

1955

Jack Layton and Marian Layton v. Kay Clark : Petition for Rehearing

Utah Supreme Court

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Lowry, Kirton & Bettilyon; Attorneys for Respondents;

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In the Supreme Court of the State of Utah

JOE HEASTON and H. R. ELLIS, a
partnership, d/b/a Heaston Ellis
Motor Company,

Plaintiffs, (Respondents)

vs.

MANUEL MARTINEZ,

Defendant (Appellant)

JACK LAYTON and MARIAN LAY-
TON, a partnership, d/b/a Denver
Auto Auction,

Plaintiffs, (Respondents)

vs.

KAY CLARK,

Defendant (Appellant)

No. 8228

FILED
MAY 31 1956
Clerk, Supreme Court, Utah
No. 8238

PETITION FOR REHEARING

LOWRY, KIRTON & BETTILYON

*Attorneys for Respondents
and Petitioners*

TABLE OF CONTENTS

	Page
Points of the Court's Opinion	
1. That the Plaintiffs are estopped to assert their rights to the automobiles for which these replevin actions were instituted without discussing the law of estoppel	4
2. Title 41-1-65 exempts the automobiles in question from being registered.....	4
3. That Bruce, the licensed used car dealer of Utah, had indecia of title of the automobiles involved.....	4
 ARGUMENT	 5
Point I. That the Plaintiffs are estopped to assert their rights to the automobiles for which these replevin actions were instituted without discussing the law of estoppel	5
Point II: Title 41-1-65 exempts the automobiles in question from being registered	5
Point III: That Bruce, the licensed used car dealer of Utah, had indecia of title of the automobiles involved	24
STATEMENT OF POINTS	4
CONCLUSION	26

CASES CITED

Al's Auto Sales v. Moskowitz, 224 Pac. (2) 588	20
Beck v. New Bradford Acceptance Corp., 3 Atl. (2) 55.....	21
Garrett v. Hunter, 48 So. (2) Sec. 871	19
L. M. Motors v. Pritchard, 25 NE (2) 129	17

	Page
Mackie & Williams Food Stores, Inc. v. Anchor Casualty Company, U.S.C.A. 8th C. 216 F (2) 317.....	15
Pageamas v. Mixon Motor Co., 101 NE (2) 1280	18
Siegel et. ux. v. Bayless et. al., 248 Pac. (2) 968	21
Swartz v. White, 80 Utah 150, 13 Pac. (2) 643	13

STATUTES CITED

41-1-18, Utah Code Annotated, 1953	10
41-1-19, 41-1-20, 41-1-24, 41-1-31, 41-1-35, 41-1-40, Utah Code Annotated, 1953	11
41-1-64, 41-1-65, 41-1-66, 41-1-72, 41-1-76, Utah Code Annotated, 1953	11
41-1-72, Utah Code Annotated, 1953	15
41-1-65, Utah Code Annotated, 1953	13
41-3-2, Utah Code Annotated, 1953	11
41-3-23, Utah Code Annotated, 1953	11

TEXTS CITED

19 American Jurisprudence, P. 634, Sec. 34, P. 642; Sec. 42; Sec. 43	6
46 American Jurisprudence, P. 625, Sec. 462; P. 620, Sec. 458	9
Blashfield, Vol. 7, Sec. 4357	9
15 Words & Phrases, P. 613-614	7
Williston on Sales, Sec. 313, 314, 315, 316, 320	9

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No. 8238

PETITION FOR REHEARING

The written opinion of the court in this case is persuasive and reaches a desirable result from the standpoint of the Defendants and Appellants, citizens of the State of Utah. Since the opinion is not law until petition for rehearing has been

acted upon, Plaintiffs respectfully submit an analysis of the opinion together with their reasons for regarding the decision as contrary to good law and the rights of and against the interest of other Utah citizens and the commerce of automobiles in the State of Utah.

The opinion proceeds upon three conclusions:

1. That the Plaintiffs are estopped to assert their rights to the automobiles for which these replevin actions were instituted without discussing the law of estoppel.

