

1951

# 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.*

FILED

OCT 26 1951

Utah Supreme Court, Utah

BRIEF OF DEFENDANT  
CROSS-COMPLAINANT AND RESPONDENT  
W. J. SAUNDERS

JOHN S. BOYDEN,  
ALLEN H. TIBBALS,  
*Attorneys for Respondent,  
W. J. Saunders.*

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ASSURANCE CORPORATION,  
LTD., a corporation,  
*Defendant, Cross-Complainant  
and Appellant.*

Case No.  
7686

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## BRIEF OF DEFENDANT CROSS-COMPLAINANT AND RESPONDENT W. J. SAUNDERS

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### STATEMENT OF FACTS

The lower court found the facts in this case to be, in brief, that one Jimmie Simpson sold a car to one Haskell N. Bates and thereafter disappeared without having obtained a title to the car for Mr. Bates. Simpson was a bonded dealer and the Employers Liability Assurance Corporation, Ltd., was the surety on the bond of Mr. Simpson. As a direct result of Simpson's failure

to carry out his duties as a dealer, Mr. Bates suffered damages and W. J. Saunders, who financed the transaction, suffered damages. The court awarded a decree against the surety, Employers Liability Assurance Corporation, Ltd., in favor of Mr. Bates and in favor of Mr. Saunders. It is from this decree that the Employers Liability Assurance Corporation, Ltd., prosecutes this appeal.

W. J. Saunders, defendant, cross-complainant and now respondent, is in substantial disagreement with the statement of facts set forth by appellant, and finds points of difference with the statement of facts appearing in the brief of respondent Bates, and therefore, believes it desirable to make the following statement of facts based on the evidence adduced at the trial.

Respondent, W. J. Saunders, and Jimmie Simpson were each licensed and bonded used-car dealers under the laws of the State of Utah (R. 12, Par. 2, R. 28, R. 41 F2, R. 50 F. 2 and 3). In the interest of economy, Saunders and Simpson did business from the same used-car lot at 999 South Main Street in Salt Lake City, Utah (R. 167). They were not partners, and there was no evidence that they shared profits or losses (R.168). Each had his own cars to sell, and when one of them sold a car belonging to the other, in contrast to splitting of profits, the one whose car was sold paid the one who sold it a flat fee of \$25.00 (R. 167-168).

On November 5, 1949, Haskel N. Bates, plaintiff and respondent, purchased from Jimmie Simpson a

1947 Chevrolet Fleetline Sedan for the sum of \$1,345.00 (R. 76). All of the transaction with respect to the sale of this car was between Bates and Simpson. Bates did not have any dealings with Saunders at the time the car was sold (R. 76, 77, 78, 79, 101, 102, 106, 107, 123, 124, 125). At the time of the sale Bates signed a purchase agreement, four copies, in blank. He did this for the purpose of financing the car (R. 125, 270 Ex. 1 and B. He received a copy of this purchase agreement from Simpson which he was unable to produce at the trial (R. 110). He also received a Used Car Order made out by Simpson (R. 77-78, 270; Ex. A).

Simpson was unable to finance the car and asked Saunders to finance it for him, which Saunders did through Strevell Paterson Finance Company (R. 153-154). By financing the car Saunders could make a small sum of money by way of the reserves which would be earned if Bates paid out the contract, which reserve would amount to approximately \$70.00 (R. 155), and since Saunders thought it was good paper, he bought the paper and financed the car (R. 155-156).

The car was one which Simpson had brought in from the State of California where he had obtained it from Brokaw-Bauer, a California dealer. The title to the car was forwarded by Brokaw-Bauer in the name of Simpson to the Continental Bank, Central Branch (R. 140, 250, 251, 252, R. 270 Ex. 10 and 11). Saunders turned over the money secured through his financing of the car to Simpson, in payment for the contract he pur-

chased from Simpson (R. 175, 270; Ex. 7). It was Simpson's responsibility to go to the bank and obtain the title to the car which Simpson has sold to Bates (R. 177-179). This Simpson failed to do, having apparently pocketed the money and disappeared (R. 140, 171).

