1959

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

Utah Supreme Court

Pugsley, Hayes, Rampton & Watkiss; David K. Watkiss; Attorneys for Respondents;

In the Supreme Court of the State of Utah

CLEARFIELD STATE BANK,
Plaintiff and Appellant,

vs.

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

Case No. 9043

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

STATEMENT OF FACTS

The Appellant has set forth a statement of facts in rather considerable detail and it appears to be in most respects correct.

Inasmuch as the issues as to all respondents are the same, except in very limited situations which will be treated separately in the brief, the respondents have all joined in this

brief and the same is submitted on behalf of each and all of them.

It is deemed advisable, however, to state very briefly the relative situations and positions of the parties to this proceeding. Salt Lake Auto Auction is in the wholesale automobile business and sells, through its auction, automobiles to dealers only. Salt Lake Auto Auction as such wholesaler is a licensed automobile dealer in Utah. The Respondent Indemnity Insurance Company of North America is the surety on the dealer's bond of Salt Lake Auto Auction.

George B. West d/b/a West Motor Company was a retail used car dealer. West entered into an agreement with Salt Lake Auto Auction to purchase a motor vehicle which is the subject of this action. Possession of the car was given to West. Salt Lake Auto Auction was to retain the title to the vehicle until paid for, and under instructions from West transmitted the title documents along with a draft to West's bank, which, incidentally was and is the plaintiff in this action. West failed to pay the draft and thereby obtain the title, and said draft, together with the title was returned by the Bank to Salt Lake Auto Auction, who kept and retained the title. In the meantime, West, without the knowledge or consent of Salt Lake Auto Auction, entered into the conditional sales contract for the sale of said automobile to Respondent Peters Plumbing & Heating Company, said conditional sales contract being assigned by West to the plaintiff and Appellant herein, all as appear from the face of the documents in the files.

As further appears from the files and records, including the affidavits supporting the motions for summary judgment,

neither West, nor his assignee, the Appellant herein, ever did deliver title to said motor vehicle to Peters Plumbing & Heating Company, or to any person or agency on behalf of Peters Plumbing and Heating Company, including the Motor Vehicle Department of Utah, within twenty-four hours or at all, for the very good reason that West never did have nor never did become entitled to have the title or indicia of title to said motor vehicle.

STATEMENT OF POINTS

POINT I

THE QUESTION AS TO WHETHER OR NOT THE PLAINTIFF HAS A RIGHT TO ALLEGE OR SET FORTH ALTERNATE OR INCONSISTENT CLAIMS IS NOT AN ISSUE IN THIS ACTION.

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ARGUMENT

POINT I

THE QUESTION AS TO WHETHER OR NOT THE PLAINTIFF HAS A RIGHT TO ALLEGE OR SET FORTH ALTERNATE OR INCONSISTENT CLAIMS IS NOT AN ISSUE IN THIS ACTION.

Respondents have no argument with the right of the plaintiff to set forth different, alternative and even inconsistent claims in his complaint; nor do we now, nor did we at the hearing on the motion for summary judgment, contend that Respondents were entitled to rely on allegations most

favorable to them, or any of them, and ignore allegations most favorable to the plaintiff, if in fact there were any real and material issues of fact. Under the theory of the Respondents and each of them, however, we do not feel that there are any allegations, consistent or not, which give rise to material issues of fact. This phase of the case will be developed in connection with the arguments on other points herein.

In passing, however, we suggest that even under the present liberal rules of pleading, and including Rule 8 (e) (2) quoted by Appellant, a plaintiff may not, in the same count allege facts as relates to one defendant and then take the position that if such allegation of fact favors another defendant in the action, that as to such other defendant plaintiff can ignore the allegation and claim it does not bind him except as it suits his best purposes and as it relates to the defendant to whom he would have it relate.

POINT II

THERE ARE NO GENUINE ISSUES OF MATERIAL FACTS.

