1959

Clearfield State Bank v. Peters Plumbing and Heating Co. et al : Appellant's Reply Brief

Utah Supreme Court

E. Morgan Wixom; Attorney for Plaintiff and Appellant;

Case No. 9043

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,

Appellant's Reply Brief

Defendants and Respondents.

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Defendants and Respondents.

ARGUMENT

POINT I.

SECTION 45-1-65, UTAH CODE ANNOTATED 1953, DOES NOT RELIEVE SALT LAKE AUTO AUCTION INC. FROM THE RESPONSIBILITY AND DUTY TO DELIVER CERTIFICATE OF TITLE.

Plaintiff's complaint alleges that Salt Lake Auto Auction sold the 1958 Chevrolet automobile to George B. West knowing that said George B. West purchased said automobile for the purpose of selling the same and that said George B. West did sell said automobile (Complaint, paragraphs 5 and 6 of Second Claim for Relief). The respondents' brief overlooks or avoids the fact that the complaint alleges that the Bank purchased the con-

ditional sales contract covering the sale of the Chevrolet automobile from George B. West and *paid value* for the conditional sales contract in respondents' discussion of estoppel.

The provisions of Section 41-1-65 do not relieve the wholesaler from the duty of transferring title to the retailer where the automobile sales transaction is one between dealers. The provisions of 41-1-65 merely relieve the selling dealer from obtaining a transfer of registration of such vehicle when the sale is to another dealer, but specifically requires a transfer of the then existing title.

> "41-1-65. TRANSFER TO DEALER when the transferee of a vehicle is a dealer who holds the same for 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 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 their certificate of registration to the person to whom such transfer is made.*" (Italics supplied)

The failure to deliver the tilte certificate of the automobile in question to the transferee West or to the purchaser from West constitutes a violation of the act and the condition of the bond.

Section 41-3-23(D), Utah Code Annotated 1953, provides as follows:

> "PROHIBITED ACTS OR OMISSIONS — VIOLATION BY LICENSEE. — It shall be un-

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

Section 41-3-18 gives a right of action against the license dealer and the surety upon the dealers bond for "violation of any of the provisions of this act . . . " Thus, the failure of Salt Lake Auto Auction to deliver title to the automobile in question to George B. West or to the persons to whom he has sold the automobile or sold the title thereto is a violation of the act and gives the plaintiff a right of action against Salt Lake Auto Auction Inc. and its bondsmen, Indemnity Insurance Company of North America, for damages.

POINT II.

PLAINTIFF BANK IS NOT CHARGED WITH KNOWLEDGE OF TITLE IN ANYONE OTHER THAN GEORGE B. WEST.

The respondents in their brief referring to the plaintiff as "the Bank" at page 13, state:

> "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, ..."

There is nothing in the record to indicate that the plaintiff Bank knew or should have known that the dealer

George B. West had no right to sell the Chevrolet automobile. On the contrary, the record shows "that at the time the possession of said motor vehicle was delivered to the said George B. West . . . Salt Lake Auto Auction knew that West intended to offer said motor vehicle for sale." That under such circumstances Salt Lake Auto Auction is estopped, has been discussed in appellants brief filed herein.

The mere fact that the plaintiff is a bank and knows of a custom of flooring cars or of delivering cars and holding title certificate does not charge it with actual or implied knowledge that such was the fact in this particular instance. In the case of Commercial Credit Company vs. Barney Motor Company, (Cal.) 76 P. 2nd 1181, and cases cited therein, it was held that mere knowledge of the general practice of flooring cars was not sufficient to place on inquiry a bank which parted with value in purchasing a title retaining conditional sales contract without actual notice or knowledge of the facts to put the bank on inquiry of the title of a title holder who had entrusted the motor vehicle to a dealer under a trust receipt.

POINT III.

