

1954

# Jack Layton and Marian Layton v. Kay Clark : Brief of Respondents

Utah Supreme Court

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Lowry, Kirton & Rettilyon; Attorneys for Respondents;

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# In the Supreme Court of the State of Utah

JACK LAYTON and MARIAN LAY-  
TON, a partnership dba DENVER  
AUTO AUCTION,

*Respondents,*

vs.

KAY CLARK,

*Appellant.*

No. 8238

**FILED**

SEP 24 1954

Clerk, Supreme Court, Utah

## BRIEF OF RESPONDENTS

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# In the Supreme Court of the State of Utah

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JACK LAYTON and MARIAN LAY-  
TON, a partnership dba DENVER  
AUTO AUCTION,

*Respondents,*

vs.

KAY CLARK,

*Appellant.*

No. 8238

APPEAL FROM THE THIRD JUDICIAL DISTRICT  
COURT OF THE STATE OF UTAH, HONORABLE  
CLARENCE E. BAKER, JUDGE

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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

This is an action in replevin brought by the plaintiffs,  
doing business as the Denver Auto Auction, against one, Kay  
Clark, in which it is alleged by the Complaint on file that the

plaintiffs are the owners and entitled to the possession of one, 1950 Buick Special, 4 door Sedan, Motor No. 55806184. The facts have been stipulated to and are on file in said case. Said facts are briefly as follows: That the plaintiffs are in the business known as the Denver Auto Auction with their place of business in Denver, Colorado. That they are in the business of selling automobiles wholesale by auction to automobile dealers. That one, M. R. Bruce, a licensed automobile dealer, doing business as RaDon Auto Sales at Salt Lake City, Utah, on or about the 3rd day of March, 1953, purported to buy three automobiles from the plaintiffs including the Buick described in the Complaint. That the said Bruce was given possession of said automobiles and on Bruce's instructions, drafts were drawn payable in three days from the date thereof and a copy of which has been incorporated in the stipulation, said drafts being payable through the First National Bank of Murray, Utah. That the title to said automobiles, including the Buick, were attached to the drafts and said titles were to be delivered to said Bruce on his payment of said drafts.

That on receiving possession of said automobiles, the said Bruce removed them to Salt Lake City and placed them on his used car lot where the defendant, Kay Clark, appeared and purchased, in the usual course of trade, the Buick described in the complaint. That the said M. R. Bruce never did pay said draft nor obtain the title to said automobile. That at the time of the sale by Bruce to the defendant, no inquiry was made by Clark as to the title of said property and no representations were made by Bruce to Clark except those contained in the purchase order, a copy of which is attached to

the Stipulation of Facts, the certificate of title still being in the possession of the plaintiffs in this action. It is the contention of the plaintiffs that the said M. R. Bruce had no right to sell said automobile, that it was not his property or right to possession of same as against the plaintiffs, and that the plaintiffs are entitled to the possession of said Buick automobile.

Based upon these facts and the law, the lower Court rendered judgment in favor of the plaintiffs and from said judgment the defendant appeals to this Court.

## STATEMENT OF POINTS

### Point I

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE RESPONDENTS WERE NOT ESTOPPED TO ASSERT THEIR TITLE AS AGAINST THE APPELLANT, AND FOR HOLDING THAT THE APPELLANT WAS NOT A BONA FIDE PURCHASER FOR VALUE AND THAT HE DID NOT OBTAIN ANY TITLE AS AGAINST THE RESPONDENTS.

### Point II

THE TRIAL COURT SHOULD NOT HAVE HELD THAT IN COLORADO A RESERVATION OF TITLE IN A SALE OF PERSONAL PROPERTY IS REGARDED AS A CHATTEL MORTGAGE, AND IS REQUIRED TO BE

FILED AS REQUIRED BY THE CHATTEL MORTGAGE STATUTE, AND THERE BEING NO COMPLIANCE WITH THE COLORADO STATUTE ON THIS MATTER THE RESERVATION OF TITLE IN THE RESPONDENT IS INVALID.

## ARGUMENT

### Point I

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE RESPONDENTS WERE NOT ESTOPPED TO ASSERT THEIR TITLE AS AGAINST THE APPELLANT, AND FOR HOLDING THAT THE APPELLANT WAS NOT A BONA FIDE PURCHASER FOR VALUE AND THAT HE DID NOT OBTAIN ANY TITLE AS AGAINST THE RESPONDENTS.

There are no Utah cases directly in point on the question here involved but the Utah statutes and their interpretation by the Supreme Court are very helpful in deciding the present question.

The Court's attention is called to the provisions of the Utah Code Annotated, 1953, Title 60, Chapter 2, Section 7, which reads as follows:

"60-2-7. Sale by a person not the owner.

(1) Subject to the provisions of this title, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no



better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this title, however, shall affect:

(a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction."

