

1959

Clearfield State Bank v. Peters Plumbing and Heating Co. et al : Brief of Appellant

Utah Supreme Court

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Case No. 9043

IN THE SUPREME COURT**of the****STATE OF UTAH****FILED**

JUN 12 1959

CLEARFIELD STATE BANK,

Clerk, Supreme Court, Utah
*Plaintiff and Appellant,***-VS-**PETERS PLUMBING & HEATING COMPANY,
SALT LAKE AUTO AUCTION INC., AND
INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,*Defendants and Respondents.***Appellant's Brief**E. MORGAN WIXOM,
*Attorney for Plaintiff
and Appellant*

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IN THE SUPREME COURT
of the
STATE OF UTAH

CLEARFIELD STATE BANK,

Plaintiff and Appellant,

-vs-

PETERS PLUMBING & HEATING COMPANY,
SALT LAKE AUTO AUCTION INC., AND
INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,

Defendants and Respondents.

STATEMENT OF FACTS

This is an appeal brought by Clearfield State Bank, Plaintiff and Appellant, from a Summary Judgment entered in favor of the Defendants and Respondents, Peters Plumbing and Heating Company, Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America and against the Plaintiff and Appellant by the District Court of Davis County, State of Utah.

For the purpose of this appeal Clearfield State Bank, the Plaintiff and Appellant will be referred to as Plaintiff. The Respondents, Peters Plumbing and Heating Company, Salt Lake Auto Auction Inc., and Indem-

nity Insurance Company of North America will be referred to by their respective names.

Plaintiff has brought this action against the Defendants to quiet title to a chevrolet automobile in the the Plaintiff, for the possession of said chevrolet automobile or for its reasonable value in case possession thereof cannot be had, for attorney's fees and, in the event a judgment and decree quieting title to 1958 chevrolet automobile in Plaintiff cannot be made and in the event Plaintiff be not entitled to possession of said chevrolet automobile or in any of such events that Plaintiff have Judgment against Peters Plumbing and Heating Company or George B. West or Salt Lake Auto Auction Inc., or Indemnity Insurance Company of North America or Glens Falls Insurance Company or against all of such Defendants or any number of such Defendants as may be liable for the sum of \$2,900.00 and interest.

Plaintiff has filed its Complaint herein. An Answer, Counterclaim and Cross Complaint and a Motion for Summary Judgment has been filed by Salt Lake Auto Auction Inc., and its bondsman, Indemnity Insurance Company of North America. No Answer has been filed by Peters Plumbing and Heating Company; said Peters Plumbing and Heating Company having filed only a Motion for Summary Judgment.

Plaintiff's Complaint alleges in usual form the corporate existence of the various parties to this appeal (Complaint, page 1, paragraphs 1, 2, 3, 4 and 5) and alleges the execution and delivery of the bond of Indemnity Insurance Company of North America, conditioned that Salt Lake Auto Auction Inc. would conduct

it's business as a new or used motor vehicle dealer without fraud or fraudulent representations and without violation of the provisions of Title 43, Chapter 3, Utah Code Annotated 1953 and that such bond was in force and effect. (Complaint, page 3.) All of the aforesaid matters are admitted by the pleadings for the purposes of this appeal, as are many of the other allegations of the Complaint.

The Complaint alleges and the answering Defendants, Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America, deny that on or about the 9th day of July, 1958, George B. West was the owner of and in possession of a certain 1958 chevrolet four-door station wagon, Serial No. C580141264. (Complaint, page 1, paragraph 6).

The Complaint further alleges that on or about the 9th day of July, 1958, one George B. West was engaged in business as a Used Motor Vehicle Dealer under the name and style of George West Motor Company and that on the 9th day of July, 1958, said George B. West was the *owner* of and in *possession* of a certain 1958 chevrolet four-door station wagon, serial number C580141264, that on or about the 9th day of July, 1958, the Defendant and Respondent, Peters Plumbing and Heating Company, entered into a conditional sales contract with George B. West for the purchase of such 1958 chevrolet station wagon, a copy of said conditional sales contract being annexed to and made a part of the Complaint as Exhibit "A". (Complaint, page 1, paragraphs 3, 6 and 7).

