw-Bauer and Bates defaulted on his contract, after deducting Saunders' reserve from the transaction. Saunders admitted, however, that he kept out the amount which he turned over to Simpson \$29.90 for the purpose of obtaining registration of the automobile in Utah and paying the sales tax. (R. 207) No credit was given by the Court for this sum. Even if Simpson was liable to Saunders, the amount of the judgment should be reduced in this amount.

POINT NO. VII.

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT SAUNDERS IS LIABLE TO EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., FOR ALL AMOUNTS AWARDED TO BATES AGAINST SAUNDERS AND/OR SIMPSON IN THIS TRANSACTION ON THE BOND APPLICATION AGREEMENT BETWEEN SAUNDERS AND EMPLOYERS.

There was introduced as Exhibit B by Employers the application for surety bond executed by defendant Saunders to the Employers Company. As a part of the application, Saunders agreed:

“Second, to indemnify the said company against all loss, liability, costs, damages, attorneys’ fees and expenses whatever, which the company may sustain or incur by reason of executing said bond, in making any investigation on account thereof, in prosecuting or defending any action which may be brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained.”

It is clear that Saunders was liable to Bates, and the liability therefore accrued against Employers Company. Both as a joint venturer, therefore, and in his own right as seller to Bates, Saunders is liable to Employers on this bond application. The Trial Judge clearly erred in failing to grant judgment in favor of Employers and against Saunders, and in failing to require Saunders to hold Employers liable for the amount of the judgment.

In fact, the Trial Judge’s theory seemed to be that he had a bonding company before him, and that he would work out some holding that would permit the plaintiff to recover against the bonding company and permit recovery against the bonding company by Saunders, regardless of the legal considerations involved. The liability of Saunders to the bonding company in the event of judgment against him accounts for the unusual effort to free Saunders from liability.

It is submitted that the failure of the Court to grant judgment to Employers Company and against Saunders is plain and reversible error.

POINT NO. VIII.

THE COURT ERRED IN FAILING TO MAKE FINDINGS OF FACT AS TO THE ALLEGATION OF THE COMPLAINT OF BATES AND THE CROSS-COMPLAINT OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., AGAINST DEFENDANT AND CROSS-DEFENDANT SAUNDERS.

Plaintiff's amended complaint states in substance that Saunders falsely and fraudulently represented to plaintiff and to Strevell-Paterson Finance Company that the title was held by Saunders and Strevell-Paterson, and that every representation made by Simpson to plaintiff was true; that plaintiff believed said representations and relied thereon, and that he was thereby damaged. (Par. 10 of said Amended Complaint; R. 14) Plaintiff further alleged that Saunders violated the laws of the State of Utah in failing to register the vehicle in question, failing to obtain a certificate of title transferring same to plaintiff, and that Saunders was further liable in adopting the contract prepared by Simpson. (Pars. 14, 15 and 16 of said Amended Complaint; R. 15)

The Employers' Company alleged in its cross-complaint against Saunders that the sale of the automobile by Simpson and Saunders was in pursuit of the business of these persons as a joint enterprise; that Saunders was aware of all of the facts and circumstances surrounding the sale, and that he was liable as a principal

to Bates and therefore liable to Employers on his indemnity agreement. (Pars. 2, 3, 4, 5, and 6; R. 29) Employers further alleged that Saunders sold the car to Bates and that he did not have title and knew he did not, and that he was primarily liable by reason of the subsequent obligations placed on the seller of the automobile. (Pars. 3 and 4, R. 30.)

At no point in the two sets of Findings of Fact and Conclusions of Law prepared by counsel for Bates and Saunders did the Court make findings on these questions. Counsel for plaintiff apparently felt that he should make an effort, so he included the finding, "that the allegations in plaintiff's complaint against defendant W. J. Saunders except as stated in these findings, are not sustained by the evidence and are untrue." No further effort was made to explain away Saunders' liability to Bates.

This Court has held in decisions too numerous to require citation that litigants are entitled to findings upon all questions of fact raised by their pleadings. The questions raised as to the knowledge of Saunders, his signing the purchase document as seller, his participation in the transaction, and his remuneration from Strevell, together with questions concerning adoption and ratification by him, are all seriously raised by plaintiff and by this appellant. The fact is that there is no evidence in the record and none available except that the contentions made as to Saunders' liability are true.

No facts could be found except that which would require a conclusion that Saunders was liable.

Certainly the Trial Court erred in failing to make findings on these important issues.

CONCLUSION

The errors of the Trial Court require a new trial. Judgment should in any event be entered in favor of Employer against Simpson on its indemnity agreement.

Respectfully submitted,

McKAY, BURTON, McMILLAN
and RICHARDS