1971

# E. Penn Smith v. Fred W. Royer And Western Surety Company : Brief of Respondent

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

E. PENN SMITH,
*Plaintiff-Appellant,*

v.

FRED W. ROYER and
WESTERN SURETY COMPANY,
*Defendants-Respondents.*

---

# BRIEF OF RESP

---

Appeal from Judgment of the Th
Salt Lake County, Honorable G

---

RO
DAVIS
716 N
Salt La
*Attorneys*
*Defend*

MICHAEL W. PARK
BURNS AND PARK
95 North Main Street
Cedar City, Utah 84720
*Attorney for*
*Plaintiff-Appellant*

TABLE OF CONTENTS



AUTHORITIES CITED CASES

TABLE OF CONTENTS (continued)

*Page*



STATUTES AND TREATISES

# IN THE SUPREME COURT OF THE STATE OF UTAH

E. PENN SMITH,
*Plaintiff-Appellant,*

v.

FRED W. ROYER and
WESTERN SURETY COMPANY,
*Defendants-Respondents.*

Case No.
12243

# BRIEF OF RESPONDENTS

## NATURE OF THE CASE

This is an action wherein plaintiff-appellant seeks damages for deprivation of the use of a vehicle which was taken from plaintiff after he refused to surrender it to its rightful owner's assignee, the defendant, Fred W. Royer.

## DISPOSITION IN LOWER COURT

The Honorable Gordon R. Hall granted defendants' Motion for Summary Judgment by finding defendant Royer had superior right to possession of the vehicle and that plaintiff had no legal claim for damages.

## RELIEF SOUGHT ON APPEAL

Defendants-respondents seek to have Judge Hall's decision affirmed and costs awarded to defendants.

## STATEMENT OF FACTS

Intermountain Gas and Oil Company purchased a 1966 Oldsmobile automobile from Poulos Motor Company, P. O. Box 217, Magna, Utah, sometime prior to September 15, 1966. (R-26, 28; cf. 36) Thereafter, the said corporation acquired a certificate of title for the said automobile. (R-18, 28, 41) Intermountain Gas and Oil Company is a Utah Corporation duly authorized to do business within the State of Utah and entitled to own property in its own name. (R-29) At all times relevant to the within action, Intermountain Gas and Oil Company, a corporation, owned the said 1966 Oldsmobile. The use of the vehicle was loaned to the plaintiff. (R-21, 28, 41) Plaintiff refused to return the vehicle upon demand by Intermountain Gas and Oil Company. (R-41) Thereafter, the said owner assigned to the defendant-respondent, Fred W. Royer, the right of possession and the right to collect damages for its wrongful detention. (R-41) Mr. Royer filed an action in the Washington County District Court pursuant to his assignment and pursuant to 12-1-9 Utah Code Annotated, 1953 to seek possession of the vehicle and damages. (R-18) The vehicle was taken from plaintiff in January of 1968. (R-44)

Plaintiff-appellant filed the within suit as a separate action November 5, 1968, against the defendants-respond-

ents who subsequently dismissed the prior suit against plaintiff in Washington County about June 10, 1970. (R-1, 49)

Plaintiffs sole claim to the vehicle and/or damages for his dispossession of it, is that allegedly one Austin Smith and/or a corporation known as Gold Bar Resources owed him some obligation under a real property lease and orally promised to give plaintiff an interest in the subject automobile. (R-1, 33, 34, 41, 44) Plaintiff has not alleged nor claimed that either Gold Bar Resources or Mr. Austin Smith has or ever had any legal or equitable title to the subject vehicle. (R-1, 33, 34, 41, 44) In fact, all ownership and legal interest in the vehicle at all times relevant to this suit rested with defendant, Fred W. Royer, and his assignor, Intermountain Gas and Oil Company. (R-28, 29, 41).

Plaintiff has produced no evidence that title was ever transferred to him, that he paid any consideration to any person for the automobile, nor that he ever checked to see who owned the vehicle, after or before, he was allegedly orally given some promise that title would be conveyed to him in the future. (See entire record).

## ARGUMENT

### POINT I

**ONE WHO HAS THE RIGHT TO IMMEDIATE POSSESSION MAY SEIZE PERSONAL PROPERTY, WITH OR WITHOUT A COURT ORDER, AND NO LIABILITY ENSURES FROM SUCH A SEIZURE; THEREFORE, SINCE DEFENDANT ROYER AS AS-**

SIGNEE OF THE LEGAL OWNER HAD A RIGHT TO IMMEDIATE POSSESSION, HE IS NOT LIABLE IN ANY RESPECT TO PLAINTIFF.

A. THE FACT THAT A WRIT OF REPLEVIN WAS QUASHED DOES NOT AFFECT THE COMMON LAW RIGHTS OF THE LEGAL OWNER OR HIS ASSIGNEE TO SEIZE AND RETAIN POSSESSION OF PERSONAL PROPERTY.