THE PROVISIONS OF SECTION 41-3-3, UTAH CODE ANNOTATED 1953, DO NOT BAR SUIT AGAINST SALT LAKE AUTO AUCTION, INC., OR ITS BONDSMEN, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

Plaintiff's action against Salt Lake Auto Auction is for damages and/or to quiet title to the automible in question. Section 41-3-3, Utah Code Annotated, merely

provides that there shall be no right of action for recovery of a motor vehicle or any part of the selling price thereof by a dealer or his successors or assigns, in any case where the vendor dealer shall have failed to comply with the terms and conditions of the act. Plaintiff is not sueing Salt Lake Auto Auction for the possession of the autimobile nor are they sueing them for the purchase price as there is no contract of purchase between Salt Lake Auto Auction and plaintiff. Plaintiff seeks to quiet title to the automobile and for its damages as against Salt Lake Auto Auction.

POINT IV.

SECTION 41-4-3, UTAH CODE ANNOTATED 1953, IS CONTRARY TO THE CONSTITUTIONS OF THE STATE OF UTAH AND OF THE UNITED STATES OF AMERICA, IS UNCONSTITUTIONAL AND VOID.

Section 41-3-2, 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 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."

Section 41-3-3, Utah Code Annotated 1953, provides as follows:

> "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 maintained in the courts of this state by any such dealer or vendor, his successors 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."

Section 41-3-3 effects an arbitrary transfer of the property of one private person (Clearfield State Bank) to another private person (Peters Plumbing & Heating Company). Such statute is so arbitrary and unreasonable as to be repugnant to the due process clause of both the Constitution of the United States and the Constitution of the State of Utah, and in addition, such statute discriminates against automobile sellers and automobile sales transactions.

The provisions of Section 41-3-2 fixes a forty-eight hour time limit for delivery to the vendee of a certificate of title issued for the automobile purchased by the State Tax Commission of Utah. By reason of the failure of the vendor, George B. West, to issue title within forty-eight hours, the respondents, the wholesaler, the wholesaler's bondsman, and the vendee, claim that no action can be brought against any of them for any reason or for any amount because of the provisions of 41-3-3.

Section 41-3-3 in effect forfeits to the vendee the property of the vendor or of persons to whom the vendor may have assigned or sold a property interest in an automobile for the failure to deliver a certificate of title.

The due process provisions of the Constitution of the United States and of the State of Utah prohibit both State and Federal legislation that effects an uncompensated transfer of one person's property to another private person.

> "There is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or special enactment." Cooley on Constitutional Limitations, 7th Ed., 505-508, Stirle vs. Rohmeyer (Wis.), 260 N.W. 647.

> "While the amount of a penalty is within the control of a legislature in the exercise of its police power, this power is subject to the limitation that the amount must not be so grossly excessive as to constitute a deprivation of property without due process of law and accordingly the imposition of a penalty in a named sum as liquidated damages may be so greatly out of proportion to the possible actual damage and so arbitrary and oppressive as to constitute a violation of the constitutional provisions." 16A C.J.S. 901-902, Constitutional Law, Section 640.

In the case of Missouri Pacific Railroad Company vs. Tucker, U. S. Supreme Court, 230 U. S. 340, 57 L. Ed. 1507, the state of Kansas had enacted a statute prescribing rates for the intrastate shipment of oil, etc., and prescribing a penalty of $500 and reasonable attorney's fees for exacting, demanding or receiving any sum in excess of the prescribed rate. The plaintiff-respondent had made a shipment of 25 barrels and was charged $3.02 in excess of the prescribed legislative rate

and brought the action for his $500 penalty and reasonable attorney's fees under the statute. The railroad company defended upon the grounds that the statutory rates were confiscatory and void and that the statute and particularly the provision for the recovery of $500 as liquidated damages was so arbitrary and unreasonable as to be repugnant to the due process of law and equl protection clause of the 14th Amendmnt to the Constitution of the United States.