Not at any time, prior to Simpson's disappearance, did Bates even attempt to contact W. J. Saunders, and in fact he did not contact Saunders until January 14, 1950, after he had been unable to locate Simpson for a period of several weeks (R. 87), and when he did, he did so for information about Simpson (R. 116, 123-124). Because Simpson failed to pay the amount due to Brokaw-Bauer to the Continental Bank on the draft there in Simpson's name, and thus release the title, Brokaw-Bauer replevied the car through an action brought against Bates in the Third Judicial District Court in and for Salt Lake County, State of Utah (R. 93-97). At the time of this law suit, neither Bates nor Employers Liability Assurance Corporation, Ltd., looked to Saunders in connection with the transaction, and no effort was made to interplead Saunders in that action (R. 140-142). Saunders made no representations at any time in connection with this matter to anyone save Strevell Paterson Finance Company, and he paid to Strevell Paterson Finance Company the amount due on the car (R. 225-226).

Saunders in order to cover the Bates contract which he re-negotiated with Strevell Paterson Finance Company, and which he guaranteed, authorized deductions to be made from his reserves accumulated with the

finance company, which deductions amounted to \$867.75 (R. 231). Thus Saunders was directly damaged in the amount of \$867.75 as a result of Jimmie Simpson's failure to acquit his duties as a dealer in Used Motor Vehicles in accordance with the requirements of the law of this state (R. 183).

The bond furnished by Jimmie Simpson as required by law of a licensed dealer in used motor vehicles, and upon which bond the appellant was surety, was in full force and effect at the time of this transaction (R. 28, Par 3). The bond is conditioned that the motor vehicle dealer, "shall well and truly observe and comply with all the requirements and provisions of THE ACT PROVIDING FOR THE REGULATION AND CONTROL OF THE BUSINESS OF DEALING IN MOTOR VEHICLES, as provided by Chapter 67, Laws of Utah, 1949, and indemnify any and all persons, firms, and corporations for any loss suffered by reason of the fraud or fraudulent representations made, or through the violation of any of the provisions of said Motor Vehicle Dealer's Act and shall pay all judgments and costs adjudged against said principal on account of fraud or fraudulent representations and for any violation or violations of said law during the time of said license, \* \* \*" (R. 270, Ex. 12). The bond is, as required by statute, in the penal sum of \$5,000.00 (R. 28, Par. 3). The respondent, W. J. Saunders, cross claimed against the aforesaid surety, Employers Liability Assurance Corporation, Ltd., for the loss which he suffered by



virtue of Jimmie Simpson having absconded with the funds turned over to him by Saunders, and failing to obtain and deliver a proper title to the motor vehicle which Simpson sold to Bates, as Simpson was required by law to do (R. 23, 24, 25). The lower court found in favor of Saunders and against the appellant (R. 51, 52, 53), and entered judgment accordingly (R. 47, 48), in favor of Saunders for \$867.75, together with his costs. The court similarly found in favor of the plaintiff Bates, and against the bonding company and entered judgment on the plaintiff's complaint as amended in favor of Bates in the sum of \$933.52, together with his costs (R. 39-46). The court dismissed the cross-complaint of the Employers Liability Assurance Corporation, Ltd. against Saunders and dismissed the complaint against Saunders by Bates (R. 39, 48).

#### STATEMENT OF POINTS RELIED UPON

An attempt to reply to the briefs submitted by counsel for appellant, and for respondent Bates, utilizing the same order of presentation of points and argument as followed in the respective briefs by them submitted does not result in a logical statement of the case of the respondent Saunders. It is believed that the court will find covered in the argument on the points as hereinafter set forth, the reply of respondent Saunders to all of the points relied upon by the appellant and by respondent Bates.