2. Title 41-1-65 exempts the automobiles in question from being registered.

3. That Bruce, the licensed used car dealer of Utah had indecia of title of the automobiles involved.

STATEMENT OF POINTS

POINT I

THAT THE PLAINTIFFS ARE ESTOPPED TO ASSERT THEIR RIGHTS TO THE AUTOMOBILES FOR WHICH THESE REPLEVIN ACTIONS WERE INSTITUTED WITHOUT DISCUSSING THE LAW OF ESTOPPEL.

POINT II

TITLE 41-1-65 EXEMPTS THE AUTOMOBILES IN QUESTION FROM BEING REGISTERED.

POINT III

BRUCE, THE LICENSED USED CAR DEALER OF UTAH, HAD INDEED OF TITLE OF THE AUTOMOBILES INVOLVED.

ARGUMENT

POINT I

THAT THE PLAINTIFFS ARE ESTOPPED TO ASSERT THEIR RIGHTS TO THE AUTOMOBILES FOR WHICH THESE REPLEVIN ACTIONS WERE INSTITUTED WITHOUT DISCUSSING THE LAW OF ESTOPPEL.

POINT II

TITLE 41-1-65 EXEMPTS THE AUTOMOBILES IN QUESTION FROM BEING REGISTERED.

The above two points are so interconnected in the Court's opinion that they are discussed here together.

The opinion of the Court in these two cases is based upon the conclusion that the Plaintiffs in these actions are estopped to assert their rights to the two automobiles involved. In arriving at that conclusion the Court decided that the Buick and Pontiac automobiles were not subject to the automobile registration statutes of the State of Utah.

To the first proposition, the Respondent and Petitioner would like to call the Court's attention to the fact that the

Court failed to consider the facts of the cases under consideration in the light of the general law and cases on estoppel.

Estoppel is defined by American Jurisprudence, Volume 19, Page 634, Section 34 as follows:

" . . . Equitable estoppel or estoppel in pais is the principal by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed."

The general principals and grounds of estoppel are set out in Page 642 at Section 42 which reads as follows:

" . . . The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, inconsistent with, those which the party subsequently attempts to assert; (2) *intention, or at least expectation, that such conduct shall be acted upon by the other party*; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his *position* prejudicially." (Italics added.)

In American Jurisprudence, Section 43, it is further stated that the law to be as follows:

"43. Certainty.—Estoppels must be certain to every intent and are not to be taken or *sustained by mere argument or doubtful inference*. No party ought to be precluded from making out his case according to its truth unless by force or some positive principle of law. Hence, *the doctrine of estoppel in pais must be applied strictly and should not be enforced unless substantiated in every particular*. The acts, claims, or conduct relied on to estop must be plainly inconsistent with the right afterward set up and must clearly appear to have been done or made by the party whom it is sought to bind. Where, however, the words or acts of a party are clearly shown, he may be concluded not only by the words or acts themselves, but by natural and reasonable inferences therefrom." (Italics added.)

In Words and Phrases, Volume 15, Page 613-614, in a statement supported by a long line of cases cited thereunder, it is stated that the essential elements are as follows:

" . . . To constitute an estoppel, the following elements are essential: (1) There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts. (2) *These facts must be known to the party estopped at the time of his said conduct, or, at least the circumstances must be such that knowledge of them is necessarily imputed to him.* (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him. (4) *The conduct must be done with the intention, or at least, with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon.* (5) The

conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse." (Italics added.)

In all of these text statements and the cases cited in support thereof, it is held that one of the essential elements to support an estoppel is that conduct of the party to be estopped must be done with the intention or at least with the expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and possible that it will be so acted upon. With that particular element in mind, the Petitioner would like to review the facts in these cases and the law of the cases cited by the Court to support the proposition that the Plaintiffs are estopped to maintain these actions.

The sole basis for estoppel on the part of the Plaintiffs as set out by the Court and as contended for by the Appellants is the fact that the Plaintiffs, who are wholesale automobile dealers out of the State of Utah, delivered possession of the automobiles in question to one, Bruce, a licensed Utah Used Car Dealer who, contrary to the agreement with the Plaintiffs, placed the automobiles on his lot in Salt Lake City where they were sold to the Defendants.