The Utah Code Annotated, 1953, Title 41, Chapter 1, Section 72, reads as follows:

"41-1-72. Necessary before transfer complete.—Until the department shall have issued such new certificate of registration and certificate of ownership, delivery of any vehicle required to be registered shall be deemed not to have been made and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose except as provided in section 41-1-77."

In connection with this case, we call the court's attention to the case of Swartz vs. White, reported 80 Utah 150, 13 Pac. (2) 643, Utah Case 1932. In this case, the plaintiff claimed to be an innocent purchaser for value and brought an action for claim and delivery for a Buick roadster automobile against the defendant. The car was owned by and registered in the name of the defendant, Mrs. C. H. White. She was also the legal owner. She advertised the same for sale and a party by the name of M. J. Stewart appeared at her home and requested

permission to try and sell the car on a commission basis. She let him take the car to demonstrate but retained the title certificate. He returned the car on two or three occasions. At a later date, Stewart called on the defendant's husband at his place of business and told him he had a sale for the car and asked for the car and also the title certificate. White gave these to Stewart. Stewart departed with the car and the certificate of ownership promising to return shortly, which he failed to do. A new certificate of ownership was issued by the Secretary of State in the name of M. J. Stewart as owner and Swartz Sales Service as legal owner. Under the evidence, Stewart brought the car to the place of business of Swartz and obtained an advance on the car in the amount of \$125.00 and he turned the title certificate over to Swartz. White saw the automobile on the street and took possession of the same and Swartz brought this action claiming that he was the lawful owner and entitled to the possession of said automobile. The lower Court held for the plaintiff. The Supreme Court in holding for the defendant stated on page 645 as follows:

“(1, 2) The judgment for plaintiff must be reversed for the reason, as we view the record, that plaintiff never at any time obtained title to the car nor was he shown to be entitled to possession. It is the general rule “that no one can transfer a better title than he has, unless some principle of estoppel comes into operation against the person claiming under what would otherwise be a better title.” 24 R.C.L. 374. So also by the Uniform Sales Act, Comp. Laws Utah 1917, Section 5132, where goods are sold by a person who is not the owner, and who does not sell them under the authority, or with the consent of the owner, the buyer acquires no better title than the seller had, unless the

owner is by his conduct precluded from denying the seller's authority to sell. One who acquires property by theft, or one who by fraud acquires possession of personal property for a particular purpose with the intention of appropriating the property to his own use and without any intention on the part of the owner to transfer title to him, cannot transfer a good title. 24 R.C.L. 375."

and again on Page 646 as follows:

"The possession of the certificate of ownership indorsed as it was by Mrs. White is not, under our motor vehicle law, evidence of ownership in Stewart. Comp. Laws Utah 1917, Section 3972, as amended by Laws Utah 1925, p. 266, c. 125, Section 3 (now Section 3972XO.) The Statute provides in effect that upon registration of an automobile the secretary of state shall issue a certificate of registration and of ownership to the owner, and upon a transfer being made the owner shall indorse the certificate of ownership and deliver it with the certificate of registration to the new owner; that the certificates shall be delivered to the secretary of state, who, upon payment of a fee of \$1, shall issue new certificates of registration and ownership to the person entitled, and that: "Until the Secretary of State shall have issued such new certificate of registration and certificate of ownership, as herein provided in sub-division (d), delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose." The words of the statute, italicized by us, are clear and unambiguous and undoubtedly mean what they say. Any claimed transfer from Mrs. White to Stewart was incomplete. Title had not passed and the transfer was not valid or effective for any purpose. *Briedwell v. Henderson*, 99

Or. 506, 195 P. 575; Parke v. Franciscus, 194 Cal. 284, 228 P. 435."

In respect to the effect of the registration statutes we call the Court's attention to the case of Robinson vs. Poole et al., Missouri 1950, 232 SW (2) 807, which case held that sale of a motor vehicle registered in the state without accompanying Assignment of Title Certificate to buyer is fraudulent and void and imposes an absolute mandatory requirement that sale be accompanied by such assignment to be valid.

In connection with the White case, a rather recent Idaho case is called to the Court's attention, Lux vs. Lockridge, 150 Pac. (2) 127, Idaho 1944. In this case, the plaintiff appellant agreed with the Gray Motor Company to trade an automobile, pickup truck and three trucks for a new automobile, a new pickup and three new trucks. Plaintiff to retain possession until deliveries of the new vehicles. The transaction as to the new automobile and pickup were completed. Somewhat later the Gray Motor Company took the defendant to see the plaintiff's trucks and one of the trucks was taken by an employee of the motor company to the dealer's garage and was later sold to the defendant. Shortly after this, a freeze on the sale of new trucks was issued by the United States Government and the motor company was unable to deliver a new truck to the plaintiff. The plaintiff requested the defendant to return the truck claiming it had been delivered to the dealer and defendant upon condition that if the plaintiff was unable to get a new truck, this truck was to be returned to him. The defendant refused, claiming that he had no knowledge of an agreement between the plaintiff and the motor company and