Such conditional sales contract between George B.

West as seller and Peters Plumbing and Heating Company as Purchaser, provides tht George B. West sells and the Peters Plumbing and Heating Company purchases said 1958 chevrolet station wagon for the total price of \$1,275.00 payable in installments of \$425.00 each on the 15th day of each month beginning August 15, 1958, together with interest at the highest legal rate on any delinquent installment from and after the date of delinquency; that all of the payments on said conditional contract matured on October 15, 1958; said conditional contract further provides that title to the 1958 chevrolet station wagon was retained by the seller or sellers assigns until full payment was made in money and further that the purchaser, Peters Plumbing and Heating Company, would settle all claims against the seller George West Motor Company directly with the seller and that seller could assign the conditional sales contract without notice to the purchaser "and when assigned it shall be free from any defense, counterclaim or cross complaint by purchaser". The contract further provides:

"if purchaser defaults on any obligation under this contract or if the holder shall consider the indebtedness or the car insecure, the full balance shall without notice become due forthwith, together with a reasonable sum as attorney's fees, if this contract is placed with an attorney. Purchaser agrees in any such case to pay said amount or, at holder's election if such payment is not made, to deliver the car to the holder, and holder may, without notice or demand for performance or legal process, enter any premises where the car may be found, take possession of it and custody of anything found in it, and retain all payments as compensation for use of the car while

in purchaser's possession. The car may be sold with or without notice at private or public sale (at which the holder may purchase) with or without having the car at the sale; the proceeds less all expenses authorized by law shall be credited on the amount payable hereunder; purchaser shall pay on demand any remaining balance of this contract and shall receive any surplus: "Upon full payment of purchaser's obligation, the holder may deliver all original papers, including any certificate of title, to seller as purchaser's agent".

The Complaint further alleges that George B. West "*For Value Paid By The Plaintiff*" sold and assigned such conditional sales contract and all of his right, title and interest in or to the said 1958 chevrolet automobile to the Plaintiff. (Complaint, page 1, paragraph 8). The Complaint goes on further to allege that the Respondent, Peters Plumbing and Heating Company, has defaulted in the performance of said conditional sales contract in that it has failed to make payment of the installments falling due under the terms thereof at the time and in the manner provided for in said conditional sales contract and by reason of the default of the Defendant and Respondent, Peters Plumbing and Heating Company, as aforesaid the Plaintiff elected to declare the entire balance due and payable and that there was \$1,275.00 due, owing and unpaid to the Plaintiff upon said conditional sales contract. (Complaint, page 2, paragraph 10).

The Complaint further alleges that Plaintiff is entitled to the possession of the automobile; that it is valued at \$2,500.00; that Peters Plumbing and Heating Company agreed to pay reasonable attorney fees and that \$400.00 is a reasonable sum to be allowed as at-

torney's fees; that the 1958 chevrolet automobile is in the possession of Peters Plumbing and Heating Company who wrongfully withhold the same from the Plaintiff; (Complaint, pp. 2 and 3, paragraphs 11, 12, 13 and 14) and further alleges that Peters Plumbing and Heating Company, Salt Lake Auto Auction Inc., and George B. West, claim or assert some right, title, interest in or lien upon said 1958 chevrolet automobile, adverse to that of the Plaintiff; that such right, title, interest in or lien upon said 1958 chevrolet automobile, if any of the said Defendants, or any of them, is inferior to the interest of the Plaintiff. (Complaint, page 3, paragraph 15.)