There is no dispute as to the actual facts. The only dispute is the interpretation of them in the light of the cases. Bruce had no bill of sale, no certificate of registration, no contract of sale, he had nothing but *bare naked possession* and with that possession only he placed the automobiles on his Used Car Lot.

This Court has in effect, by juricial fiat, ruled that the

British Law of "market overt" is the law in this State without the benefit of any legislative act. For a brief history of this law see American Jurisprudence, Volume 46, Page 625, Section 462.

The reason such a holding should not be applied was called to the Court's attention in the Respondents' brief in Case No. 8238. See Williston on Sales, Sections 313, 314, 315, 316 and 320. Also Blashfield, Volume 7, Section 4357 and American Jurisprudence, Volume 46, Page 620, Section 458.

As between the parties to this litigation the doctrine of Caveat Emptor is more just and applicable. The Petitioner withheld any evidence by which the used car dealer could make a warranty. The Defendants at the time they dealt with the used car dealer could have demanded and impliedly by law did receive a warranty of title for their protection. However, the Plaintiffs did not give the seller any evidence by which he could honestly make such a warranty, so that the buyers failed in their duty to "beware" to ascertain the facts: failing to do so caused their damage.

In order to determine whether the elements of estoppel are present in this case, it is necessary to refer back to the state of mind of the Plaintiffs' or their intentions at the time of their delivery of the automobiles in question to Bruce, and in reviewing the facts to make that determination we find the following:

First a transaction, common in the automobile industry, that is the sale by a wholesaler to a dealer in the manner described in the Stipulation of Facts set out in the original briefs covering these two transactions; that is the delivery of posses-

sion of the vehicles in question and the retention of the Certificates of Title by the seller until the automobiles were paid for. This was done with the complete assurance on the part of the Plaintiffs that Bruce could not sell the automobiles and transfer title without the Certificate of Title.

The question is raised why should the Plaintiffs have such an idea or thought. The answer might simply be that any normal persons knows that in the automobile world a Certificate of Title is necessary to acquire title to an automobile so that any person with common sense knew that when the purchaser bought an automobile from Bruce or any other dealer the vendor would have to deliver to the buyer a Certificate of Title; thus in order to do this the vendor would have to have a Certificate of Title. With this thought in mind, the Plaintiffs would naturally think that by retaining the Certificate of Title no one would buy the car without obtaining such a Certificate or in any event the dealer would not sell the automobile without having such a Certificate especially in view of the agreement between Bruce and the Plaintiffs that he would not sell or offer these cars for sale until he had acquired the Certificate of Title.

The Plaintiffs also are charged with and we can assume knew and understood the following provisions of the Utah Code governing the registration and licensing of automobiles. Title 41, Chapter 1, Section 18 reads as follows:

"41-1-18. Registration and certificates of title—Unlawful to violate provisions requiring.—It shall be unlawful for any person to drive or move or for an owner knowingly to permit to be driven or moved upon

any highway any vehicle of a type required to be registered hereunder which is not registered or for which a certificate of title has not been issued or applied for, or for which the appropriate fee has not been paid when and as required hereunder, except that when application accompanied by proper fee has been made for registration and certificate of title for a vehicle it may be operated temporarily pending complete registration upon displaying a temporary permit duly verified, or other evidence of such application, or otherwise under rules and regulations promulgated by the commission."

The following sections governing registration of vehicles were also in force which the Plaintiffs could rely upon, that is, Sections 41-1-19, 41-1-20, 41-1-24, 41-1-31, 41-1-35 and 41-1-40.

The Plaintiffs also knew and were charged with and had a right to rely upon the following sections of the Statutes governing transfer of title or interest. Sections 41-1-64, 41-1-65, 41-1-66, 41-1-72, and 41-1-76.

The Plaintiffs also knew that the Statutes provided the following: Section 41-3-2:

"41-3-2. 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."

Also Section 41-3-23, Sub-section (b):

"41-3-23. Prohibited acts or omissions—Violation by licensee. It shall be unlawful and a violation of this

act for the holder of any license issued under the terms and provisions hereof:

(b) To violate any of the terms and provisions of this act or any of the rules and regulations promulgated by the administrator under the authority herein conferred upon him."