## POINT NO. I.

RESPONDENT SAUNDERS IS NOT LIABLE TO RESPONDENT BATES OR TO APPELLANT FOR ANY INJURY RESULTING FROM THE FAILURE OF SIMPSON TO COMPLY WITH THE MOTOR VEHICLE DEALERS ACT.

## POINT NO. II.

THE COURT'S FINDINGS AND CONCLUSIONS THAT APPELLANT WAS LIABLE TO RESPONDENT SAUNDERS ON THE BOND OF JIMMIE SIMPSON IS SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE AND IS IN ACCORDANCE WITH THE LAW.

## ARGUMENT

### POINT NO. I.

RESPONDENT SAUNDERS IS NOT LIABLE TO RESPONDENT BATES OR TO APPELLANT FOR ANY INJURY RESULTING FROM THE FAILURE OF SIMPSON TO COMPLY WITH THE MOTOR VEHICLE DEALERS ACT.

Jimmie Simpson was a licensed and bonded dealer in used motor vehicles under the laws of the State of Utah. This point was admitted by the pleadings of all of the parties to the action (R. 1, 12, 23), and was so found as a fact by the trial court (R. 50, F. 2), and the appellant was the surety on the bond of the said Jimmie Simpson, as admitted by the appellant in the Answer to the Complaint (R. 28), and as so found by the court (R. 52, F. 10).

Jimmie Simpson obtained from a California dealer in motor vehicles, Brokaw-Bauer, a 1947 Chevrolet Fleetline Sedan which Jimmie Simpson brought in to the state of Utah for the purpose of selling the same,

and this fact, so found by the court (R. 50), is supported by the evidence (R. 97, 144, 186).

Haskell N. Bates, respondent, saw the motor vehicle in question on the used car lot at 999 South Main Street in Salt Lake City, State of Utah, on November 5, 1949 (R. 73, 76, 77). He talked to Jimmie Simpson about the car, and Simpson let him take the car and try it out (R. 77). Simpson quoted to Bates the price on the car and told him what he would allow to Bates on the 1941 Ford which Bates was driving and which he wished to turn in on the purchase of the Chevrolet (R. 76). Bates being satisfied with the car, asked Simpson to figure a contract on the purchase of the car (R. 77). This Simpson did and made out a purchase order (R. 77, 78; R. 270, Ex. A), upon which Simpson wrote his name at the top and Bates signed at the bottom (R. 77, 78; R. 270, Ex. A).

As a down payment on the purchase of this 1947 Chevrolet car, Bates turned in his 1941 Ford to Simpson and obtained the title to the Ford from his residence, which he endorsed in blank and turned over to Simpson on the same day, November 5, 1949 (R. 78, 79; R. 270, Ex. 2). Simpson thereafter sold the 1941 Ford which Bates turned in to him, to one Henry Oliver, as reflected by the records of the Tax Commission, Motor Vehicle Department (R. 270, Ex. 5).

The same day, November 5, 1949, Simpson delivered the possession of the Chevrolet to Bates and Bates kept it until the same was replevied by Brokaw-Bauer in the forepart of 1950 (R. 92).

Saunders took no part in the sale which was made or in any of the subsequent transactions with respect to the securing of title, or license plates (R. 101, 102, 106, 111, 113, 116). In connection with the sale, the testimony of Bates, the purchaser, is clear and unequivocal. Quoting from the record at pages 101 and 102.

Attorney:

Q. Now, Mr. Bates, at the time that you entered into this contract of purchase on this 1947 Chevrolet, was Mr. Saunders present?

Bates:

A. No sir.

Q. Did you have any dealing with Saunders in regard to the purchase of this car or the sale of the 1941 Ford which you turned in on this car, at any time?