the Court found that the plaintiff did not sell the truck to the defendant, that he sold it to the Gray Motor Company, that the defendant, Lockridge, purchased the truck from the Gray Motor Company and not from the plaintiff and that Lockridge had no knowledge of any agreement between the Gray Motor Company and the plaintiff, Lux, and the Court found that Lockridge was an innocent purchaser of the truck. Judgment was, nevertheless, entered for the plaintiff, Lux, to the defendant to deliver the truck to the plaintiff. The defendant appealed and the judgment was affirmed. The Court in deciding for the plaintiff discussed the case of Swartz vs. White as authority for their holding and stated as follows at Page 128:

“(1, 2) There was a sharp conflict in the evidence as to whether defendant knew plaintiff retained the right to regain possession of his truck in the event the company could not deliver a new truck. There is, however, no dispute in the record that the certificate of title remained at all times in plaintiff’s possession and was never transferred by him to the company or defendant and that defendant received no certificate of title from the company or plaintiff. All were equally charged with notice of chapter 144, supra, providing that no person could “acquire any right, title, claim or interest in or to” a motor vehicle until the vendee had issued to him the certificate of title. Without, therefore, determining whether or not a sale without the transfer of the certificate is void, though urged by both parties pro and con to do so, we are impressed with the cogency of the reasoning in Swartz v. White, 80 Utah 150, 13 P. 2d 643, to the effect that a purchaser not receiving the certificate of title is not a bona fide purchaser for value and therefore as against defendant the contract existing between plaintiff and

the company could be shown, defeating his rights to retain the truck."

We call the Court's attention to the early annotation reported in 13 L.R.A. at page 717, which reads as follows:

"A purchaser of chattels takes them, as a general rule, subject to whatever may turn out to be infirmities of the title. *Farmers & M. Nat. Bank v. Logan*, 74 N. Y. 568.

And it is a rule of extended application, that no person can transfer any greater title than he himself has in the thing transferred. 2 Kent, Com. 324; *Saltus v. Everett*, 20 Wend. 267, 275; *Brower v. Peabody*, 13 N.Y. 121; *Peer v. Humphrey*, 2 Ad. & El. 495; *Dows v. Perrin*, 16 N.Y. 325; *Covill v. Hill*, 4 Denio, 323, 327; *Whistler v. Forster*, 14 C.B.N.S. 248; *Ballard v. Burgett*, 40 N.Y. 314.

The sale of chattels by one not in possession of the legal title conveys to the transferee no title in the goods, even where the purchase is for value and in entire authority. *Boyce v. Brockway*, 31 N. Y. 490; *Brower v. Peabody*, 13 N. Y. 121; *Hoffman v. Carow*, 22 Wend. 285; *Spaulding v. Brewster*, 50 Barb. 142; *Dudley v. Hawley*, 40 Barb. 397; *Cobb v. Dows*, 10 N.Y. 335; *Murray v. Burline*, 10 Johns. 172; *Everitt v. Coffin*, 6 Wend. 604; *Saltus v. Everett*, 20 Wend. 270; *Connah v. Hale*, 23 Wend. 462; *Covill v. Hill*, 4 Denio, 323; *La Place v. Aupoix*, 1 Johns. Cas. 407; *Disbrow v. Tenbroeck*, 4 E.D. Smith, 397. F.S.R.,"

and also the law as contained in 46 American Jurisprudence, Page 620, Section 458, reads as follows:

"458. Generally—It is a general rule as regards personal property that title, like a stream, cannot rise higher than its source; and therefore, it is a general

principle that a seller without title cannot transfer a better title than he has, unless some principle of estoppel comes into operation against the person claiming under what would otherwise be the better title, as where the owner by some direct and unequivocal act has clothed the seller with the indicia of ownership, or unless the seller has authority from the owner. In other words, the seller of property other than negotiable securities can ordinarily convey no greater rights than he himself has."

This matter is discussed in Blashfield, Volume 7, Section 4357 as follows:

"The owner of an automobile, it has been held, merely by reason of having delivered its possession to a dealer in automobiles, is not estopped to claim title as against a bona-fide purchaser from the dealer, even though the dealer was authorized by the owner to exhibit the automobile for the purpose of obtaining offers of purchase.

The owner, when trading his automobile to a dealer, may properly reserve title until the performance of certain conditions, such as furnishing of the proper title papers, and hence a sale of the automobile by the dealer passes no title, since he had none to pass.

\* \* \*

A person who purchases an automobile from a dealer without obtaining the title papers, or in reliance on the dealers promise to furnish the title papers later without making any effort to ascertain the true ownership, acquires no title as against the owner, where the owner, for example, had attached the title papers to a draft and had sold and delivered the automobile to the dealer subject to payment of the draft, which was never paid."