The Complaint further alleges that the Defendant, Salt Lake Auto Auction Inc., sold to the Defendant, George B. West, said 1958 chevrolet automobile and did not within 48 hours of the sale thereof or at any time deliver to said George B. West or to any person whomsoever and endorse according to law a certificate of title issued for said vehicle by the State Tax Commission of Utah but instead said Defendant, Salt Lake Auto Auction Inc., wrongfully holds the certificate of title to such 1958 chevrolet automobile and further alleges that Salt Lake Auto Auction Inc., at all times mentioned in the Complaint and at the time of the delivery of said 1958 chevrolet to George B. West as stated in the Complaint, knew that said George B. West purchased said automobile for the purpose of selling the same and that George B. West did sell said automobile to Peters Plumbing and Heating Company. (Complaint, pages 1 and 2, paragraphs 7 and 8).

The Complaint further alleges that George B. West,

at the time of the sale and assignment of said conditional sales contract to the Plaintiff by George B. West, that said George B. West represented to the Plaintiff that he was the sole owner of said 1958 chevrolet automobile, that the same was free from all liens and encumbrances and that George B. West had full power and authority to convey and sell; (Complaint, page 4, paragraph 7) and that Plaintiff in reliance upon such representations, purchased said conditional sales contract from George B. West. (Complaint, page 4, paragraph 10).

Complaint further alleges that at the time of the execution of the conditional sales contract and the delivery of possession of the 1958 chevrolet automobile to Peters Plumbing and Heating Company and at the time of the sale and assignment of conditional sales contract to the Plaintiff, Salt Lake Auto Auction, Inc., owned or claimed to own the 1958 chevrolet automobile, which the Defendant, George B. West, knew at the time he made the representations. (Complaint, page 4, paragraph 8). Plaintiff further alleges that George B. West, has failed to deliver a title certificate to Peters Plumbing and Heating Company or to the Plaintiff for more than 48 hours after the sale and still fails to deliver such certificate of title. (Complaint, page 2, paragraph 9.

The Complain further alleges, in the alternative, "that the Plaintiff, by reason of the failure of the Defendant, Salt Lake Auto Auction, Inc., to deliver title to said 1958 chevrolet automobile as aforesaid or by reason of the willful misrepresentations of the Defendant, George B. West, as aforesaid or by reason of his failure to deliver title to said 1958 chevrolet as aforesaid or by reason of the failure of Salt Lake Auto

Auction, Inc., to deliver title as aforesaid and the failure of George B. West to deliver title as aforesaid and by reason of the willful misrepresentations of George B. West as aforesaid has been damaged in the sum of \$2,500.00 and the further sum of \$400.00 attorney's fees . . ." (Complaint, pp. 4 and 5, paragraph 11).

The Defendants and Respondents, Salt Lake Auto Auction, Inc., and Indemnity Insurance Company of North America have filed their Answer and Cross Complaint wherein they admit the allegations of paragraphs, 1, 2, 3, 4, 5, 7 and 9 of First Claim For Relief of the Complaint. Said Salt Lake Auto Auction, Inc., and Indemnity Insurance Company of North America have denied that George B. West was the owner of and in possession of said chevrolet automobile on the 9th day of July, 1958; have admitted the sale and assignment of the conditional sales contract referred to in the Complaint to the Plaintiff and Appellant; denied that there was any value paid for the assignment; have alleged that they have no information as to whether Peters Plumbing and Heating Company has defaulted in the performance of the conditional sales contract referred to in the Complaint; have denied that there was \$1,275.00 or any other amount due and owing to the Plaintiff upon said conditional sales contract and have alleged that said George B. West had no title to nor right to sell said Chevrolet automobile and that the same was and is owned by Salt Lake Auto Auction, Inc., and that said George B. West did not have any title to or interest in said motor vehicle and that the Plaintiff, Clearfield State Bank, acquired no interest or title to said motor vehicle; have denied that Plaintiff is entitled