A. No, sir.

Q. You never had any dealings with him at all, did you?

A. No, sir.

Again quoting from the record at page 123 we find Bates testifying as follows:

Q. Now, Mr. Bates, at the time you purchased this car from whom did you make the purchase?

A. I bought the car from Jimmie Simpson.

Q. You didn't buy the car from Mr. Saunders? That is Mr. Saunders sitting there, isn't it?

A. I didn't buy it from him.

Q. He didn't have anything to do with the sale of the car, did he?

A. Not that I know of.

Q. Did Mr. Saunders at the time you purchased this car, November 5, 1949, make any representations to you at all concerning the car, either to its condition or its title?

A. No, sir.

Q. You didn't even talk to him, did you?

A. No, sir.

Q. You never talked to Mr. Saunders until January 14, 1950, isn't that right?

A. That's right.

It therefore appears from the testimony of Bates, the purchaser, that Saunders took no part in the actual sale of the car. Furthermore, it should be noted that a written contract is not necessary to a valid sale of a motor vehicle. All that is required by law is that the dealer:

“\* \* \* upon transferring a vehicle of a type subject to registration hereunder, whether by sale, lease, or otherwise, to any person other than a manufacturer or dealer, shall immediately give written notice of such transfer to the department upon the official form provided by the department.” 57-3a-73, U.C.A. 1943.

The report referred to by the section quoted above must be accompanied by the indicia of title properly endorsed. 57-3a-71 and 57-3a-76, U.C.A. 1943.

Thus, in this case, as between Simpson and Bates, the sale could have been completed upon the delivery of the car and title by Simpson to Bates and furnishing

of the statutory dealer's notice to the department and upon the payment of the purchase price in cash by Bates. In such event had there been some discrepancy in the title, or some failure to comply with the statutes on the part of Simpson, the liability would have been clear cut as between Bates, Simpson and the bonding company.

If Saunders is to become involved in sharing liability with Simpson to Bates, there must be either a legal representative authority by joint venture, partnership, as a joint tortfeasor, or otherwise. We have already pointed out that Bates had no personal contact with Saunders. With considerable repetition appellant has insisted that Saunders and Simpson were partners or at least joint adventurers.

Our Supreme Court in *Wasatch Livestock & Loan Co. vs. Lewis & Sharp*, 35 P. 2d 835, 84 Utah 347, has said:

“Joint adventure is in the nature of partnership.”

And in *Kaumans vs. White Star Gas & Oil Co.*, 63 P. 2d 231, 92 Utah 24:

“Joint venture is in the nature of partnership and subject to the law of partnership so far as substantial rights of the parties are concerned.”

There is an absolute absence of any showing on the part of appellant or of Bates, plaintiff below, that Simpson and Saunders ever shared profits or losses, or in any way acted as partners. The mere joint use

of a lot upon which a sign was erected indicating the name of both Saunders and Simpson is far from sufficient to prove partnership under any of the tests of the Uniform Partnership Act adopted by the State of Utah. It is particularly significant that these men each had separate licenses issued by the state of Utah to sell used cars, and the sign at the lot on which the names of both Simpson and Saunders appeared, referred to the separate bonds of each of them, negating any assumption that these men were operating jointly as a partnership. Bates testified that he noticed the sign. We quote from page 85 of the record.

Attorney:

Q. Did it have any signs on it?

Bates:

A. Yes, it had a sign on the roof, on the front part of the roof.

Q. What did it say?

A. W. J. Saunders and Jimmie Simpson. I believe it said, "Used Cars and Bonded Dealers" under each one's name.

Q. Under each one separately?

A. And give the number. The number of the bond.

Bates further testified that on one occasion he believed Simpson had referred to Saunders as a partner, but at no time did Bates ever testify that he believed Saunders was Simpson's partner, and under these circumstances there could be no partnership by estoppel, there not having been any substantial representation

and no reliance by Bates.

The Uniform Partnership Act, as adopted in the state of Utah, provides :

69-1-13. U.C.A. 1943. Partner by Estoppel.

“(1) When a person by words spoken or written or by conduct represents himself, or consents to another's representing him, to any one as a partner, in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made who has on the faith of such representation given credit to the actual or apparent partnership, and, if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by, or with the knowledge of, the apparent partner making the representation or consenting to its being made.”