The same subject is discussed in Williston on Sales, Section 313, which reads as follows:

"Although intrusting possession to another may lead an innocent third person to believe the possessor is the owner, no court has gone so far as to hold that the mere intrusting with possession would preclude the owner from asserting his title. If the owner of goods is responsible for or cognizant of no other deceptive circumstances, it is an entirely proper thing for him to intrust another with the goods either for the advantage of the owner or of the possessor, and the law has never attempted to debar the owner from so doing. \* \* \* "

Section 314 deals with the possession intrusted to one who habitually sells such goods. In this section, Williston discusses the English rule and disagrees with the same. The English rule apparently holds that title passes to the purchaser, under such circumstances. Section 315 of Williston reads as follows:

"It is a step beyond the situation considered in the preceding section if the owner has not only intrusted possession to one who is in the habit of selling such goods, but has given him authority to exhibit the goods to possible purchasers and obtain offers from them. Even in this case an innocent purchaser is not protected, but slight additional circumstances may turn the scale."

In Section 316, Williston discusses where possession is intrusted with indecia of title, and we call to the Court's attention that *Bruce was not given any indecia of title whatsoever to these automobiles. He had bare possession only.* Section 320 of Williston reads as follows:

"A few states and only a few have passed factors Acts. California, Montana, and North Dakota have



identical provisions originating in the California code. A Factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership."

This last section is important particularly in view of the holding of California and one or two other cases where they have held against the plaintiff in an action similar to the one at bar. California has held that the person in the possession, as Bruce was in this case, was a factor, and based on that, permitted persons buying the car to retain the same, but Utah has no such statute and, therefore, the California holding can clearly be distinguished under Utah law.

The case most nearly in point to the case in question is *Deahl vs. Thomas*, Texas Appeals 1949, 224 S. W. (2) 293. In this case the facts are substantially as follows: On or about October 29, 1948, the appellee sold a new Mercury Club Coupe to P. C. Hicks, a dealer in used automobiles, for a consideration of \$2950.00, subject to payment of a draft for \$2950.00 in payment of the automobile drawn by Hicks on a Clarendon bank, payable to appellee. Upon taking possession of the automobile at Clarendon, Hicks sent the draft to appellee at his home in Lamey, Missouri where it was deposited by appellee, with papers evidencing title to said automobile attached thereto, in a Missouri bank for collection in due course. On or about October 30, 1948, and before draft in question had been presented for payment, Hicks sold the automobile to appellant for a consideration of \$2150.00 in cash, together with a trade-in value of \$1125.00 on a used car. Appellant took possession of new automobile with the understanding Hicks would supply papers in a few days. The

draft was never paid, although presented to Hicks twice. When appellee learned appellant had possession of the automobile, he filed suit for recovery. Judgment was rendered for plaintiff and affirmed. On page 295, the Court held:

"While appellant complains in several points of error presented of various irregularities of procedure in the trial court, the controlling issue to be determined is the question of who holds legal title and the right of possession of the automobile. Appellant contends that he is protected under the law of estoppel under the facts in this case. Yet, under his own admission as a witness, he purchased the automobile upon the promise only of Hicks that the necessary papers of title would be delivered to him later. He inquired about such papers later and Hicks continued to put him off. Neither Hicks nor appellant ever received such papers. There is no evidence even tending to show that appellee concealed or attempted to conceal the title papers to the automobile, or did anything to prevent their inspection by anybody. According to appellant's own testimony, he knew legal title to the automobile was not delivered to him when he took possession of it and he made no effort at the time he paid Hicks for the automobile and took possession of it to determine the true ownership of the automobile. Appellant could have ascertained the true ownership of the automobile at the time he paid for it if he had exercised reasonable diligence. Under the record before us, it is our opinion that the law of estoppel does not apply in this case, *Holland vs. Blanchard*, Tex. Civ. App. 262 S.W. 97; *Pac. Finance Corp. v. Gilkerson*, Tex. Civ. App. 217 S.W. (2) 440.)"

On Page 296 the Court held as follows:

"Section 27 of the certificate of Title Act, Article 1436, Vernons Annotated Penal Code, requires the

procurement of a certificate of Title as a condition precedent to the right to transfer a motor vehicle. Section 53 of the same act provides that all sales made in violation of this act shall be void and no title shall pass until the provisions of this act have been complied with. Mere possession of property does not warrant an assumption of legal ownership. The rule is well established that one who buys property must at his own peril ascertain the ownership. *Seigal v. Warwick*, Tex. App. 214 S.W. (2) 883, and other authorities there cited. It has been held that it is the duty of one who purchases a motor vehicle imported into Texas to investigate and see that the seller of the same has complied with the Texas Certificate Law. *Ball Bros. Trucking Co. vs. Sorenson*, Tex. Civ. App. 191 S.W. (2) 908, Appellant did not make such an investigation in this case or any other investigation about ownership of the automobile. He relied wholly on the promise of Hicks to procure the papers later. He was therefore derelict in performing the duty required of him in order to protect his best interest and he acted at his own peril in purchasing the automobile and paying for it merely on the promise of Hicks to furnish title at some later date."