to the possession of said Chevrolet automobile; alleged that the value of the car at the time of the commencement of the action was \$2,250.00 rather than \$2,500.00 as stated in the complaint; have admitted the provisions of the conditional sales contract attached to the Plaintiff's Complaint as Exhibit "A"; denied the Plaintiff is entitled to receive \$400.00 or any other amount as attorney's fees; have admitted that the possession of the Chevrolet automobile is with Peters Plumbing and Heating Company; and denied that Peters Plumbing and Heating Company wrongfully withheld the motor vehicle from the Plaintiff. Said Respondents having admitted the execution and delivery of the bonds as set forth in paragraphs 3 and 4 of the Complaint; have alleged and admitted that they entered into a contract of sale of said Chevrolet automobile to George B. West and admitted that they did not deliver the title to said George B. West or to any other person; have denied that they sold the car to George B. West and alleged the title thereto is in Salt Lake Auto Auction Inc., and that Salt Lake Auto Auction Inc. has never been obligated to deliver a title unto said Defendants; Respondents, Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America, also admit "*that at the time the possession of said motor vehicle was delivered to the said George B. West answering Defendant, Salt Lake Auto Auction Inc., knew that said George B. West intended to offer said motor vehicle for sale*" and have affirmatively alleged that George B. West had no right to sell said car until the sum of \$2,250.00 was paid to Salt Lake Auto Auction Inc., Said Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America

admit that George B. West did enter into the conditional sales contract with Peters Plumbing and Heating Company attached to the Complaint as Exhibit "A", and answering Respondents further admit the allegations of paragraphs 7, 8 and 9 of the Second Claim For Relief of the Complaint to the effect that George B. West represented to the Plaintiff, Clearfield State Bank, that he was the owner of said chevrolet automobile free of all liens and encumbrances knowing that Salt Lake Auto Auction Inc. claimed some interest in said automobile and that George B. West has not, at any time, delivered a title to said automobile to any person; Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America have denied that the Plaintiff relied upon the representations of George B. West and have denied paragraph 11 of the Complaint alleging in effect that Plaintiff has been damaged by reason of George B. West's misrepresentations or by reason of his failure to deliver the title or by reason of any of such things. Said Respondents, Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America by way of an affirmative defense alleges that Salt Lake Auto Auction Inc. is the owner of the chevrolet automobile; further allege that Clearfield State Bank, the Plaintiff and Appellant, has received sufficient moneys from George B. West to pay the contract. (Answer)

It should be noted that nowhere in the Answer of Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America has the nature of said Defendants' and Respondents' claim to the automobile been set forth or has the nature of the transaction of Salt Lake Auto Auction Inc., with George B. West been set

forth but instead, it is specifically admitted that they gave the car to him knowing he was a dealer in used cars and that he intended to place it for sale.

No Answer has been filed by Peters Plumbing and Heating Company. Peters Plumbing and Heating Company has filed a Motion for a Summary Judgment in favor of Peters Plumbing and Heating Company and against the Plaintiff, Clearfield State Bank, and in the alternative for a Dismissal with Prejudice of said action, based upon the files, pleadings and records of said case and upon the Affidavit of J. Max Peters filed with such Motion which Affidavit which is to the effect that Peters Plumbing and Heating Company purchased the chevrolet automobile referred to in the pleadings and that George B. West, the seller and the Plaintiff, Clearfield State Bank, as seller's assignee under the conditional sales contract, have failed and refused to deliver the certificate of title issued for said vehicle by the State Tax Commission to Peters Plumbing and Heating Company within 48 hours or at all and that demand was made for such title. (Motion For Summary Judgment of Peters Plumbing and Heating Co.)

Nowhere in the pleadings does it appear that the money due upon said conditional sales contract for the purchase of such automobile has been paid or tendered or has there been a tender back of possession of said automobile.

A similar Motion for Summary Judgment based upon the identical and same Affidavit has been filed by Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America, its bondsman. (Motion for

Summary Judgment of Salt Lake Auto Auction and Indemnity Insurance Co.)