In this case we submit that the record does not contain any evidence or one word of testimony that Saunders at any time consented to the representation by Simpson that he was a partner, with Simpson, or that Saunders at any time publicly or to Bates ever held himself forth as a partner with Simpson. It will be noted that in the absence of public representation, under the statute quoted, the act of the party seeking to invoke the estoppel must have been taken in reliance on the existence of the partnership. In this case Bates testified that no representation whatever was made concerning Saunders until after the transaction was completed



except that a few days after he bought the car, he believed the following Monday, the day of the transaction having been a Saturday, when he returned to see Simpson, Simpson made mention of Saunders as being either his finance man, or his partner, Bates was not sure which (R. 84, 85). There is no showing at any point in the record of any act or omission to act by Bates, in reliance upon the representation by Simpson of Saunders as his partner. We again stress the fact that there is not one word in the record which indicates that Saunders had any knowledge of such representation ever at any time having been made.

With equal emphasis and reiteration appellant further contends that the respondent Saunders and Simpson were joint tort feasons. The baseless scurrility of appellant's contentions at page 32 of his brief, wherein respondent Saunders is referred to as a "conspirator" and by inference as a "thief" is not justified by the zealotness of counsel to serve his client to the fullest extent. On the contrary it is unbecoming of ethical practice, and employs the tactics of a school boy, who, being outwitted and void of argument in desperation resorts to name calling. Neither opposing counsel has, or can cite, one instance of a false or fraudulent representation made by Saunders to Bates. In fact, all of Bates' testimony was to the exact opposite, that he did not see Saunders until January 14, 1950, two months and ten days after this sale had been made by Simpson to Bates, and Bates had been in possession of the car all of that time (R. 90, 101, 123, 124).

"The essential elements required to sustain an action for deceit are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage." *American Jurisprudence*, Vol. 23, P. 773, Sec. 20. Also see *Heckt v. Metzler*, 14 Utah 408, 48 P. 37.

A careful scrutiny of the transcript and record will reveal that with the exception of the representation made by Simpson to Bates at the time when Bates returned to see Simpson concerning the financing, that Saunders was "his partner or finance man," (R. 84), the representations of Simpson were, so far as can be determined, truthful. The fact is that Simpson did have the right to sell the car, he apparently did have the intention of complying with his obligations as a dealer at the time that he sold the car to Bates, and he did have at his command the means of obtaining the necessary title to the car. The fact is, that in spite of the truth of the representations which were made, in spite of his apparent honest intentions at the time of the sale, weeks later, Simpson absconded with the money obtained in the transaction and failed to carry out the burden imposed upon him by law as a dealer in used motor vehicles. The question of the truth or falsity of any of the representations made by him is not conclusive of the issues to be decided in this case, for the liability on the bond

arises not alone from fraud, but from non compliance with the statute as well. The latter is made out, and by virtue of Simpson's failure both Bates and Saunders suffered loss. The statement in the brief of the appellant appearing at page 29, "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 tort feors on its indemnity agreement," is as illogical and untrue as is the analysis provided by the appellant in its brief on the law of the subject. By way of illustration of this statement we wish to direct the court's attention to one instance of this kind in the brief of the appellant. There the appellant quotes from the Restatement of Torts, Vol. 4, Pages 435, 436 and 439. In so doing appellant emphasizes a small portion of a sentence out of clause (c), "and is a substantial factor in causing the result," and then builds his argument on this emphasized passage paying no heed to the balance of the paragraph which completely changes the entire aspect of the problem. When read in its entirety, one finds that the gist of the offense recognized by the Restatement as being a factor in constituting one a joint tort feor is that the act of the party sought to be bound as a joint tort feor must by itself constitute a breach of duty and this act must then be a substantial factor in causing the result. The importance of the entire context cannot be overlooked, and in this case, we submit that no act of Saunders, as reflected by the testimony and the evidence, constituted a breach of duty. The law imposes no obligation upon Saunders to

be unusually wary of Simpson merely because they were both dealers in used motor vehicles. Saunders had no reason to distrust Simpson, and had Simpson performed as he agreed to do the transaction would have met with everyone's satisfaction. The tort was that of Simpson, and Saunders was as much injured thereby as anyone. We submit that the appellant does not sustain the burden of showing Saunders to be a joint tortfeasor with Jimmie Simpson.