See also the case of *Onwiler vs. Burtrum*, decided in 1950, a Texas case reported in 236 SW (2) 157, and the case of *Fisher vs. Bullington*, 50 So. (2) 91, La. 1951. In this case the plaintiff brought action in replevin to recover a Plymouth automobile in the possession of the defendant alleging him to be the owner. One John D. Cole negotiated for the purchase of the automobile and gave a check to the plaintiff drawn on Twin City Bank of North Little Rock, Arkansas. The plaintiff attached the title papers to the check and forwarded to the bank for collection. The check returned with

title papers to the plaintiff. The car later was sold by Cole to one James W. McKenzie, Jr., and by him to the defendant. Judgment was rendered for the plaintiff and on Page 92 the Court says:

"Plaintiff's action is predicated upon the contention that his negotiation with Cole was a conditional sale, as a consequence of which Cole was not vested with Title nor was the Plaintiff divested of Title to the vehicle in question until and unless the purchase price represented by the check delivered to the Plaintiff by Cole was paid. It logically follows if Plaintiff's contention be true that the dishonoring of the check was evidence of the failure of fulfillment of the alleged conditional sale and that Plaintiff continued to be vested with Title to the automobile despite the machinations of Cole and his associates \* \* \* .

While we have some question as to whether the transaction between Plaintiff and Cole can be properly denominated as a conditional sale, we are nonetheless firmly of the opinion that the precautions taken by Plaintiff were sufficient to confirm him in the continuance of his Title."

See also *Ohio Motors vs. Russell Willis, Inc.*, a Tennessee case decided in March, 1952, 246 SW (2) 962. The most recent case in this respect is the case of *Slaton vs. Lamb*, Alabama 1954, 71 So. (2) 289. In that case suit was brought by the seller against an innocent purchaser from the buyer to recover automobile. The plaintiff through an auto auction in Tennessee sold to one T. C. McDonald the automobile in question. He gave a check in payment and a written agreement was entered into which, among other matters, it was agreed that title to the automobile should remain with the seller until

the check had been paid. Buyer was given possession. He took the automobile to Alabama and sold it on an auction to the defendant, Slaton, an automobile dealer, who then resold the car and the car could not be located. The Court held for the plaintiff and on Page 292 says:

“In the case at bar it is not a question of the purpose of the sale by Lamb to McDonald. It is a question of whether there is in fact a sale. As a matter of fact the sale was never made because the cash was not paid \* \* \* In the case at bar, Lamb never parted with the legal Title and never authorized anyone else to sell so as to pass the title. A purchaser from McDonald, therefore, could not acquire the legal title which is necessary to constitute one a bona fide purchaser.”

In the case of Pugh vs. Camp, Ark. 1948, 210 S.W. (2) 120, the appellant traded a Ford to one Haynes, a used car dealer, for a Chevrolet. The appellant kept title papers on the Ford until he received title to the Chevrolet. Haynes sold the Ford. The appellant brought this action in replevin for the Ford, and the Court said at Page 121:

“If the appellant did reserve the title to the Ford car, its sale by Haynes passed no title, since he had none to pass, and title can be reserved by parole.”

Crawford Finance Company vs. Derby, 63 Ohio App. 50, 25 N.E. (2) 306. In a case of replevin in a syllabus by the Court as follows:

“1. The holder of a chattel mortgage on, and a manufacturers certificate of title to an automobile given him by a dealer, has a lien on the automobile superior to any claim of a subsequent buyer of it from that dealer.

3. The Ohio certificate of title law for the registration of title to motor vehicles, Section 6290-2 to 6290-20 general code, is exclusive, and the only way a buyer can acquire a good title to such a vehicle from a dealer is by procuring a certificate of title from the proper clerk of Court as provided in Sections 6290-3, 6290-4 and 6290-5 General Code."

Payne vs. Strothkamp, Missouri 1941, 153 S.W. (2) 402. In an action of replevin to recover an automobile from defendant who purchased it from a third party to whom plaintiff intrusted automobile for demonstration to a prospective buyer, the Court directed a verdict that plaintiff was entitled to possession of the automobile, held proper under the evidence that the automobile originally belonged to plaintiff and that a certificate of title had been issued to him and that plaintiff had not assigned the certificate as provided by statute.