It is submitted, therefore, that with the above knowledge of the importance of the Registration Statutes, the Plaintiffs' intentions and expectations would naturally be that the law would be complied with. That is the natural and reasonable conclusion and if a person reaches that conclusion can it be logically said that the Plaintiffs' conduct was done with the intention or at least with the expectation that it would be acted upon by the other party or under such circumstances that is both natural and probable that it will be so acted upon as was done in the case before the court? In other words knowing the provisions of the Statutes, knowing the common understanding that the Title Certificate goes with each and every automobile, a fact known by all individuals, is it natural to assume that the Plaintiffs when they delivered possession of these automobiles to Bruce thought that persons would buy them without any thought as to Title or any inquiry as to the Title; or is it natural to assume that they thought or had reason to believe that Bruce would proceed to sell these cars without first obtaining the Certificates of Title? The answer to that is no.

In order to support the conclusion of the Court in the present opinion it is necessary to infer, without proof, that Plaintiffs did not know the laws of Utah concerning registration of title, and (2) that it must be inferred that the Plaintiffs

knew or had reason to believe that the used car dealer would engage in unlawful sale and (3) it must be further inferred that the Plaintiffs knew that the Defendants would not inquire as to seller's title and (4) it must be inferred that the Plaintiffs knew or should have known that the Defendants would not act as a prudent person. All of these inferences must be found against the Plaintiffs without a fact to support them before estoppel can be legally imposed against the Plaintiffs.

The Court has said that Section 41-1-65 in effect nullifies and wipes out the recording Statutes in the case of an automobile held by a dealer for resale. This is an erroneous conclusion. There is no exception in any of the Sections of the Statutes above referred to covering an automobile purchased in a foreign state, and in the Utah case of Swartz vs. White, 80 Utah 150, 13 Pac. (2d) 643, the Court did not indicate any exceptions when it used the following language at Page 646:

" . . . Until the secretary of state shall have issued such new certificate of registration and certificate of ownership, as herein provided in subdivision (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." (Italics added.)

In none of the cases cited by the Court or Appellant, have the Courts been called upon to decide the cases in light of a Statute, the same as Section 41-1-72 of the Utah Statutes. In fact this Statute seems to be peculiar to the State of Utah.

In light of the effect the Court gives to Section 41-1-65, the Petitioner would like to consider that section of the Statute at this time. This section of the Statute provides that the dealer purchasing an automobile for resale may hold the Title under the following conditions, *holds the same for resale, and displays thereon the Registration Plates issued for such vehicle, or does not drive or permit it to be driven upon the highway.* The only one of the above conditions present in these cases was that the automobiles were held for resale, the other requirements were not present.

The Statute further provides that "but such transferee upon transferring his title or interest to another person shall execute and acknowledge an assignment and warranty of title upon the Certificate of Title and deliver the same and the Certificate of Registration to the person to whom such transfer is made," none of which was done in the cases before the Court, and the buyer did not ask for or in any way inquire about registration certificate or title certificate.

This section does not exempt the automobile sold by a dealer from registration, in fact it specifically provides for registration.

It is submitted, therefore, that the mere fact an automobile is purchased by a dealer for resale does not bring that transaction outside of the registration Statutes.

The provisions of Section 41-1-72 contains its only exception:

“ . . . and said intended transfer shall be deemed to be incomplete and not valid or ineffective for any purpose *except as provided in Section 41-1-77.*”

Thus the transfer of an automobile through a dealer is incomplete and not valid or effective for any purpose until a new Certificate of Registration and certificate of ownership has been issued, and no person can become a bona fide purchaser for value until that is done.