Left groping for straws then, in his frantic effort to pin the liability for the failure of Simpson on Saunders rather than on the Bonding Company, the appellant seizes upon the fact that Saunders signed as "Seller-Dealer" when making application to Strevell Paterson Finance Company for a loan. Let us remember that Saunders has paid in full to Strevell Paterson Finance Company, admitting his liability in financing the loan, but the chasm in logic which appellant has failed to span is the connection between Bates and Saunders, either by way of contract or misrepresentation. Bates admitted that he signed the contract known as "purchase agreement" (R. 270, Ex. 1 and B), in blank knowing and understanding that it was to be used in obtaining necessary financing (R. 122, 125). Mr. Minson, manager of the automobile finance department of the Strevell Paterson Finance Company, testified that the signing as seller dealer was common practice with dealers doing business with Strevell Paterson Finance Company when they sought to finance a deal under circumstances such as this (R. 229-230).

*Jones on Evidence*, second edition, Vol. 4, P. 3261,  
Sec. 1770, states:

“Consent to the filling of blanks is often implied where an instrument is signed and delivered and blank spaces are left unfilled. It has often been held in such cases that the holder has implied authority to fill the blanks in conformity to the general character of the paper. Such authority has been implied in connection with blanks left in deeds, sealed instruments generally, simple contracts, \* \* \*.”

Saunders exercised this implied power to fill in the blanks in conformity to the general character of the paper, and did so exactly as it had been contemplated by Bates that someone would do, for the purpose of financing. The representations thus made by Saunders to Strevell Paterson Finance Company were authorized by Bates who gave the instrument in blank for the express purpose of securing financing. Bates cannot now be heard to complain of the representations so made, and Saunders lived up to his representations to Strevell Paterson Finance Company. We have in this case no demand by Strevell Paterson Finance Company. In this case both of the parties now seeking to fix responsibility and liability on Saunders made exactly the same mistake as did Saunders; they all trusted Simpson, and Simpson failed to perform. Such use of this instrument for the purposes afore-stated is freely admitted by Bates and by Saunders. Appellant takes the unusual position that Saunders and Bates cannot agree upon the true state of facts or testify thereto because of a written instru-

ment used between them, it being further the contention of appellant that to give any explanation of that instrument beyond the terms thereof would be a violation of the parol evidence rule. Appellants cite no case in support of this unusual assertion that a third party can vary the agreed state of facts by raising a technical rule of evidence which neither of the parties involved have cared to assert. If such were the law a third party could prevent the original parties to a transaction from explaining the circumstances under which a document was made and given. The tendency of the court seems to be in exactly the opposite direction even though the parties directly involved themselves raise the objection.

“The complicated dealings between many of those trafficking in and loaning money on automobiles have reached a point where the courts must strip transactions of their pretenses and look at them as they really are, with the camouflage of papers giving a similitude of passing title removed, or they will be dealing with fictions instead of facts. Those who buy and sell, bail and loan money on motor vehicles must be given to understand that the realities of their transactions will be sought for by the courts, they will look through the screen of paper titles to ascertain what was the real situation.” *Root v. Republic Acceptance Corporation*, 123 A. 650, Supreme Court of Pa., 1924.

It is upon these facts and principles of law that we conclude that no liability either to Bates or to the Appellant has been made out as against the respondent Saunders, and to this conclusion is added the weight of the trial court's decision.

## POINT NO. II.

THE COURT'S FINDINGS AND CONCLUSIONS THAT APPELLANT WAS LIABLE TO RESPONDENT SAUNDERS ON THE BOND OF JIMMIE SIMPSON IS SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE AND IS IN ACCORDANCE WITH THE LAW.