Justice Van Devanter in delivering the opinion of the U. S. Supreme Court states:

> "It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. Nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages, taking one case with another . . . What the statute does is to authorize a recovery of $500 in every case, whether the shipment be of 1 barrel or of 10 or 25 barrels, or of a tank car; and this although it is of common knowledge that the possible damages in respect of the charge for carrying any of these from one point in the state to another could never be more than a small fraction of that sum."
>
> "As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the

taking of property without due process of law, and therefore in contravention of the 14th Amendment . . . "

In the case of Stierle et al vs. Rohmeyer et al, (Wis.) 260 N.W. 647, the constitutionality of a statute canceling and deeming a mortgage indebtedness satisfied for the failure of mortgagee to comply with the statute relating to foreclosure was considered. The plaintiff had loaned money to defendant and taken a real estate mortgage and chattel mortgage securing a loan of $5500.00. Prior to the time of the suit plaintiff-mortgagee had taken possession of some of the property covered by the chattel mortgage and sold the same. In so doing mortgagee had failed to comply with the requirements of the statute relating to the foreclosure in that he failed to give notice of the sale and failed to make a return of the sale as required by the statute. Mortgagee brought suit for foreclosure of the mortgaged debt of $4500 and mortgagee defended claiming the debt canceled by virtue of non-compliance with the statute by mortgagee and for damages plus $25.00. The trial court applied the statute, found that the mortgagor had been damaged in the sum of $138 by the unlawful sale and awarded him a $25 penalty for non-compliance with the statute and entered judgment canceling the mortgages of record and dismissing the mortgagee's complaint for the deficiency due on the indebtedness and awarded the defendant mortgagor $163 damages. The Wisconsin Supreme Court held that the portion of the statute providing that "the debt secured by such mortgage shall be deemed fully satisfied and the mortgage canceled" was unconstitutional as a violation of the due process clause of the 14th Amendment

to the Constitution of the United States on the ground that it was arbitrary and unreasonable. The Court in its opinion states as follows:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of Amendment of the Constitution of the United States."
>
> "It is under this concept of due process that state courts have held that property rights cannot be taken from one person and transferred to another by legislative action, in whatever form those rights may be. Gilman v. Tucker, 128 N.Y. 190, 28 N.E. 1040, 13 L. R. A. 304, 26 Am. Rep. 464; New England Trout & Salmon Club v. Mather, 68 Vt. 338, 35 A. 323, 33 L. R. A. 569; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L. R. A. 302; Rockwell v. Nearing, 35 N. Y. 302; Taylor v. Porter, 4 Hill (N. Y.) 140, 147, 40 Am. Dec. 274; Williams v. Village of Port Chester, 72 App. Div. 505, 76 N. Y. S. 631, 635; Kinney v. Beverley, 2 Hen. & M. (12 Va.) 318, 336; Quimby v. Hazen, 54 Vt. 132, 140; State ex rel Chapman v. Medical Borad, 34 Minn. 387, 26 N.W. 123; Meffert v. State Board, 66 Kan. 710, 72 P. 247, 1 L. R. A. (N.S.) 811; Brown v. Board of Levee Com'rs, 50 Miss. 468, 479."
>
> "The Supreme Court of the United States has expressly held that a statute which by its terms exacts penalties beyond the bounds of reason is unconstitutional. Southwestern T. & T. Co. v. Danaher, 238 U. S. 482, 35 S. Ct. 886, 888. 59 L. Ed. 1419, L. R. A. 1916A, 1208; Missouri Pacific R. Co. v. Tucker, 230 U.S. 340, 33 S. Ct. 961, 963, 57 L. Ed. 1507; Kansas City S. R. Co.

v. Anderson, 233, U. S. 325, 34 S. Ct. 599, 58 L. Ed. 983; Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 741, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034. To the same point are Ex parte Wood (C. C.) 155 F. 190; Beckler Prod. Co. v. American Express Co., 156 Ark. 296, 246 S. W. 1, 26 A. L. R. 1197; State v. Crawford, 74 Wash. 248, 133 P. 590, 46 L. R. A. (N. S.) 1039. See note on this subject in 46 L. R. A. (N.S.) in connection with the report of the case last cited. In all of these cases, it is held that a penalty that is unreasonable in amount deprives the penalized party of his property without due process. The penalty here is clearly subject to the same condemnation as those involved in the cases cited. In the Tucker case, supra, a penalty of $500 imposed by statute for charging a shipper a freight rate in excess of a statutory rate was held to render the penalty provision void. The opinion states: " It will be preceived that this liability is not proportioned to the actual damages. . . . As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and appressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment."