The Court's attention is also called to the recent case of Mackie and Williams Food Stores, Inc., vs. the Anchor Casualty Company, U.S.C.A. 8th Circuit, 216 Fed. (2d) 317. The facts in this case are briefly as follows: The Mackie and Williams Food Stores are a Missouri corporation doing business in the State of Missouri. Mackie, furnishing the money, purchased at a receiver's sale at Little Rock, Arkansas a large tractor and semi-trailer. At the time of the sale the Arkansas Certificate of Title was endorsed in blank and delivered to Mackie and R. F. Boyd of Joplin, Missouri. The vehicles were moved to the lot of Patton and Boyd of Joplin, Missouri for sale, Boyd taking the Certificate of Title with him. No application for a Missouri Certificate of ownership was made by Mackie. Mackie and Williams later repaid Mackie the money advanced for the vehicles and purchased automobile comprehensive insurance on them. The vehicles were destroyed by fire while the policies were in force. The insurer brought this action for declaratory judgment praying that it was not liable for the loss based solely on the theory that because the Missouri

Statutes relating to transfer of title to motor vehicles were not complied with, that Mackie and Williams, Inc., had no insurable interest. Judgment was given to the Casualty Company and it was affirmed on appeal.

The Court in affirming the judgment after discussing the Statutes at Page 321 held, basing their decision upon and discussing the case of State Exrel. Conn. Fire Ins. Co. of Hartford, Conn. vs. Cox, 306, Missouri 537, 268 S.W. 87, the Circuit Court discussing that case said:

"It is said that the provisions of the Missouri Motor Vehicle Act were essentially a police regulation of the highest type, in the enactment of which public welfare was primarily considered. It was held that the express terms of the Statute that the vendor attach his signature to the assignment on the back of the Certificate of Title could not be dispensed with and substantial compliance substituted therefor, even to create insurable interest. There is no escape from the conclusion that under the laws of Missouri, literal technical compliance with the requirements of the Statute is mandatory and essential to the passing and acquisition of an insurable interest."

The Court further at Page 322 said:

"Reverting to the argument made on behalf of Mackie and Williams that Paragraph 4 of Section 301.210 does not apply because the vehicles *were not registered under the laws of Missouri*. It should be clear from what has been said that even if Paragraph 4 does not prohibit the sale in Missouri by a Missouri vendor to a Missouri vendee of a motor vehicle registered in another state, until and unless the Certificate of ownership shall pass between the parties, Mackie had not protected his Title to the vehicles to such an extent

that he could make valid conveyance of an insurable interest thereon to Mackie and Williams." (Italics added.)

The Court in holding that the Plaintiffs are estopped to assert their title to the automobiles in question rely on 4 or 5 cases which the Petitioner would like to analyze at this point:

The case of L. B. Motors vs. Pritchard, Illinois case, 25 N.E. (2d) 129 cited 1940. On February 2, 1937 one Hunt purchased an automobile from the Plaintiff, L. B. Motors and delivered a note due March 2, 1937 and conditional sales contract in payment of the same. On April 20, 1937 Hunt sold the automobile to one, Emma Weiss, who signed a conditional sales contract and promissory note payable in monthly installments beginning May 20, 1937. On the same day, April 20, 1937, Hunt sold this contract to the Defendant. Thereafter Emma Weiss, having defaulted in making her payments, Pritchard took possession of the car. The conditional sales contract executed by Hunt was in default and the Plaintiff demanded the car from Pritchard. This did not occur until October 20, 1937.

The Court in deciding the case made the following significant statements in regard to the facts at Page 131:

"The note which Hunt executed became due March 2, 1937 * * * Seven weeks after the note came due Emma Weiss * * * purchased the car * * * and in the following paragraph the Court says: 'She did obtain actual possession of the car and used it for months and it was not until October 20, 1937 the appellee knew the appellant had claimed any title or interest therein. It was on that day long after Emma Weiss had

defaulted and after appellee had taken possession of the car that appellant notified appellee that it held a certificate of title to the automobile and demanded of appellee either \$420.00 in interest or the automobile."

And the Court at Page 131 says:

"The Motor Vehicle Law and the Uniform Motor Vehicle Anti-theft Act both provide penalties for those persons who do not comply with the provisions thereof. These acts in our opinion were not intended as recording statutes and do not in any way alter, modify or change the effects of the provisions of the Uniform Sales Act as construed by our Courts and have no application to the facts disclosed by this record."