State Bank of Black Diamond vs. Johnson, 104 Washington 340, 177 Pac. 340. This is a replevin action wherein the plaintiff seeks recovery of an automobile claiming title of same by virtue of a conditional sales contract executed by one Grant-Coffin-Campbell Company, as vendor, an assignment of all the rights of the company under the conditional sales contract and forfeiture of vendee's rights. The defendants, Johnson and Dahl, claim lawful possession and title to the automobile as innocent purchasers.

In September of 1917, the company then being the owner of the automobile and in possession of the same, entered into a conditional sales contract with A. L. Skonnord. This contract was assigned to the bank assigning all right, title and

interest in and to the note and contract. Skonnord failed to pay the balance and returned the automobile to the company.

On October 25, 1917, Johnson and Dahl entered into a conditional sales contract with the company for the purchase of a second hand car of the same general description as the car described in the conditional sales contract above set out but not specifically describing said car. On the following day, Campbell delivered the car covered by the conditional sales contract and gave the bill of sale in the name of "Campbell Motor Company, Inc." There was no such company and Johnson and Dahl paid the balance due on their contract. On December 1, 1917, the bank discovered the sale and then demand was made on Johnson and Dahl to return the car to the bank. They refused. Thereafter, this action was brought and judgment was rendered for the plaintiff and affirmed on appeal. On Page 343, the Court says:

"Johnson and Dahl claimed to be innocent purchasers, also contended the company was engaged in business of selling automobiles and this automobile was purchased by Johnson and Dahl at its place of business, it being in possession and the apparent owner of the automobile.

It is true that possession of personal property is some evidence of title thereto by the one in possession of it, but to sustain Johnson's and Dahl's claim of title in this case it would be necessary to go to the extent of invoking in their favor the doctrine that a sale in market overt vests good title in the vendee though the vendor had no title, applicable under certain conditions in England. 35 Cyc. 358. If the vendor has no title, the vendee acquires none, unless the one having title has by act or neglect estopped himself from disputing

the vendees claim of title so acquired. It seems plain that there was no such estoppel here. \* \* \* The fact still remains that neither, Grant-Coffin-Campbell Company, Campbell Motor Company, nor Edward P. Campbell had any right, title or interest whatever in the automobile at the time one or other of them assumed to sell it to Johnson and Dahl. Whatever view may be taken of this case other than the question of the Bank acquiring title to the automobile by assignment of the conditional sales contract, there remains the fact that Johnson and Dahl's vendor had no title to convey and the want of estoppel preventing the Bank from asserting its title to the automobile."

Judgment affirmed.

Eatonville State Bank vs. Marshall, Wash. 1932. 17 Pac. (2) 14. This is an action of replevin by the Eatonville Bank against Marshall, from Judgment of Dismissal. The plaintiff appeals and the case was reversed.

The appellant was the owner of a 1929 Ford acquired from a Ford dealer in satisfaction of a debt. In order to realize on this car, he turned it over to the Kirkland Motor Company, a dealer in Fords, giving them permission to exhibit and demonstrate the car to prospective purchasers but no sale was to be made without appellant's approval. Thereafter, Kirkland Motor Company let one of its salesmen take the automobile to Seattle on two occasions. When there he exhibited it to the respondent, a second hand car dealer, who, on the second visit, purchased the same, paying the salesman \$400.00 and receiving a bill of sale, which the salesman signed as owner and seller. The salesman was never heard of thereafter and he never made an accounting to the



Kirkland Motor Company. The respondent relied on the defense of innocent purchaser. Judgment for the defendant and was reversed on appeal.

An examination of the annotation cited by the appellant (47 A.L.R. 85) shows numerous statements supporting the position of the respondents in this action. For example, we quote from the paragraph on Page 88 of the annotation:

"It has been admitted in Pennsylvania in a case involving a bailment lease of motor trucks to a dealer, that if the bailor permits the bailee so to act with the property (other than having possession), or so clothes him with apparent ownership as to mislead or deceive the public, an estoppel may arise against the owner, but it is held that such conduct must affirmatively appear from the evidence. *Leitch v. Sanford Motor Truck Co.* (1924) 279 Pa. 160, 123 Atl. 658. And it is held in this case that the fact that the bailee put the truck on exhibition in the salesroom where he was engaged in buying and selling the vehicles would not convert the bailment into a conditional sale, or estop the owner from asserting his title."

The annotation also refers to an Idaho case, *Peasley vs. Noble*, 1910, 17 Idaho 686, 27 L.R.A. (N.S.) 107 Pacific 402. In light of that case, the Court's attention is called to the case of *Lux vs. Lockridge*, *supra*, showing that in case of a bailment or the delivery of mere possession of a chattel a subsequent purchaser does not acquire a right as against the true owner of the property.

The appellant relies upon two Utah cases. The first is the case of *Harrison vs. Auto Securities*, which is reported in 57 A.L.R. 388, followed by an annotation entitled:

"Right of purchaser from *agent or dealer* in possession of article for purpose of demonstration or solicitation, without actual authority to sell." (Italics added.)