Appellant contends that as between the Appellant and the Respondents Salt Lake Auto Auction and Indemnity Insurance Company of North America, there are two issues of fact present.

First, it is contended, is the issue "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." We do not know what Appellant means by "bona fide purchaser for value of the conditional sales contract." Certainly, Appellant cannot seriously contend that such a contract is in the category of a negotiable instrument so that it is taken free of any defenses. Hence, appellant must simply mean that the contract was taken by appellant without any knowledge as to infirmities therein. The contract which is attached as a part of the complaint shows on its face that appellant took it simply as an assignee of GEORGE B. WEST, with full recourse, the assignment stating that "the undersigned hereby sells and assigns the within contract and all of his, its or their right, title and interest in and to the property subject thereto * * * ." Hence, appellant took and received only what West had and subject to defenses against West. This general rule is stated in CJS, Assignments, Sec. 84 as follows:

> "No matter what the property or thing passed, the right or title acquired by the assignee is simply that previously possessed by the assignor and no more."

Be that as it may and regardless of whether or not the appellant took the assignment in good faith without any knowledge of infirmities in the title, this is not a material issue, by reason of the statutory restrictions of Sections 41-3-2 and 41-3-3 UCA 1953 which will be referred to in detail in argument of other points in this brief, and which statutes specifically provide that the plaintiff and appellant has no standing in the Court.

Second, it is contended by appellant that there is an issue of fact as to "whether or not the automobile was sold to GEORGE B. WEST giving title or ownership of such auto-

bile to WEST at the time he sold the same to Peters Plumbing & Heating Company and sold a conditional sales contract to plaintiff."

This again, if an issue, is not an issue of material fact for the reasons above set forth. Furthermore, as appellant states, his first course of action is purely and simply a count in claim of delivery. No allegation is made that the Salt Lake Auto Auction had possession of, or was withholding, said motor vehicle from the plaintiff and appellant. Hence, no relief could be had against Salt Lake Auto Auction on that cause of action. On the second cause of action, the allegations clearly set forth that appellants were purely and simply assignees of GEORGE B. WEST of the conditional sales contract and that West failed to deliver title to the automobile within 48 hours as required by Sec. 41-3-2 above referred to. Such being the case, the appellant has no standing in Court and hence the matters referred to, even though an issue of fact, are not *material* issues of fact.

The reasons why said matters referred to by appellant, even though issue of fact, are not material issues of fact will become apparent in connection with the arguments on the other points which follow in this brief, and, hence repetitious argument under this point will be omitted.

POINT III

SALT LAKE AUTO AUCTION AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA WERE AND ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE:

(A) *The provisions of Sections* 41-3-2 *and* 41-3-3 *prohibit plaintiff from maintaining its action.*

Preliminarily, it should be mentioned that it is obvious that Indemnity Insurance Company of North America, as surety on the bond of Salt Lake Auto Auction, cannot be held in the action unless there is first some basis for holding Salt Lake Auto Auction.

In any light, the undisputed facts as shown by the pleadings and files of this case are that Salt Lake Auto Auction delivered possession to the car in question to George B. West, an automobile dealer, said respondent, Salt Lake Auto Auction retaining the indicia of title to the car; that West purported to sell and did deliver said car to defendant Peters Plumbing & Heating Company under the conditional sales contract Exhibit "A" attached to the complaint; that West assigned said contract to the appellant without recourse; that neither West, nor his assignee the appellant herein, could or did deliver to the vendee (Peters Plumbing & Heating Company) and endorsed according to law a certificate of title issued for said motor vehicle by the State Tax Commission.

Sec. 41-3-2 and 4-3-3 UCA 1953 provides as follows:

> "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.*"
>
> "41-3-3—*Penalties for violation of act*—No action or right of action to recover any such motor vehicle, or any part of the selling price thereof, shall be main-

tained in the courts of this state by any such dealer or vendor, his successor or assigns, in any case wherein such vendor or dealer shall have failed to comply with the terms and provisions of this act, and such vendor or dealer, upon conviction for the violation of any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than $299 or by imprisonment for not more than six months in the county jail, or by both such fine and imprisonment."