And in commenting on this the same Court in the case of Pageamas vs. Mixon Motor Co., 101 N.E. (2d) 1280 at Page 281 says:

"It is settled law in this State that the cited Statute is not a recording Statute and does not affect the validity of the sale of a motor vehicle which is otherwise valid."

Now Illinois apparently has no provision in their Statutes or did not have any provision in their Statutes similar to Section 41-1-72 of the Utah Code nor a section similar to Section 41-3-2 of the Utah Code.

Besides the lapse of time and the permitting of the car to be in the possession of the dealer for a period of several months indicating negligence on the part of the Appellant in that case, none of which facts were present in the cases before the Court, and the Illinois Court had no Statute to compare with Utah Statutes.

In the case of *Garrett vs. Hunter*, cited by the Court, 48 Southern (2) Section 871, Mississippi case, the Court held in that case that the question involved was decided in an early Mississippi case, *Columbus Buggy Co. vs. Turley*, 19 Southern 232.

The Turley case involved the sale of buggies by the Columbus Buggy Co. to one, J. M. Smitha, a livery stable keeper in Natchez, Mississippi for which he paid part cash and gave his note for the balance. By the terms of the Contract, Smitha agreed to hold said goods and *the proceeds of such as were sold as agent for the Columbus Buggy Co.* and in trust for the benefit of an subject to the order of the Columbus Buggy Co.

The Court in the opinion at Page 233 says:

"In the case before us, the vehicles were presumed to be sold to Smitha for resale. The course of business and comon observation would perhaps raise the presumption but no resort need be necessarily had to presumption *the seller has in its contract expressly authorized the buyer to resell.*"

The Court in conclusion says at Page 234:

"Many States have of late years enacted Statutes requiring the recordation of Contracts in which Title is retained in the vendor, and many adjudications may be found under such Statutes, but the cases cited by us were decided independent of Statutes as it appears before the enactment of Statutes."

The Mississippi Statutes regarding automobiles are greatly different from Utah. Mississippi has no special provisions with respect to Chattel Mortgages, Conditional Sales Contracts or the like on motor vehicles. The only provision of that State

is that a vehicle must be licensed annually and required to have a number plate displayed from the rear only. It has no provisions for Certificates of Title. The case of Garrett vs. Hunter is in effect then a horse and buggy case decided in a State with no recording or registration Statutes governing the transfer of title or sale of automobiles, and in no wise can be persuasive in the case at bar.

Another case cited by the Court for its holding is Al's Auto Sales vs. Moskowitz, Oklahoma 1950, 24 Pac. (2d) 588. The facts in that case are somewhat similar to the facts of the case at bar. The Plaintiffs purchased a Plymouth and the following day sold it to one, Charles E. Cross, a used car dealer of Tulsa, Oklahoma. On December 18th Cross signed a check or draft payable to the Plaintiffs drawn on a Tulsa bank in full payment. A Certificate of Title was attached to the draft which was dishonored on presentment, and on December 23rd or 24th, the Defendant purchased a car from Cross paying for the same, and a bill of sale was given to Moskowitz signed by both parties. The Oklahoma case is decided by the Court as set out on Page 591 on the following basis:

"Plaintiffs under the facts in this case cannot recover by reason of the Certificate of Title. Such Certificate of Title to an automobile issued under a Motor Vehicle Code is not a muniment of title which establishes ownership, but is merely intended to protect the public against theft and so forth."

Again we call the Court's attention to the fact that Oklahoma does not have any Statutes similar or equivalent to Section 41-3-2 of Utah or Section 41-1-72 of Utah. That case, therefore, cannot be relied upon as supporting the propo-

sition that the Plaintiffs in these cases are estopped to assert their rights to the Buick and Pontiac automobiles.