The Harrison case is strictly a case of agency. The owner of the legal title of the property in question entrusted the same to their agent who in turn sold it to the plaintiff. The Court on Page 389 says:

"M. L. Graham Company retained title to the automobile until the balance of the purchase price was paid. The M. L. Graham Company transferred this contract of sale to the Auto Securities Company and in the transfer guaranteed the payment of the debt. In March, 1925, the M. L. Graham Company repossessed the said car and had it in its place of business in Salt Lake City. \* \* \* One G. A. Clark was a member of the firm of the Clark-Lavan Motor Company. This company was dealing in automobiles at Price, Utah, and was *the agent of the M. L. Graham Company for the sale of the Gray sedan*. It appears from the record that there was some written contract existing between the Graham Company and the Clark-Lavan Motor Company respecting this agency." (Italics added.)

Again on Page 390, the Court states:

"It is likewise undisputed that the Clark-Lavan Motor Company maintained a place for the retail of automobiles at Price, Utah, and also that *they were the agents under some arrangement with the M. L. Graham Company for the sale of the Gray car* at and prior to the date when this sale was consummated." (Italics added.)

It is submitted, therefore, that this case is in no way in point to the case before the Court as there is nothing in the

Stipulation to indicate any agency existing between the respondent and the RaDon Auto Sales. The facts as set out in the Stipulation are to the contrary. It is submitted, therefore, that the Harrison case does not assist the appellant in this action. Further, the Court's attention is called to the annotation found in 57 A.L.R. 388, reading on Page 393, as follows:

"It is a principle of both the common and the civil law, that no one can transfer better title to personal property than he has, unless some element of estoppel comes into operation against the person claiming under what would otherwise be the better title. 24 R.C.L. 373. *The mere possession of chattels by whatever means acquired, if there is no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title as against the former.* 24 R.C.L. 375. Accordingly, the rule is that mere possession of personal property by an agent or servant does not confer upon him ostensible authority to sell it, and a sale under these circumstances does not confer title as against the principal, even though the buyer is a bona fide purchaser." (Italics added.)

And pursuing the annotation further, we find cases such as the case of Royle vs. Worcester Buick Company, 243 Mass. 143, 137 N.E. 531, referred to on Page 394, the facts are somewhat similar to the case at bar, they hold that the true owner may recover the chattel. Also the Court's attention is called to the statement at Page 395, which reads as follows:

"In England, and in many jurisdictions in this country, statutes commonly known as the Factors' Act have been enacted for the protection of persons who in good faith, and for value, purchase property intrusted to the possession of a particular class of commercial agents."

And where such statutes have been enacted, the Courts have held contrary to the position taken by the plaintiffs in this case. Going along in the annotation, Page 395, the Court's attention is called to the case of Hamilton Mach. & Tool Co. vs. Mechanic's Mach. Co., 179 Ill. App. 145, in which the result is reached as contended for by the respondent in this action.

The other Utah case cited in the appellant's brief is the case of Jones vs. the Commercial Investment Trust, 228 Pacific 896. It is contended by the respondent that this case is not in point. This is a case of the so-called floor planning of automobiles. The automobile company, namely Naylor-Woodruff Motor Company, was purchasing automobiles for the factory and the same were financed and floor planned by the Commercial Investment Trust. The automobile dealer received a bill of sale for each automobile, and on receipt of the same, he paid 20% of the purchase price plus freight. The title to the automobile was transferred to the finance company under an instrument called a Negotiable Trust Receipt, and this instrument provided that the dealer should display and sell the automobiles and that on their sale he was then to transmit the purchase price to the finance company and receive the title. The automobiles received in that case were received by the dealer by October of 1922 and the dealer had until December 1, 1922 in which to pay for the car in question. The same was sold to an innocent purchaser. The dealer went broke and failed to transmit the purchase price to the finance company. The Court held that the buyer was entitled to the car for the reason that the car was left with the dealer for

the specific purpose of selling the same and the finance company was estopped to claim title to the car as against the innocent purchaser. It is submitted that there are no such facts present in the case before the Court. The RaDon Auto Sales Company was not given authority to sell this automobile, it had no bill of sale or any document of any kind which would mislead any innocent purchaser. It was not being financed by the plaintiffs in this action. There was no floor plan arrangement and under the facts of the Stipulation, there is nothing to indicate that the plaintiffs intended the RaDon Auto Sales Company to offer to display this car for sale until the draft had been picked up and title delivered to the RaDon Auto Sales Company. The RaDon Auto Sales had bare naked possession only, which the annotations above referred to say is not sufficient.