"The desicions of the United States Supreme Court that have upheld penalties as reasonable recognize the principle that to be upheld they must be reasonable. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. Ed. 417; Chicago & N. W. Ry. Co. v. Nye, etc., Co., 260

U. S. 35, 43 S. Ct. 55, 67 L. Ed. 115; Life & Casualty Ins. Co. of Tenn. v. McCray, 291 U. S. 566, 54 S. Ct. 482 485, 78 L. Ed. 987. In the last case cited, it is said that the principle applies "though the increment to the judgment be classified as penal, if the amount is not immoderate. The measure, not the name, controls." This court has enunciated the principle in State v. Redmon, 134 Wis. 89, 114 N.W. 137, 143, 14 L. R. A. (N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408, as is shown below. It was held by the New Jersey Court of Appeals in Cigarmakers' Union v. Goldberg, 72 N. J. Law, 214, 61 A. 457, 70 L. R. A. 156, 111 Am. St. Rep. 662, that due process of law requires that in the infliction of penalties by Legislatures, the Legislature should prescribe the amount of the penalty, or some definite standard for fixing the amount, or that the amount should be determined in a judicial proceedings instituted against the offender. The statute here involved, after fixing the amount of the penalty at $25, and the damages to the mortgagor, goes on to inflict as further penalty a forfeiture of the whole debt, whether it be $5,000, as here, or 5 cents in another case. The latter penalty has no relation whatever either to the injury inflicted upon the debtor, to the turpitude involved in the statutory violation, or to any injury to the public. It is nothing but arbitrary expropriation, the taking of a creditor's property regardless of the amount or value thereof, and conferring it upon the debtor. It is inflicting on one person for the omission of a statutory duty a penalty different in amount from that inflicted on another person for violation of the same duty under the same circumstances, and is thus denying to persons the equal protection of the law."

"It is contended the penalty provision may be upheld as an exercise of the police power. But statutes under the police power must be reasonable. This court said in State v. Redmon, supra: 'In general, as before shown, all police regulations must bear the judicial test of reasonableness under all the circumstances. This doctrine is being more and more emphasized as the number of police regulations multiply, evincing a tendency to fence in individual freedom as to matters not formerly so narrowed by legislative enactments.' . . . Illustrative of that it is said in Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, that every legislative exercise of the police power must be reasonable, and in Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560, that reasonableness is one of the inherent limitations of such power.'"

"State v. Redmon, supra, also treats exhaustively of the police power and points out that two things must exist to sustain a statute enacted in the exercise of this power. After quoting from Lawton v. Steele, 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385: "'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' the court comments as follows: 'Controlling significance should be attached to the words above quoted, "the interests of the public generally," etc., "require such interference." Not that some individuals now and then, or even generally demand it, or require it. In other

words, that it is reasonably essential or necessary to such interests that the subject thereof should be dealt with by the legislature.' and states that enactments under the police power must meet the test as stated by Sec. 143, Freund, Police Power: "Does a danger exist? Is it of sufficient magnitude? Does it concern the public Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential righst and principles?"