Another case relied upon by the Court is the case of *Beck vs. New Bradford Acceptance Corp.*, reported 3 At. (2d) 55, a Rhode Island case 1938. In that case the Plaintiff brought the car from one Rickertson, a dealer on July 30, 1935, which had been purchased from a distributor on the same day. The dealer gave a purchase money note and was given the right to use the car "for storage and for display purposes only." The Defendant, a Finance Company, purchased the Contract from the distributor. Both Defendant and Distributor had noticed at the time of the sale to the dealer that he was buying the car for resale. On May 2, 1936, Rickertson defaulted on his note and soon thereafter the Defendant found the car in the possession of the Plaintiff and took possession. The Plaintiff brought the action to recover. In that case there was no discussion as to registration Statutes. As a matter of fact, Rhode Island does not have any registration Statutes or Certificates of Title provisions. They require registration for plates only, and they require no formalities to effect the transfer of title of an automobile, and as stated in the facts by the Court "they knew the car was being bought for resale." It is submitted, therefore, that this case cannot be relied upon to support the position that the Plaintiffs in the case before the Court are estopped to assert their rights to their automobiles.

And finally the Court cites as authority for their holding the case of *Siegel et ux vs. Bayless et al.*, California 248 Pac. (2d) 968. In that case in August, 1950 Plaintiffs, residents

of Michigan, turned over their 1949 Cadillac to one, Couls to deliver to California *for the purpose of selling it*. Couls was also given the *Registration Certificate* which bore the genuine signature of Mr. Siegel on its face. The Title Certificate was not delivered to Couls. Couls was authorized to sell the car for \$3,600.00. Any sale at a lower price was to be submitted and approved by the owner. A used car dealer by the name of Cole took possession of the car November 1st for the purpose of displaying it. Cole received an offer of \$3100.00 from the Defendant, which offer was communicated to Siegel, who advised him that the offer was satisfactory. Cole sold the automobile for \$2785.00 and absconded. The Plaintiff brought this action to recover the automobile, and judgment was given for Defendant. The Court in deciding this action at Page 969 says:

“ . . . The basic question is whether Cole was a factor in this transaction. It clearly appears from the evidence and findings that he was.

(1) Section 2026, Civil Code, defines a factor as “an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, * * * .” There can be no doubt Cole was employed as an agent by plaintiffs to sell their Cadillac. He was engaged in an independent business. Possession of the car was delivered to him. Thus he meets all the requirements of a factor. As such he had “ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.” Civil Code, sec. 2369. Here the court has determined the purchasers of the automobile “had no notice of any claim of ownership of plaintiffs.” Under these circumstances Cole had authority, so far as defendants were concerned,

to deal with the automobile as his own, for although the authority of a factor is by this section declared to be "ostensible," it is, "as to persons without notice as real 'as it is when it is declared to be actual.' " 12 Cal. Jur., Factors, sec. 7, p. 416."

And also on Page 970 the Court in conclusion held:

" . . . (4, 5) Finally, in support of the judgment it should be pointed out that the conduct of plaintiffs in turning the car over to Cole through their agent Couls, and in permitting it to be and remain on Cole's used car lot and actually authorizing him to sell the automobile on their behalf justifies an inference of negligence on their part. The Court determined the defendants were not guilty of negligence in purchasing the car from Cole. This situation makes applicable the maxim that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ. Code, sec. 3543. The loss here must therefore fall upon the plaintiffs. The judgment is affirmed."

It is submitted, therefore, that the Court erred in concluding that the Plaintiffs in this action were estopped to assert their right to the title of and right to the possession of the Buick and Pontiac automobiles in question here, for the reasons that under the law of estoppel the elements necessary to make that out are not present; and second, that the Plaintiffs had a right to rely upon the Statutes of Utah which, if complied with, would have prohibited Bruce from selling to the buyers, the Defendants. The Plaintiffs thus having the right to rely upon these Statutes and their compliance therewith, they certainly didn't knowingly or with intent, place themselves in a position to be estopped to later assert their interests in and to the automobiles in question.

POINT III

BRUCE, THE LICENSED USED CAR DEALER OF UTAH, HAD INDECIA OF TITLE OF THE AUTOMOBILES INVOLVED.