The general proposition of law as cited from American Jurisprudence, *Blashfield and Williston*, supra, cite cases involving watches, hogs, furniture and innumerable articles of personal property and in all of these cases the so-called purchaser has no means of determining the title to the property which they are acquiring. In the instant case, we have the title statutes of the State of Utah to protect all parties and as it is pointed out in the case of *Dehl vs. Thomas*, supra, the Appellant should have been charged with some responsibility in determining whether Bruce had a right to sell the automobile in question. The means was available to him and certainly he could and should not stand in any stronger position than the purchaser of one of the innumerable articles of personal property mentioned above.

Out state in adopting the uniform statutes regarding conditional sales as pointed out above, provided that:

"Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." Title 60, Chapter 2, Section 7, Utah Code Annotated, 1953."

and our Supreme Court has indicated that this and the registration statutes are not mere window dressing.

The Utah Court, in the case of Swartz vs. White, supra, and the Court of our neighboring state, Idaho, in the case of Lux vs. Lockridge, supra, have held that these recording statutes mean what they say and to follow the reasoning and argument of the appellant in this brief and to follow the decisions of the cases cited by the appellant means in effect that the registration statutes are wiped off the books, and statutes like ours covering conditional sales above referred to will have in effect been judicially repealed, in the case of automobiles.

It has become an accepted fact that one who buys a piece of real property without checking the title does so at his peril. It is true that personal property is different than real property, but in considering the registration statutes all of the safeguards have been set up to protect the public in acquiring automobiles, the same as in regard to real property. For this Court to say that the fact that a person buys a car from a used car dealer eliminates the necessity of checking the title of an

automobile seems to do violence to the registration statutes. In this respect it is conceded that in some of the reported cases the Courts have in effect stated that the registration statutes have not been enacted for this purpose, but it is the position of the respondents in this action that the vendor and vendee of an automobile have a right to rely upon the registration statutes of the state and in this case the Denver Auto Auction when they attached the title to the draft with the understanding with Bruce that the automobiles would not be placed upon his lot until these drafts had been honored and the titles picked up that they, the Denver Auto Auction, had a right to assume that these certificates of title meant something more than a mere scrap of paper and that they were entitled to the protection that the registration statutes said they had in retaining the certificates of title.

## Point II

THE TRIAL COURT SHOULD NOT HAVE HELD THAT IN COLORADO A RESERVATION OF TITLE IN A SALE OF PERSONAL PROPERTY IS REGARDED AS A CHATTEL MORTGAGE, AND IS REQUIRED TO BE FILED AS REQUIRED BY THE CHATTEL MORTGAGE STATUTE, AND THERE BEING NO COMPLIANCE WITH THE COLORADO STATUTE ON THIS MATTER THE RESERVATION OF TITLE IN THE RESPONDENT IS INVALID.

The Appellant for the first time in this case raises the question of the Colorado Statute or law. It was never pleaded

and never raised in the lower Court. We submit, therefore, that even assuming the law to be as stated by the appellant this Court cannot consider this matter; and the Court's attention is called to the 20 American Jurisprudence, Page 69, Sections 46 and 47, and to the Utah case of Dickson vs. Mullings, 66 Utah 282, 241 Pacific Reporter, 840 at Page 842, the Court holds:

"Whether the state of New York has a statute on the subject is not shown. No such or any statute of New York is either pleaded or proved. It, of course, is well settled that state courts cannot take judicial notice of laws or statutes of a sister state. It also is well settled in this jurisdiction (American Oak Leather Co. v. Union Bank, 9 Utah, 87, 33 P. 246; Dignan v. Nelson, 26 Utah, 186, 72 P. 936; Stanford v. Gray, 42 Utah, 228, 129 P. 423, Ann. Cas. 1916A, 989; Grow v. Railroad Co., 44 Utah 160, 138 P. 398, Ann. Cas. 1915B, 481) that, in the absence of proof, it will be presumed that the law of another state is the same as the law of the forum and the court will administer and apply the law of the jurisdiction until the law of the situs is shown. Thus, in the absence of proof, it will be presumed that the law of New York on the subject is the same as the law of Utah."

## CONCLUSION

It is submitted, therefore, that Bruce, the used car dealer, had only naked possession of the automobile in question. He was given possession subject to the payment of a draft and never receiving title to the automobile, there never was a sale by the plaintiff, in this action, to Bruce. The transaction was never completed. The title of the automobile was attached



to the draft, sent to the bank of Bruce's designation and Bruce did not honor the draft and acquire the title. Bruce did not have anything to indicate he was the owner of this automobile other than possession. No registration certificate or bill of sale, nothing that would mislead the appellant in this action to believe that he, Bruce, owned the automobile and had the right to sell it. The appellant made no inquiries as he should have done as has been pointed out in the cases cited in this brief to Bruce's right to sell this automobile; and under the cases cited by the Respondent he could not have been and is not a bona fide purchaser for value of the automobile in question. It is submitted, therefore, that the judgment of the lower Court should be affirmed.

Respectfully submitted,

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