"It is for the court to decide 'whether it really relates to a legitimate subject, or under the guise of doing so violates rights of persons or property.' State v. Redmon, 134 Wis. 89, 107, 114 N. W. 137, 141, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003. 15 Ann. Cas. 408. As stated in Mugler v. Kansas, 123 U. S. 623, 661, 8 S. Ct. 273 297, 31 L. Ed. 205: 'The courts are not bound by mere forms, nor are they to be misled by mere pretensse. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so ajudge, and thereby give effect to the constitution.' "

"The penalizing provision here involved does not meet the above test. If it be said that the public interest is so involved as to justify some penalty, all reasonable requirements in that re-

gard are met by the $25 penalty and the stipulation as to recovery of all damages sustained. A greater penalty than $25 doubtless might reasonably have been imposed. Penalties of double or treble damages have been upheld. But to go the extent here attempted in imposing the penalty under consideration is utterly unreasonable, 'a palpable invasion of rights secured by the fundamental law' and 'unduly oppressive,' and it is our duty 'to so adjudge and thereby give effect to the constitution.' "

"The penalizing provisions of the statute are not saved by the fact that the transfer of the property is to be effected in the guise of a penalty."

In Re Deming's Guardianship, (Wash.) 73 P. 2nd 764, the court considered a statute awarding a ward a 10% penalty for failure of the guardian to render an accounting at the time required by statute. The court in holding the penalty unconstitutional stated:

"Manifestly, the 10 per cent is a penalty and and not a compensation. Brown v. Kildea, 58 Wash. 184, 108 P. 452, 1135. Its imposition does not depend upon the existence of any damage whatsoever. A penalty may be so excessive as to amount to a deprivation of property without due process of law. Southwestern Tel. & Tel. Co. v. Danaher, 238 U. S. 482, 35 S. Ct. 886, 59 L. Ed. 1419, L. R. A. 1916A, 1208; Superior Laundry Co. v. Rose, 193 Ind. 138, 137 N. E. 761, 139 N. E. 142, 26 A. L. R. 1392; Stierle v. Rohmeyer, 218 Wis. 149, 260 N. W. 647; 12 C. J. 1246-1247, sec. 1031, 1032."

"It is true that the law as it stands affords a court an opportunity to punish a guardian, who

may have been slow in filing his accounts, for other derelictions of duty, but this is not an admirable theory, or one which either Legislatures or courts should encourage. A default by a trustee should carry its own appropriate penalty, and a statute which may permit the imposition of deserved punishment in a case in which the law fails to provide an adequate penalty is not, for that reason, to be upheld, if, considered in connection with its clearly expressed purpose, it is obnoxious to certain well-organized legal principles. As we read the penalty statute in the light of the laws of Indiana and the decisions of the Supreme Court of that state, and in consideration of the fact that in this jurisdiction there is no statute providing a penalty to be vested upon a guardian in case of his misappropriation of his ward's property, we cannot but conclude that the statute in question makes mandatory so severe a penalty for what will often amount to no more than a trivial departure from a guardian's statutory duties, resultig in no damage to his ward, as to amount to deprivation of property without due process of law."

"Careful consideration of the statute now under discussion, in the light of the authorities, convinces us that the provision thereof purporting to impose a 10 per cent penalty for failure to file a verified account within the time limited by law is arbitrary, unjust, and discriminatory is not based upon any reasonable theory of compensation, and that the same is consequently void as amounting to taking property without due process of law. We accordingly hold that the portion of the law purporting to impose a 10 per cent penalty for failure to file a verified account within the time limited by law is void and of no effect."

Additional citations and cases may be found in the text of the above decisions. To recite them independently in this brief would amount to supernumeration of citations already before the Court.

The reasoning of the above decisions are equally applicable to the due process clause of the Constitution of Utah, Article 1, Section 7, which provides "No person shall be deprived of life, liberty or property without due process of law."

Though the words "forfeiture" or "penalty" are not used in Section 41-3-3, the actual effect of 41-3-3 is to forfeit to Peters Plumbing and Heating Company the automobile and property rights of the plaintiff, Clearfield State Bank.