The plaintiff-respondent in the instant case has failed to allege, claim or prove that any ownership interest to the subject vehicle existed in the parties from whom he claims an interest. His naked claim is that one Austin Smith or a corporation known as Gold Bar Resources orally promised to give him title to an automobile at some time in the future as payment for a personal obligation owed by them. See plaintiff's Complaint, R-1; plaintiff's answers to defendants' interrogatories, R-33; and plaintiff's affidavit, R-44. Also, it is important to note that neither Gold Bar Resources Corporation nor Mr. Austin Smith are parties to this action; therefore, any alleged oral statements by them are hearsay when reported by the plaintiff and cannot be considered by the Court. Rule 56 (e) of the Rules of Civil Procedure, as amended.

Hence, the relevant points of record when viewed most favorably to the plaintiff shows that "paper title", as plaintiff chooses entitle defendants' interest, was by his own admission vested in Intermountain Gas and Oil Company and its assignee, Fred W. Royer. See plaintiff's brief P4; R-21, 28, 41. Defendant acquired physical possession of the subject vehicle from one who held no

personal interest in the automobile. R-44 Later plaintiff refused to deliver possession to Intermountain Gas and Oil Company upon demand. R-41. The vehicle was subsequently seized from plaintiff's possession. Plaintiff filed this suit and subsequently filed a Motion for Summary Judgment; apparently satisfied with the record and feeling that no deposition should be taken of Mr. Austin Smith or Gold Bar Resources Corporation. R-43.

Plaintiff's whole case, then, rests on the supposition that replevin is the only remedy available to recover possession of property by the legal owner, and that if a replevin bond is posted before a subsequent seizure of a chattel, a full for forfeiture must be ordered without any proof of plaintiff's superior right of possession or proof of damages. In support of this position, plaintiff-respondent has cited dicta from a 1922 Utah case and a "general rule" from American Jurisprudence; a closer look at the applicable law with reference to the facts of this case is in order.

First it is important to note that defendant, Royer did not dismiss the original suit brought against plaintiff to recover possession of the subject vehicle until more than two and one-half years after plaintiff filed the within action, during which time the parties were actively prosecuting their positions in the within case. Since both cases involved identical issues and facts, it was senseless to have both cases pending and proceeding at the same time. If plaintiff wished to try the issues in the instant case and forum as is indicated by his suit, defendant Royer was perfectly justified in dismissing his prior

action. His dismissal is not tainted by the smell of wrong doing of one who gets possession of a chattel by replevin and immediately dismisses the court action in an attempt to avoid a trial of the issues regarding possessory rights. See cases cited 24 ALR 3rd 768 and dicta of *Bankers Commercial Security Trust Company, District Court of Box Elder, Utah* 211, Pac 187 (1922).

Therefore, the rule referred to by plaintiff, as with all general rules, is subject to exceptions and refinements. It is respectfully submitted that if the original possessor of the chattels institute a separate action incorporating the issues of the first action, a dismissal of the first is not prejudicial to that individual in that his possessory right may be heard; therefore, no bond for future should automatically be declared.

A second exception to the general rule is allowing a court to order return of property or forfeiture of the replevin undertaking where it " . . . appears from the record that the defendant (the original party in possession) is not entitled to possession of the property." *Kerbey v. Hume,* 19 Ky. (3 TB Mon) 181 cited in 24 ALR 3rd 778. In such a situation, one seizing property is not liable to the party dispossed. Utah Law on this point is clear. A replevin action is only ancillary to the underlying and basic issue; that is, the right of final possession. This point was stated in *Kunz v. Nelson,* 94 Utah 185, 76 Pac. 2d 577, 580, (1938):

> "A moment's reflection . . . will reveal that claim and delivery is only ancillary to an action for pos-

session in order to retain or obtain possession pending the trying out of those rights by the Court."

Therefore, one may not complain about loss of possession of property or damages from that loss, even if a replevin action is defective, if he has no valid claim to that possession. This fundamental point of law is clearly stated in the Restatement of Torts, Section 272:

> "One who is entitled to immediate possession of a chattel is not liable to another for dispossessing him of it."

Hence, the germane and controlling issue of this case is who has the superior right of possession.

B. TO OBTAIN OWNERSHIP TO A MOTOR VEHICLE, ONE MUST OBTAIN A CERTIFICATE OF TITLE AND CERTIFICATE OF REGISTRATION; WITHOUT SUCH CERTIFICATES ONE ACQUIRES NO INTEREST SUPERIOR TO THE TITLE HOLDER, UNLESS SAID TITLE HOLDER IS ESTOPPED TO ASSERT THAT TITLE.