Heretofore in the argument under Point I we have set forth in detail the facts adduced at the trial relating to the sale of the 1947 Chevrolet Fleetline Sedan to respondent Bates, by Simpson. Jimmie Simpson as a licensed dealer in used motor vehicles under the laws of the state of Utah was bonded. It was stipulated by counsel that the form and style of the bond is identical with Ex.12, R. 270, and that on such bond Jimmie Simpson was principal and the appellant was the surety (R. 257; R. 28, second defense). It will be noted that the bond is a joint and several obligation, therefore, the appellant and Jimmie Simpson are both liable individually for loss resulting from breach of the conditions of the bond. By way of general authority for this statement we cite section 45 of *American Jurisprudence*, Vol. 8 page 726:

“Sureties Liability As Principal.—The rule is well settled that when principal and surety are bound jointly and severally on a bond, although there is no express admission on the face of the instrument that all are principals, yet the surety cannot aver by pleading that he is surety only. Hence, when one who is in reality only surety is willing to place himself in the situation of principal by expressly declaring upon his contract that he binds himself as such, it has been

held that there is no hardship in holding him to the character in which he assumes to place himself."

The conditions of the bond are set forth therein as follows:

KNOW ALL MEN BY THESE PRESENTS: That we, ..... of ..... as principal, and ..... a surety company qualified and authorized to do business in the state of Utah as surety, are jointly and severally held and firmly bound to the people of the state of Utah to indemnify any and all persons, firms and corporations for any loss suffered by reason of violation of the conditions hereinafter contained, in the penal sum of ..... Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

The condition of this obligation is such, That, Whereas, the above bounden principal has applied for a license to do business as a ..... Motor Vehicle ..... within the state of Utah, and that pursuant to the application a license has been or is about to be issued,

Now, Therefore, if the above bounden principal shall obtain said license to do business as such ..... Motor Vehicle ..... and shall well and truly observe and comply with all the requirements and provisions of the Act Providing For The Regulation And Control Of The Business Of Dealing In Motor Vehicles, as provided by Chapter 67 Laws of Utah 1949, and indemnify any and all persons, firms and cor-



porations for any loss suffered by reason of the fraud or fraudulent representations made or through the violation of any of the provisions of said Motor Vehicle Dealer's Act and shall pay all judgments and costs adjudged against said principal on account of fraud or fraudulent representations and for any violation or violations of said law during the time of said license and all lawful renewals thereof, then the above obligations shall be null and void, otherwise to remain in full force and effect. (R. 270, Ex. 12).

It will be observed that Section 13 of Chapter 67 *Laws of Utah* 1949 sets forth the Act prohibited, and thereunder it is stated:

"It shall be unlawful and a violation of this act for the holder of any license issued under the terms and provisions hereof: \* \* \* (D) To violate any law of the State of Utah now existing or hereafter enacted respecting commerce in motor vehicles or any lawful rule or regulation respecting commerce in motor vehicles promulgated by any licensing or regulating authority now existing or hereafter created by the laws of the state of Utah."

By 57-3a-73 U.C.A. 1943 it is provided:

"Every manufacturer or dealer upon transferring a vehicle of a type subject to registration hereunder whether by sale, lease or otherwise, to any person other than a manufacturer or dealer, shall immediately give written notice of such transfer to the department upon the official form provided by the department. Every such notice shall contain the date of such transfer, the names and addresses of the transferor and transferee, and such description of the vehicle

as may be called for in such official form.”

It is further provided by law at 57-6-5 U.C.A. 1943:

Certificate of Title to Vendee.

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 according to law, a certificate of title, issued for said vehicle by the State Tax Commission.