An examination of the conditional sales contract attached to the complaint indicates that Peters Plumbing and Heating Company agreed to purchase the 1958 Chevrolet for a total price of $2,555.00. Peters Plumbing and Heating Company paid cash in the sum of $1,000.00, traded in an automobile for the agreed value of $395.00 and agreed to pay the unpaid cash balance of $1,160 plus insurance of $86.00, license and transfer fees of $4.00 and the time price diferential of $25.00, in monthly installments, the total contract balance being $1,275.00 to be paid by Peters Plumbing and Heating. For the conditional sales contract the plaintiff has paid money to George B. West and is out $1,275 or the Chevrolet automobile sold to Peters Plumbing and Heating Company. Peters Plumbing and Heating Company are, at most, out $1,000 plus the value of the trade-in at the time of the transaction. The effect of 41-3-3 as ap-

plied in this case is to transfer to Peters Plumbing and Heating Company the property of the plaintiff in the amount of $1,275.00 and results in an unjust enrichment of Peters Plumbing and Heating Company.

Peters Plumbing and Heating Company is not without its remedy. It may have its damages from the dealer, George B. West, upon the contract and in addition has its right of action against the bond of George B. West as an automobile dealer. Should the Court see fit to quiet title in the plaintiff, Peters Plumbing and Heating Company will have its bargain upon the payment of the contract balance and will suffer no damage.

Salt Lake Auto Auction, Inc. has its rights against the dealer, George B. West, and perhaps the dealer's bondsman, for its purchase money if it has not been paid. There is no evidence before the Court or in the record indicating what the exact nature of the transaction between West and Salt Lake Auto Auction was. As Salt Lake Auto Auction may enforce its contract, it suffers no damage.

The Utah statute, 41-3-3, like the Wisconsin statute and other statutes considered in the cases herinabove cited, is not uniform in its application as between differenct contracting parties or differenct automobile sales transactions, and like such statutes, arbitrarily forfeits to the vendee the property of the vendor, or a bona fide purchaser for value of the contract and title of the vendor, regardless of whether the damage of vendee is of $1.00 or $1,000.00 or whether the value of the property forfeited to the vendee is $1.00 or $5,000.00. Thus, between various transacting parties or various

and different sales transactions there is no uniformity in the amount of the forfeiture.

In the application of the statute the forfeiture is not only grossly out of proportion to the possible actual damage but is so arbitrary, oppressive and without uniformity in its application that its enforcement would be taking of property without due process of law and contrary to the due process clause of the Constitutions of the United States of America and the State of Utah. But for the provisions of 41-3-3, the rights of the parties can be adjusted at a trial and their respective damages, if any, determined and adjusted and justice can better be served.

POINT V.

41-3-3, UTAH CODE ANNOTATED 1953, DISCRIMINATES AGAINST AUTOMOBILE SELLERS AND AUTOMOBILE SALES TRANSACTIONS CONTRARY TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND OF THE STATE OF UTAH.

The provisions of 41-3-3 discriminates against and applies only to automobile sales and persons selling automobiles and does not apply to any other sales transactions. Any person, firm or corporation may sell a boat, machine, appliance, jewelry, product or any chattel, and should such a vendor fail or refuse to furnish a bill of sale or evidence of title at any given moment or time, he is liable only under his contract of sale for the vendees' damages, if any there be. Even real estate, whether of the value of $1,000.00 or $100,000.00, can be sold and should the vendor fail or refuse to deliver a deed or

evidence of title to the property sold at a particular time, the parties are left to their remedies under the contract. Only an automobile dealer or seller must forfeit his property to the purchaser for his failure to furnish evidence of title. Under the laws of Utah, there is no forfeiture of a seller's property to the purchaser in any form of sales transaction excepting automobile sales.

There is no basis or justification or reasonable reason for singling out automobile sales and sellers and burdening them with special legislation and special forfeitures as has been done with the enactment of 41-3-3. Auto sales transactions should be governed by the same laws and rules as other sales. There is as equal an opportunity for fraud and irregularity in transactions involving property other than automobiles as there is in automobile sales. In the case of an automobile sale there is no better reason or basis for penalizing sellers for the non-performance of a contract than there is for penalizing others.

Respectfully submitted,

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