Nothing could be more clear than that neither West nor his successor and assigns (the plaintiff-appellant herein) could maintain any action in the courts of this State to recover the motor vehicle or any part of the selling price. No statute could be drafted in language more clear.

The appellant has contended that because the contract provides that "the seller may assign this contract without notice to purchaser and when assigned it shall be free from any defense, counterclaim or cross complaint by the purchaser," that the defense of the above statute, and all other defenses are gone. It is a proposition of law concerning which there seems to be no conflicts in the authorities, that a statute enacted for the protection of the public and particularly a criminal statute, may not be nullified by an anticipatory waiver. If such were not the rule, in every contract where one party might have some little advantageous position, such party could and no doubt would insert a provision that all statutory and other defenses which the other party had were waived. The rule is set out in 56 Am. Jur., Waiver Section 7, as follows:

"Because requirements of a statute enacted for the public good may not be nullified or varied by private

contract, the donee of a private right created by statute for the public good does not have the legal right to make an anticipant waiver of such right."

It was for just such cases as the one before this Court that the statutes relied upon as above set forth were enacted. If by the simple expedient of including a waiver in the contract, the statutes could be nullified, the Legislature might as well refrain from passing any regulatory statutes and simply leave the public to the obligation of protecting itself contractually, regardless of the difference in bargaining powers between the parties to the action and regardless of the belief of the Legislature as to the necessity in the public interest, for regulating certain businesses and of providing penalties for failure to comply with such regulations.

The statutes referred to above say clearly that the appellant has no right to maintain action in the courts of this State, and all defendants and respondents herein proceed upon the assumption that the statutes mean what they clearly say. The wording of Sec. 41-3-3 in fact effectively divests the Courts of this State of jurisdiction in any action brought by a vendee or his assignee in connection with a transaction wherein Sec. 41-3-2 has not been complied with. Certainly, by a printed provision in a contract provided and furnished by the vendor of an automobile, jurisdiction cannot be conferred upon the Courts of this State in direct contravention to a statutory prohibition.

(B) *The doctrine of estoppel, as referred to in the case of Heaston vs. Martinez is not applicable to Salt Lake Auto Auction or Indemnity Insurance Company of North America.*

Contention is made by the appellant that the Salt Lake Auto Auction is estopped to claim a title or lien superior to plaintiff's (appellant's) and cites as authority therefor the case of *Heaston vs. Martinez,* 3 Utah 2d 259; 282 P 2d 833. Certainly the doctrine of that case does not extend to the extent of estopping the wholesaler of an automobile from asserting his claim against the retailer to whom he delivered the car and who fraudulently sold the same without paying for or acquiring any title or indicia of title thereto. Plaintiff as assignee of West's interest in the conditional sales contract must stand in West's shoes. West could certainly not assert any claim against Salt Lake Auto Auction and surely neither can his assignee.

Furthermore, the appellant Bank, as the financing institution dealing in automobile financing, is not in the same position as the customer who enters the used car lot to buy a vehicle. The Bank knows, or certainly should know, that in order for a dealer to have any right to sell a motor vehicle he must have in his possession the title documents thereto, properly endorsed as provided by Sec. 41-1-65 1953, which provides as follows:

> "*Transfers to dealers*—When the transferee of a vehicle is a dealer who holds the same for resale and operates the same only for purposes incident to a resale and displays thereon the registration plates issued for such vehicle, or when a transferee does not drive such vehicle or permit it to be driven upon the highways, the transferee shall not be required to obtain transfer of registration of such vehicle or forward the certificates of title and registration to the department, 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."