In Utah a comprehensive statute exists providing for the registration of title certificates and of automobile registration. These statutes specifically provide that:

> "Until the department shall have issued a new certificate of registration and certificate of ownership, delivery of any vehicle required to be registered shall be deemed not to have been made and *title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose . . .* " 41-1-72 *Utah Code Annotated* (1953) (Emphasis added)

These exact words under the previous 1943 laws of the State of Utah were ruled upon by this court. In *Stewart v. Commercial Insurance Company of Glen Falls, New York,* 114 Utah 278, 198 Pac. 2d 467 (1948), the court noted that six heirs had failed to substantially comply with this section in attempting to transfer title to a motor vehicle; therefore, the court stated: " . . . no valid sale was completed." *Stewart v. Commercial Insurance Company of Glen Falls, N. Y.,* id at p. 471..

Title and registration laws of other states similar or identical to Utah's have been held comparable in effect to the Torrens system of registering title to real property. *Merchants Rating and Adjusting Company v. Skaug,* 102 Pac. 2d 227 (Wash. 1940). Although some courts have held that these documents of title do not establish conclusively ownership, they do constitute prima facie evidence thereof. 7 *Am Jur* 2d. "Automobiles and Highway Traffic," §23. Utah has followed this position and no superior interest may be acquired to the title holder without the title holder being estopped to assert that title. See, *Jackson v. James,* 97 Utah 41, 89 Pac. 2d 235 (1939), as distinguished and modified in *Stewart v. Commercial Insurance Company of Glen Falls, New York,* supra.

Plaintiff has cited two other Utah cases and represented that they hold differently from the above analysis concerning the legal effect of title certificates. Even a cursory reading shows that these cases both deal with a situation where one with superior title is estopped to assert that title against a bona fide purchaser for value.

They do not change the law concerning ownership of automobiles as provided in Section 41-1-72 *Utah Code Ann.* (1933) cited and discussed above.

In *Swartz v. White,* 80 Utah 150, 13 Pac. 2d 643 (1932), the title owner signed a certificate of title in blank and delivered the same together with the vehicle, to a salesman. These deliveries wre made to enable the salesman to sell the vehicle, but the vehicle was fraudulently sold and the salesman absconded with the purchase price. In a suit between the new purchaser and the original owner, the Court held that the purchaser was not a bona fide good faith purchaser; therefore, the original owner prevailed. Significantly, the court said:

> "(the buyer) . . . must have known that any transfer of title from Mrs. White (the original owner) to Steward (the salesman) was, by law, regarded incomplete and *not valid or effective for any purpose until properly registered in the office of the Secretary of State and a new certificate issued to the new owner." Swartz v. White,* id at p. 646. (Emphasis added)

The case of *Heaston v. Martinez,* 3 Utah 2d 259, 282 Pac. 2d 833 (1955) enunciates the same principles of law; however, here the court found the new purchasers to be bona fide good faith purchasers for value and that the title owners were estopped to assert their title. The case is distinguished factually from the White case because out-of-state title holders voluntarily placed vehicles with a used car dealership for resale, but retained title as security for payment of a promissory note. Also significant to the court was the fact that under the provision

of 41-1-65 *Utah Code Ann.* (1953) no title transfer or registration was necessary for automobile dealers; therefore, Section 41-1-72 Utah Code Ann. (1953) did not apply to the car dealer. Again consistent with its previous statements, the court noted:

> " . . . (T)he Utah Supreme Court has . . . held that the Utah Motor Vehicle Act is some evidence of title and provide a flag or warning to prospective buyers, much as do registry acts relative to real estate or chattel mortgages, such as would put prospective buyers on notice and require them to make inquiry." *Heaston v. Martinez,* id at p. 836.

The matters of evidence in the case clearly show ownership and right of possession in Intermountain Gas and Oil Company and its assignee, Fred W. Royer. Plaintiff has not only failed to plead estoppel principles, but has failed to produce any evidence to make him a bona fide good faith purchaser for value. In fact under *Heaston v. Martinez* he is specifically charged with notice by the lack of a title certificate. Therefore, Judge Hall's ruling finding no ownership interest superior to defendants was proper and his order dismissing plaintiff's complaint should be affirmed.

## CONCLUSION

If one can show a superior right of possession in himself, he is not liable for dispossessing another of a chattel. A certificate of title issued pursuant to 41-1-72 of the *Utah Code Ann.,* 1953 is prima facie evidence of that superior right and ownership; therefore, such owner's assignee may dispossess another of possession without liability.

Under the facts of this case, no valid possessory right as against the defendants was shown by plaintiff nor were any circumstances alleged or shown as to create an issue of fact concerning an estoppel against defendant's asserting superior title and right. Therefore, Judge Hall's order granting summary judgment should be affirmed and defendants awarded their costs in this appeal.

Respectfully submitted,

ROGER F. CUTLER
DAVIS AND CUTLER
716 Newhouse Building
Salt Lake City, Utah 84111
*Attorneys for*
*Defendants-Respondents*