The Court in its opinion at Page 2 of the mimeographed copy says:

"Although Plaintiffs gave to Bruce *no written indecia of title*, nevertheless, whereas here Plaintiffs as experienced wholesale used car distributors willingly turned the automobiles over to Bruce, *knowing he was a licensed used car retail dealer, and would take the automobiles directly to his place of business in Salt Lake City for the purpose of resale, and there place them with the other stock*, is in our opinion the granting of more than mere possession. Such conduct on the part of the original sellers, Plaintiffs we believe clothed Bruce with an apparent ownership or authority to sell said cars in the ordinary course of business . . . "

By this statement the Court has found that *there was no indecia of ownership in Bruce other than being given possession by an experienced used car distributor knowing he would place the automobile on his lot with other stock for the purpose of resale.*

The Court by this statement has overlooked or ignored the entire Stipulation as to the facts as set out in the record.

The Court has said that the Plaintiffs knowingly turned over the automobiles to Bruce knowing he would take them to Salt Lake City and knowing he was a used car dealer and *would place them with other stock for resale.* These are not

the exact words used by the Court, but they are the fair purport of their meaning. (*Italics added.*)

The actual facts according to the Stipulation, Record of Appeal (R. 5-7) and as set out in the Brief of Respondents in Case No. 8228, are in effect considerably different.

The conclusion of the Stipulation reads as follows:

" . . . and said Drafts were to be honored before the said automobiles were *offered* for resale by the said M. R. Bruce." (*Italics added.*)

How can it be said that the Plaintiffs knew Bruce would do what he did in view of the Stipulation of Facts that he would not do what he did?

The only part of the Statement of the Court that stands in view of the Stipulation is that the Plaintiffs were experienced wholesale used car distributors and that they knew that Bruce was a licensed used car dealer and would take the automobiles to Salt Lake City.

The question then arises should a different rule of law be applied in these cases to wholesale used car distributors than to other persons or organizations, and should wholesale used car distributors be held to a higher or different degree of care than any other persons?

The answer is no. Rules of law are laid down to apply to all persons equally, and the mere fact that Plaintiffs were wholesale distributors of used automobiles does not necessarily give them any more knowledge of what Bruce would do under the circumstances than any other person would have known or be assumed to have known, assuming that they

knew Bruce was a used car dealer. It follows, therefore, that under the rule of law laid down by the Court under the present opinion that any person who leaves his automobile with a used, or new, retail automobile dealer for any reason whatsoever, to have greased, repaired, appraised or for a dozen or one reasons, he would be estopped to claim his automobile from a so-called "innocent purchaser of the automobile from the dealer with whom the automobile had been left because under the Court's holding they *knowingly* left it with a licensed used car retail dealer.

This is the logical conclusion to be reached from the Court's decision, and such a result would in effect wipe out the registration and licensing Statutes in a potentially large number of cases. To permit this decision to stand means that a pandora box of trouble would have been opened. This, the Respondents are sure, the Court has no intention and had no intention of doing.

CONCLUSION

In conclusion, therefore, it is submitted that the Petition for Rehearing should be granted and the Court should reconsider the opinion heretofore rendered in said case on the grounds and for the reasons: (1) That no estoppel as to the Plaintiffs has been made out under the facts and law as applicable in this case. The Court's opinion in effect puts estoppel as a bar to Plaintiffs' action by imputing by inference knowledge and actions of the Plaintiffs which have no support in fact. (2) That the Plaintiffs or original sellers acted

as careful and prudent individuals; that they complied with all Statutes involved; that they conducted these sales in the course or in the manner in accordance with the custom of the sale of used automobiles, and they did everything that they knew could be done to preserve their interest. They, therefore, acted as careful prudent individuals. On the contrary, the Defendants made no inquiries of title, did nothing to determine whether any title was available in the hands of Bruce or not; they blindly proceeded into a course of conduct that showed in the least a complete thoughtlessness and disregard for the consequences, and to hold that the Plaintiffs are estopped would in effect be punishing the prudent and rewarding the careless individual, and (3) This Petition should be granted for the reason that to permit the same to stand would open the door to untold cases of fraud by weakening the effect of the recording Statutes of Utah and enabling persons by various means to perpetrate frauds upon the public by being able to circumvent the Registration Statutes. We, therefore, humbly petition the Court for a rehearing of the cases involved and for modification of the decision heretofore rendered.

Respectfully submitted,

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