It was incumbent upon the appellant before accepting the conditional sales contract to require some evidence of title thereto from the dealer from whom they accepted the assignment. The assignment of the contract on the reverse of Exhibit "A" shows by its clear words that the Bank, in dealing with the dealer West, relied upon West and upon his warranties as to title. Appellant can point to nothing which the defendant Salt Lake Auto Auction did or failed to do which in any wise controlled or influenced appellant's action in either accepting or rejecting the assignment of the conditional sales contract. No representations were made and no thing was done by Salt Lake Auto Auction which caused or could have caused the appellant Bank to alter or change the manner in which it dealt with West in connection with the acceptance of the assignment of the conditional sales contract. Had Salt Lake Auto Auction registered the motor vehicle and shown itself as the legal owner thereon on a title issued by the Utah State Motor Vehicle Department and had Salt Lake Auto Auction held such a title so showing its name as the legal owner thereof, such, under the situation in this case, would not have in any way affected the actions of the appellant Bank. It is obvious appellant took the assignment solely on the faith and representations of its own assignee and without any representations or action on the part of Salt Lake Auto Auction concerning which it did or reasonably could rely in connection with its dealings with George B. West, except that Salt Lake Auto Auction gave bare possession of the motor vehicle to West.

We submit that the *Heaston* case did not go to such an extreme as to raise an estoppel in favor of the Bank, as the assignee of the wrongdoer, and against the owner of the motor vehicle.

Appellant cites as further authority in its favor the case of *Jones vs. Commercial Investment Trust Company,* 64 Utah 151 220 P. 896. That case is not in any respect in point. That was a so-called "floor plan" case. The motor company was purchasing cars from the factory and the same were financed and floored by the defendant. The automobile dealer received a bill of sale for each automobile and on receipt thereof paid 20% of the price of the car, plus freight. Title was transferred to the finance company by an instrument called a negotiable trust receipt which provided that the dealer was to display and sell the car, and upon such sale was to remit the purchase price of the finance company. The dealer did so sell, but failed to remit. The trust receipt documents on their face, and if displayed to the buyer, or to his financing institution, would have shown the right and in fact the intention for the dealer to sell and dispose of the car and collect the money therefor on behalf of the company which was carrying the floor plan financing. We submit that the circumstances are so unlike our case as to require no comment.

(C) *The case of Heaston vs. Martinez is unsound and should be reversed.*

Until the case of *Heaston vs. Martinez* was decided, no proposition seemed more clearly settled than that in order to transfer title to a motor vehicle and deprive the owner of the rights thereto, it was unnecessary that the actual certificate

of ownership be endorsed, delivered and a new certificate of registration and certificate of ownership issued. The public generally and people dealing in the purchase and sale of automobiles as a business relied upon the provisions of Sec. 41-1-72 UCA 1953, which provides that until such issuance of the new certificates of registration and 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 transfers shall be deemed to be incomplete and not to be valid or effective for any purpose."

Likewise, until said case, those engaged in the wholesale and retail buying and selling of motor vehicles felt secure in the belief that the law was well established, that the mere entrusting of bare possession of a motor vehicle by the owner thereof, even to one who habitually sells such goods, without at the time giving to such person indicia of ownership, would not jeopardize the right of the owner to claim his property as against someone who purchased from the one to whom the property was entrusted. Among those persons who were dealing in the wholesale and retail buying and selling motor vehicles, the practice had become almost uniform in connection with dealings between motor vehicle dealers that the owner or wholesaler of a motor vehicle, in arranging to sell a vehicle for resale would deliver possession of the motor vehicle to that dealer and, if cash were not paid at the time, would transmit the title documents to the purchasing dealer's bank with a draft; that the purchasing dealer would then pay the draft and obtain the title papers, but that until such payment was made and said title papers obtained, the wholesaling dealer need not have any worries about his right to the motor

vehicle. This orderly and customary method of doing business has now been thrown into utter confusion and, in the light of the *Heaston vs. Martinez* case, such wholesale dealers have no means at their command of protecting their interests in motor vehicles which they contract to sell and do deliver to other dealers for resale, unless they demand the full cash purchase price at the time possession of such motor vehicles are delivered.