In addition to the facts appearing of record, Mr. Zar E. Hayes, attorney for Salt Lake Auto Auction Inc., and Indemnity Insurance Company of North America and representing and arguing for Peters Plumbing and Heating Company at the hearing upon all the aforesaid Motions for Summary Judgment admitted that since the filing of the Complaint, Salt Lake Auto Auction Inc., has delivered the certificate of title to the Chevrolet automobile to Peters Plumbing and Heating Company for the sum of \$1,275.00 paid to Salt Lake Auto Auction Inc., by Peters Plumbing and Heating Company, Salt Lake Auto Auction Inc. agreeing to save Peters Plumbing and Heating Company harmless from the aforesaid conditional sales contract covering the purchase of the Chevrolet automobile by Peters Plumbing and Heating Company. (Transcript p.p. 6-7)

Clearfield State Bank has filed its Reply to the Counterclaim of Salt Lake Auto Auction Inc., against Clearfield State Bank denying each and every allegation of their Counterclaim. (Reply)

A R G U M E N T

POINT I

DEFENDANTS MAY NOT RELY UPON ALLEGATIONS MOST FAVORABLE TO DEFENSE OF A PARTICULAR DEFENDANT AS AGAINST INCONSISTENT ALLEGATIONS MOST FAVORABLE TO PLAINTIFF'S VARIOUS CLAIMS:

Plaintiff's Complaint sets forth two claims for re-

lief. The First Claim for Relief being an action against Peters Plumbing and Heating Company for replevin (claim and delivery) of the chevrolet automobile, attorney's fees and for the value of the automobile in case possession cannot be had by Plaintiff. Plaintiff's right to the automobile or its value is based upon the conditional sales contract and the failure of Peters Plumbing and Heating Company to make payment thereof at the time the same became due.

Plaintiff's Second Claim for Relief sets forth, among other things, Plaintiff's claims against all parties to the action, including Salt Lake Auto Auction Inc. and its bondsman, Indemnity Insurance Company of North America. Plaintiff's Complaint seeks relief quieting title to the automobile against all the Defendants and seeks alternative relief against the various Defendants.

The fact that allegations of the two claims for relief may be inconsistent does not bind Plaintiff to the allegations most favorable to the defense of any one Defendant as against the allegations most favorable to Plaintiff's claims against all or any part of the Defendants.

"A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defense . . . A party may also state as many separate claims or defense as he has regardless of consistency and whether based on legal or equitable grounds or on both . . . "Rule 8 (e) (2) U.R.C.P.

In addition, Rule 8 (a) U.R.C.P., General Rules of Pleading, states "Relief in the alternative or of several different types may be demanded." Rule 20 (a) U.R.C.P.

permits Defendants to be joined where relief is sought in the alternative.

The rules shall be construed to secure justice. Rule 1 (a) U.R.C.P. provides:

“(a) SCOPE OF RULES: These rules shall govern the procedure in the Supreme Court, the District Courts, the City Courts, and Justice Courts of the State of Utah, in all actions, suits and proceedings of a civil nature, . . . They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.”

POINT II

THE SUMMARY JUDGMENT SHOULD BE SET ASIDE AS THERE ARE GENUINE ISSUES AS TO MATERIAL FACTS:

The Respondents, Salt Lake Auto Auction Inc., and its bondsman, Indemnity Insurance Company of North America, have each moved for Summary Judgment. Rule 56 (c) U.R.C.P., pertaining to Summary Judgment, provides in part:

“ . . . The Judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a Judgment as a matter of law . . . ”

If there is any genuine issue as to any material fact a Motion for Summary Judgment should be denied, *Young vs. Falornia*, 121 Utah 646.

Under the rules two conditions must be met before a Summary Judgment can be granted, (1) there must be

no genuine issue of fact, and, (2) the moving party must be entitled to Judgment as a matter of law.

The Respondents, Salt Lake Auto Auction Inc. and Indemnity Insurance Company of North America have joined in their answer to Plaintiff's Complaint and in their Motion for Summary Judgment. As between Plaintiff, Salt Lake Auto Auction Inc. and Indemnity Insurance Company of North America, the following issues of fact are presented by the pleadings:

1. Whether or not Plaintiff is a bona fide purchaser for value of the conditional sales contract covering the sale of the chevrolet automobile to Peters Plumbing and Heating Company by the dealer, George B. West.