As a licensed and bonded dealer in used motor vehicles under the law of the State of Utah, Jimmie Simpson was required to comply with these provisions of the law and all other pertinent provisions. As has been shown he was specifically bonded so to do, and the appellant was the surety on that bond. Having sold the car to Haskel N. Bates, respondent herein, Simpson was then obligated to give notice to the department and furnish a certificate of title to Simpson in accordance with the provisions of the law above set out. Simpson did neither of these things. The record shows as previously set forth, that Simpson took the car turned in by Bates and sold the same (R. 270, Ex. 2 and 5). He alone received the proceeds of that transaction, Saunders received nothing therefrom (R. 170).

When Saunders financed the transaction he turned over the money he received from the finance company to Simpson (R. 175 and 270, Ex. 7). Simpson was obligated and required to obtain the certificate of title on the 1947 Chevrolet sold to Bates and this he failed to do. It was testified by Saunders and was supported by

the testimony of the employee of the Continental Bank, Mr. Joseph Max Soelberg, that Simpson was the only one who could obtain the title from the Continental Bank (R. 177, 178, 251, 253). Saunders testified that he trusted Simpson (R. 171). He had no reason not to trust him, just as the appellant and respondent Bates trusted him. Had Simpson performed as he agreed to do, and as he was bound by law to do there would be no grounds for this law suit. But Simpson failed to perform. He pocketed the money and he disappeared. As a result of this failure on the part of Simpson to obtain the title to the car and pay off the draft in his name at the Continental Bank in the amount of \$1,225.00, Saunders was required to pay to Strevell Paterson Finance Company the amount of \$867.75, which he did as testified to by Mr. Minson (R. 231, 270; Ex. 8). Saunders thus suffered a loss amounting to \$867.75, which amount is increased by his costs incurred in this action, and this loss resulted directly, proximately, and solely because of the failure of Jimmie Simpson to comply with the laws of this state as a licensed dealer in used motor vehicles, and in violation of the Act Providing For The Regulation And Control Of The Business Of Dealing In Motor Vehicles. Since Simpson's failure constituted a breach of the condition of the bond on which the appellant is surety, the appellant is liable to Saunders for the loss which he suffered. And there is no need to argue the point as to whether Saunders purchased the automobile, or the contract, as is done by the appellant, at page 44 of its brief, because Saunders

is a person protected under the terms of the bond, and the acts of Simpson were a violation of the conditions of the bond.

As to the amount of the damage suffered, the appellant raises a question at Point VI in his brief, where appellant claims that Saunders deducted \$29.90 from the remittance which he made to Simpson, and that the judgment should not in any event be affirmed as to this amount. It is submitted that a review of the record will show that other than for passing reference to the question of sales tax during the cross examination of Saunders, nothing was ever raised at the trial on this point, and the trial court was never asked to rule thereon. We believe that it is generally accepted that an appeal does not lie from matters not ruled on by the trial court. If in preparing his appeal, appellant discovered that this claim should have been asserted, it is too late to draw the matter to the attention of the trial court at this time since no such claim was made in the pleadings or presented orally to the court. And it is much too early to assert that the trial court erred before the trial court has had an opportunity to pass upon the matter.

A Point VII the appellant in its brief attempts to fix liability upon Saunders for the default of Simpson on the basis of the fact that both Simpson and Saunders were bonded by the appellant and that it became the duty of Saunders to protect the appellant against loss because of and by virtue of the terms of the application for bond filed by Saunders. This is an action brought upon the bond of Simpson, not on the bond of Saunders.

The breach in the condition of the bond is Simpson's breach, there is no defalcation by Saunders. Simply because both men were bonded by appellant does not license appellant to use the obligations of both dealers interchangeably to suit the whim of the Assurance Corporation.

We have heretofore fully discussed the lack of liability from Saunders to Bates and since this is the premise upon which appellants argument is based it follows that the application of Saunders for his bond is irrelevant to the issues in this case.

## CONCLUSION

The decision of the trial court should be sustained and the judgment of the court made and entered in favor of respondent Saunders and against Appellant should be affirmed.

Respectfully submitted,

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