Until *Heaston vs. Martinez* case came down, such motor vehicle dealers felt secure in the belief that both under the motor vehicle statutes and under the statutes as relates to sales of goods, they were securely protected by retaining the documents of title until payment was made for the motor vehicle; unless, of course, they did something in addition to giving bare possession of the car to the retail dealer which would mislead some person who was dealing with such dealer.

We submit that the Court ought again to review the situation as relates to the law of the *Heaston vs. Martinez* case. We call the Court's attention to the various authorities with regard to the principles of law which we feel ought to prevail. In 46 Am. Jur. at page 620, Sec. 458, the rule is stated as follows:

> "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."

In Blashfield, Volume 7, Section 4357, it is stated:

"A person who purchases an automobile from a dealer without obtaining the title papers, or in reliance on the dealer's 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, Sections 313 and 314, wherein the rule is stated to be that entrusting possession of goods, even to one who habitually sells such goods, does not without more create an estoppel. Sec. 313 reads in part as follows:

"Although entrusting 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 entrusting 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 entrust 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 * * *"

This Court in the *Heaston vs. Martinez* case reasoned, in the majority opinion, that Sec. 41-1-72, which requires the actual issuance of a new certificate of registration and owner-

ship before any transfer is valid for any purpose, does not apply in connection with situations such as in this case because of the provisions of 41-1-65, which reads as follows:

> "When the transferee of a vehicle is a dealer who holds the same for resale and operates the same only for purposes incident to a resale * * * the transferee shall not be required to obtain transfer of registration of such vehicle or forward the certificates of title and registration to the department, but such transferee upon 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."

We submit that even under such reasoning of the Court, nevertheless, at least Sec. 41-1-65 ought to be complied with before any transfer would be effective as between dealers. In other words, in order for any transfer to be effective between dealers, the transferor must at least execute and acknowledge an assignment and warranty of title and deliver the same to his transferee. Persons ought to be bound to know the law and we submit that if Sec. 41-1-72 under ordinary circumstances is a notice statute and that persons are presumed to know the laws as related therein, that Sec. 41-1-65 is also a statute which people ought to be presumed to know and that a purchaser ought then at least to be bound to inquire of the retail automobile dealer and say, "Let me see the assignment and warranty of title."

But going further with regard to the case of *Heaston vs. Martinez*, which case, of course, was based solely upon the doctrine of estoppel, we submit that under the factual situation

there, and, of course, similarly under the factual situation in the case now before this Court, there can be no basis for application of the doctrine of estoppel as we have always known it in the law. As pointed out so clearly in the dissenting opinion of Mr. Justice Henroid, the test as to whether there is an estoppel ought to be

> "What has the owner given to the seller which makes it appear to the BUYER that the seller is authorized to sell? Indicia of ownership amounting to a representation upon which an estoppel might be bottomed is determined by looking at the facts through the eyes of a reasonable buyer, who reasonably can believe the seller has authority to sell—not through the eyes of the owner."

The only thing which the buyer of this motor vehicle could see (insofar as anything which the Salt Lake Auto Auction did) was plain, ordinary, naked possession. There was nothing Salt Lake Auto Auction did, nothing it said, nothing it delivered to the retail dealer West, except that it gave him bare possession of the motor vehicle. What act of Salt Lake Auto Auction, or what other thing than bare possession was there or could there have been on which it could be said that either the purchaser, Peters Plumbing and Heating Company, or the plaintiff Bank relied? What did Salt Lake Auto Auction do or give which made it appear to any third person that George B. West was authorized to sell the motor vehicle?