2. Whether or not the automobile was sold to George B. West giving title and ownership of such automobile to West at the time he sold the same to Peters Plumbing and Heating Company and sold the conditional sales contract to Plaintiff. It being alleged that Salt Lake Auto Auction Inc. had sold the car to West.

POINT III

SALT LAKE AUTO AUCTION INC. AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW:

Plaintiff's Complaint alleges that Salt Lake Auto Auction Inc., "sold" and delivered the 1958 chevrolet automobile to George B. West doing business as George West Motor Company. It is alleged by Plaintiff, and admitted by Salt Lake Auto Auction and its bondsman, that "... at the time the possession of said motor vehicle

was delivered to the said George B. West, answering Defendant, Salt Lake Auto Auction Inc., knew that said George B. West intended to offer said motor vehicle for sale . . .” It is further admitted that George B. West sold the automobile to Peters Plumbing and Heating Company under the terms of the admitted conditional sales contract and subsequently sold the conditional sales contract to the Plaintiff. (Parargaph 5, pp. 4 and 5 of Answer). Whether or not the Plaintiff paid value for such contract is in issue.

If the evidence shows at a trial that Plaintiff paid value for the conditional sales contract, Salt Lake Auto Auction., will then be estopped to claim title to or lien upon the automobile superior to the title of Plaintiff.

“If the real owner of an automobile has so acted as to cloth another with apparent ownership or authority to sell it, he will be precluded from denying, as against those who act in good faith on that apparent authority and acquire the property for a consideration that he had given such authority . . . Thus, where the owner or one who has advanced the money to pay for the car permits it to be kept in the salesroom of a dealer who holds himself out to the world as owner thereof and exhibits it for sale, he thereby clothes the dealer with such apparent authority to sell that he is estopped to assert his own superior title as against a purchaser from the dealer in good faith and for full value in the regular course of business *or as against one to whom the dealer assigns a mortgage or contract of conditional sale of the automobile to an innocent purchaser and this rule prevails notwithstanding an agreement by the dealer to deliver the car to no one except*

the owner or his order." (Italics supplied) 31 C.J.S. 338, Estoppel Sec. 106 (c).

The rule of law has been followed by the courts of the State of Utah. In *Heaston vs. Martinez*, 3 Utah 2d 259, 282 P2d 833, the court states as follows:

"Although Plaintiffs (owners) gave Bruce (the dealer) no written indication of title, nevertheless, where, as here, Plaintiff (owners) as experience wholesale used car distributors, willingly turned the automobile to Bruce, knowing that he was a licensed used car retail dealer and would take the automobile directly to his place of business in Salt Lake City for the purpose of resale, and there place them with 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 to the buying public which will preclude the original sellers from reclaiming the automobiles from bona fide purchasers. Where one of two innocent parties must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss".

The same rule is followed in *Jones v. C. I. Trust* 64 Utah 151, 174.

The rule of estoppel, estopping one to claim ownership of an automobile as against a purchaser in good faith for value has been extended to protect a party who purchases a conditional sale contract covering the sale.

In the action of *Commercial Credit Company v.*

Barney Motor Company, et al. (Calif.) 76 P. 2d 1181, and in the case of Thorp v. San Joaquin Securities Co., et. al., (Calif.) 66 P. 2d 230, it was held that the owner of or person holding a security lien upon a car, by permitting an automobile dealer to place the automobile on display for sale is estopped to assert his own superior title or lien as against a purchaser from the dealer and also against a bank which purchased the conditional sales contract covering the sale from the dealer for value.

Salt Lake Auto Auction Inc., being estopped to claim title superior to Plaintiff, or to Peters Plumbing and Heating Company, is divested of title and the title passes to Plaintiff, Clearfield State Bank, subject to the rights of Peters Plumbing and Heating Company to the automobile upon payment and performance of the conditional sales contract under which Peters Plumbing and Heating Company purchased.