What can a person do to protect himself when he lets someone take bare possession of his property if the doctrine of *Heaston vs. Martinez* is to stand? We assume the greatest pro-

tection and notice of ownership might have resulted in Salt Lake Auto Auction had it, before delivering the motor vehicle to West, registered the automobile in its name with the Utah State Tax Commission and had a Utah title issued in the name of Salt Lake Auto Auction and then retained that title in its possession. Let us assume it had done just that. Would that have changed the picture in any regard so far as West, or his purchaser, Peters Plumbing and Heating Company, or the plaintiff bank, as assignee of the sales contract, are concerned? If Salt Lake Auto Auction gave bare possession of the car to West and retained the title so issued in its name, it would have made no difference whatsoever in this situation, insofar as any appearances are concerned which could be observed by either West's purchaser or the plaintiff bank. Such would have given neither of them more to see when they dealt with West than they actually saw under the conditions which existed. Inquiry by Peters Plumbing Company or by the bank under the state of the title as it actually existed would have disclosed that there was no title in West, or at least that West could not produce one. Again, we say, "Where, then, was any slight thing, in addition to bare possession, which Salt Lake Auto Auction gave to West or did which can be said to have in any way influenced the mind or thinking of either West's purchaser or the plaintiff bank in this transaction so as to raise an estoppel as against Salt Lake Auto Auction, the owner of the motor vehicle?

We submit that however the matter is viewed, the case of *Heatson vs. Martinez* stands simply for the proposition that the giving of bare possession of one's property to another is sufficient to raise an estoppel. We further submit that such

is not sound law; that the matter ought to be reviewed and that case ought to be specifically and directly overruled.

(D) *The provisions of Sec.* 41-3-2 *are not applicable to Salt Lake Auction.*

Sec. 41-3-2, upon which plaintiff rests its claim against Salt Lake Auto Auction and its insurance carrier, Indemnity Insurance Company of North America, provides:

> "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.*"

The case of *Heaston vs. Martinez,* if it stands clearly for any proposition, stands for the proposition that Sec. 41-1-65, relating to transfers to dealers, makes it unnecessary to have, and in fact contemplates that there shall not be, a "certificate of title issued * * * by the State Tax Commission" for a vehicle, where the transfer is to a dealer. The majority opinion in the *Heaston* case rests upon the proposition that the vehicles were not required to be registered in the dealer's name, nor was the dealer required to forward to the Motor Vehicle Department the certificates of title and registration. Such being the case, as to the transaction between Salt Lake Auto Auction, which is the wholesale dealer, and West, who was the dealer who purchased from Salt Lake Auto Auction, there was not in existence any "certificate of title issued for said vehicle by the State Tax Commission" (this being a foreign title)—the statutes neither required nor contemplated that any such cer-

tificate be obtained; and hence the provisions of Sec. 41-3-2 cannot possibly apply.

Such being the case, there is no violation of any provision of the Motor Vehicle Act alleged which would be the basis for a claim against Salt Lake Auto Auction or the surety on its dealer's bond under the provisions of Sec. 41-3-18 UCA 1953, or at all.

POINT IV

PETERS PLUMBING & HEATING COMPANY IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

As argued and set forth above, if Sec. 43-3-2 and 43-3-3 UCA 1953 mean anything, they prevent the appellant herein from pursuing its claim, either for the automobile involved, or for any part of the purchase price thereof, by any action in the Courts of this State. It is undisputed that West, a vendor, failed to deliver the title within 48 hours, or at all, for the simple reason that he had no title. It is also undisputed that the plaintiff is West's successor and assignee in interest on the conditional sales contract.

If Sec. 43-3-3 means what it says, that is, that no action shall be maintained by the vendor or his successors or assigns, that seems conclusively to settle the matter and there was no alternative than for the Court to grant the motion for summary judgment.

The matter of waiver and the inability of a person to give a binding anticipatory waiver of a right created by statute

for the protection of the public has been referred to fully in the arguments heretofore in this brief.

CONCLUSION

We submit that under the facts in this case and from the files and the pleadings therein, and under the law, the Court properly granted the motions of the respondents herein, namely, Peters Plumbing & Heating Company, Salt Lake Auto Auction, Inc. and Indemnity Insurance Company of North America, and each of them, for summary judgment as against the plaintiff and appellant herein. The judgment of the Court below should be affirmed.

Respectfully submitted,

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