“. . . decisions hold that title to realty can be divested or conveyed by estoppel . . . it has been well said that whether, in strictness of speech, a title may be “created” by estoppel is a refinement of no value in the light of modern equity jurisprudence, but, although the title does not pass, a conveyance will be decreed by the court of equity in accordance with the maxim that equity considers that done which should have been done. 31 C.J. S. 439, Estoppel Sec. 150.

In *Nissen v. McCafferty*, 195 N.Y.S. 549, 202 App. Div. 528, the court states that the effect of an estoppel is to conclude a party from denying the effect of his actions, and when so applied, it is as effectual as a deed would be from the party estopped.

Plaintiff has alleged that Salt Lake Auto Inc., sold the automobile to George B. West and has failed to deliver title to George B. West, or to Plaintiff or to Peters Plumbing and Heating Company at any time.

41-1-2 Utah Code Annotated 1953 provides as follows:

“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 48 hours thereof, deliver to the Vendee and endorse according to law a certificate of title issued for said vehicle by the State Tax Commission.”

41-3-18 Utah Code Annotated 1953 provides as follows:

“RIGHT OF ACTION AGAINST DEALER, SALESMAN OR SURETY ON BOND — If any person shall suffer any loss or damage by reason of fraudulent representations or violation of the provisions of this act by a licensed dealer or one of his salesmen, then acting for the dealer on his behalf, or within the scope of the employment of such salesman, such person shall have a right of action against such dealer, and/or the automobile salesman guilty of the fraud, fraudulent representation or violation of any of the provisions of this act, and/or the sureties upon their respective bonds.”

Should the evidence at a trial show that Salt Lake Auto Auction Inc., had in fact sold the car or an interest therein to West, Salt Lake Auto Auction Inc., and its bondsman, Indemnity Insurance Company of North America would be liable to Plaintiff for its damages.

“An assignment by the seller of a conditional sales contract has been held to transfer to the assignee the title to the property covered by the contract, conferring on the assignee the seller’s title subject to the buyers rights . . . it has been very generally held, either expressly or by necessary implication, that an assignee becomes vested with the title to the property by an unconditional assignment of the contract embodying the purchase money note . . .” 78 C.J.S. 448-449, Sales Sec. 641 (a).

Salt Lake Auto Auction Inc., having sold the automobile or being estopped to claim title to the automobile, the title thereto passed to Clearfield State Bank under the conditional sales contract. Salt Lake Auto Auction Inc., should therefore, pay damages to Clearfield State Bank, the Plaintiff, by reason of its failure to deliver title, which in law it is required to do and may be compelled to do.

POINT IV

PETERS PLUMBING AND HEATING COMPANY IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW:

In this action, Peters Plumbing and Heating Company has not filed any answer to Plaintiff’s Complaint. All of the allegations of the First Claim For Relief of the Complaint must therefore be considered as true for the purposes of the Motion for Summary Judgment of Peters Plumbing and Heating Company. The motion of Peters Plumbing and Heating Company for Summary Judgment is based upon the sole fact that neither Plaintiff nor George B. West has delivered title to Peters Plumbing and Heating Company as set forth in their affidavit. At this stage of the pleadings, it must be

taken as true that Peters Plumbing and Heating Company have neither paid the money due on the car or tendered payment thereof. They have admitted that they obtained title to the car from Salt Lake Auto Auction Inc., after service of the Complaint upon them. (Transcript p.p. 6-7)

If the Summary Judgment in favor of Peters Plumbing and Heating Company and against the Plaintiff, Clearfield State Bank, is to be sustained, it must appear that failure of Peters Plumbing and Heating Company to obtain a "certificate of title", a piece of paper, without payment for the automobile defeats Plaintiff's right to either the moneys due or the automobile as is provided in the conditional sales contract covering the purchase of the automobile by Peters Plumbing and Heating Company.

Plaintiff contends that failure of Peters Plumbing and Heating Company to obtain title to the automobile or "certificate of title" does not defeat Plaintiff's rights.

41-1-39, U.C.A. 1953 provides as follows:

"DELIVERY OF CERTIFICATE — The certificate of title shall be delivered to the owner in the event no lien or encumbrance appears thereon. Otherwise, the certificate of title shall be delivered to the person holding the first lien or encumbrance upon the vehicle as shown in the certificate."

The conditional sales contract under which the automobile is being purchased by Peters Plumbing and Heating Company provides "Upon full payment of purchaser's obligation the holder may deliver all original papers, including any certificate of title to seller as purchaser's agent." and further provides, "Title to the car

is retained by the holder hereof (meaning Seller or assigns) until full payment is made in money.

Until payment of the balance due upon the contract is made, Peters Plumbing and Heating is not entitled to the title, or Title Certificate.

By the conditional sales contract, Peters Plumbing and Heating further agreed to "Keep the car free from liens." If failure to receive title is a result of liens (which must appear from the evidence at the trial) such risk is assumed by Peters Plumbing and Heating Company as between them and the Plaintiff.

Plaintiff has hereinbefore presented its argument and authority to the effect Salt Lake Auto Auction Inc. has either sold such automobile or is estopped to claim the title as against Plaintiff or Peters Plumbing and Heating Company and, as a result, Salt Lake Auto Auction Inc. has transferred title or is, for all practical purposes, divested of title and title vests in Clearfield State Bank, the Plaintiff, subject to the rights of Peters Plumbing and Heating Company, under the conditional sales contract, the effect being to transfer title by operation of law.

Under the facts stated in Plaintiff's Complaint, Plaintiff is entitled to a Judgment quieting title in it to the automobile. Such Judgment will decree Plaintiff's ownership of the automobile and enable Plaintiff to obtain "certificate of title" for delivery to Peters Plumbing and Heating Company if payment of the moneys due under the conditional sales contract is made.

The conditional sales contract admittedly executed

by Peters Plumbing and Heating Company provides "that seller may assign this contract without notice to purchaser and when assigned it shall be free from any defense, counterclaim or cross complaint by purchaser".

By executing the conditional sales contract with such a provision, Peters Plumbing and Heating has waived any defense, counterclaim, set off or Cross Complaint it may have had upon the contract when suit on the contract is brought by an assignee or purchaser of the contract.

In the case of *Anglo-California Trust Company vs. Hall*, 61 Utah 223, 211 Pac. 991, a similar provision was held to be a waiver by the purchaser of purchaser's defense in an action brought by an assignee of the conditional sales contract. The Utah Court on page 229 of the Utah Report stated:

"Waiver is defined as a voluntary abandonment of some known right or advantage, and does not necessarily depend upon any new or additional consideration . . . If a purchaser desires to waive the warranty that had been given him why can he not do so and that for the benefit of the seller or assignee, or both or either? For a purchaser to sign a contract containing such a stipulation may not be a wise thing to do but courts cannot rewrite contracts into which parties have seen fit to enter, and unless fraud or duress, or something against public policy enters into the transaction, a purchaser who waives defenses, as the Defendant has done, cannot obtain relief from an improvident contract into which he enters without care and foresight."

Such conditional sales contract entered into by

Peters Plumbing and Heating Company further provides, "Upon full payment of purchasers obligation, the holder may deliver all original papers, including *certificate of title*, to seller as purchaser's agent".

Peters Plumbing and Heating Company has, by the express provisions of the contract, waived any right it may have had to the certificate of title until such time as the balance due upon the contract is fully paid. It should not now be permitted to have Plaintiff's automobile without in any manner compensating or paying Plaintiff therefore.

POINT V

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SALT LAKE AUTO AUCTION INC., AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, ITS BONDSMAN, AND SUCH SUMMARY JUDGMENT SHOULD BE SET ASIDE.

POINT VI

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PETERS PLUMBING AND HEATING COMPANY AND SUCH SUMMARY JUDGMENT SHOULD BE SET ASIDE.

E. MORGAN WIXOM,
*Attorney for Plaintiff
and Appellant*