

1951

Nathan Seamons v. Larry D. Anderson et al : Brief of Plaintiff and Cross-Appellant Seamons

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

NATHAN SEAMONS, as the surviving
partner of SEAMONS & LOVELAND,
Plaintiff and Cross-Appellant,

vs.

LARRY D. ANDERSON and HANS P.
ANDERSON,

Defendants and Appellants,

and RICHARD PETERSEN,

*Defendant, Counter-Claimant,
Cross-Claimant, Respondent
and Cross-Appellant,*

and CLAYTON E. NIELSEN and RAY
BITTERS, Co-Partners, doing business
in the firm name and style of VALLEY
CAR MARKET,

Defendants and Cross-Appellants

BRIEF OF
PLAINTIFF
AND CROSS-
APPELLANT
SEAMONS

CASE NO. 7691

Appeal from the District Court of the First Judicial District
of the State of Utah, in and for the County of Cache

HON. LEWIS JONES, JUDGE

FILED

OCT 22 1951

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2 of 4.

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NOV 20 1951

Clerk, Supreme Court, Utah

HUGO B. ANDERSON
GEORGE M. CANNON
L. DELOS DAINES

November 13, 1951

The Supreme Court of the State of Utah
State Capitol
Salt Lake City, Utah

Gentlemen:

Through inadvertence and due to the fact that only one transcript was available to counsel in this case, in some instances we failed to note the place in the record where the evidence mentioned in our brief could be found. We are, therefore, for your information and with our apologies, setting forth where in the record testimony can be found in support of the position taken in the brief of Nathan Seamons, Plaintiff and Cross-Appellant, Case No. 7691, as follows:

1. On page 4, four lines down in first complete paragraph, after the words, "by the Valley Market." please add "(T.R. 16)".

✓ the words, "17,000 miles.", please add "(T.R.-253)".

✓ 4. On page 7, last line, after words, "title from Petersen.", please add "(T.R. 128-9) (T.R. 143-5)".

✓ 5. On page 8 after paragraph 1, after the words, "conclusion of law fails.", please insert "(T.R. 2, 15, 16, 34, 91, 143-145)".

✓ 6. On page 8 after second complete paragraph, after words, "Petersen's agent.", please insert "(T.R. 128, 129, 131)".

✓ 7. On page 9 at the end of the first complete paragraph after words, "the defendants Andersons.", please insert "(T.R. 2, 15 and 16)".

✓ 8. On page 10 at the end of the first paragraph after the word, "case.", please insert "(T.R. 249, 250, 274, 275)".

✓ 9. On page 11 at the end of the first paragraph following the word, "Andersons.", please insert "(T.R. 62, 79, 80, 87, 114)".

10. On page 11 at the end of the second complete paragraph after the word, "contract.", please insert "(T.R. 166, 167)".

Very truly yours,

LDD:CJC

L. Delos Daines

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CAR MARKET,

Defendants and Cross-Appellants

BRIEF OF
PLAINTIFF
AND CROSS-
APPELLANT
SEAMONS

CASE NO. 7691

BRIEF OF PLAINTIFF AND CROSS-APPELLANT SEAMONS

STATEMENT OF FACTS

To avoid repetition, plaintiff and cross-appellant Seamons (hereinafter designated "plaintiff") substantially adopts and makes his own the statement of facts contained in the brief of cross-appellants Clayton E. Nielsen and Ray Bitters as set forth in pages 2 to 6 inclusive of their brief, except plaintiff asserts that the

instrument executed by defendants Andersons and plaintiff which was in form a conditional sales contract (plaintiff's Exhibit 1) was, in effect, a chattel mortgage.

Plaintiff after demand and refusal of payment made upon the Andersons under the above instrument, possessed the car, at which time the title thereto was put in plaintiff's hands by the Valley Market. Shortly thereafter defendant Petersen wrongfully took the title from plaintiff's desk in plaintiff's office in Logan without plaintiff's knowledge or consent (T.R. 252-253) and thereafter refused to return said title to plaintiff, although repeated efforts were made to get Petersen to do so. (T. R. 170, 221)

Upon the Andersons' failure to make payments (T. R. 198), plaintiff was legally obligated to pay and did pay to Commercial Credit Company \$1517.00. (T.R. 127)

Plaintiff asserts that he had no knowledge of any agreement whereby Petersen was to deliver title to the Mercury conditionally.

STATEMENT OF POINTS

Point 1. That the trial court erred in conclusion of law (R. 108 et seq.) by holding, in effect, that plaintiff by retention of the Mercury after repossession and by operating the Mercury approximately 7,000 miles had waived his right to a personal judgment against any party.

ARGUMENT — POINT I

Against this conclusion of law plaintiff argues:

(a) That the conclusion that plaintiff waived his right to a personal judgment against any of the parties is contrary to the law and evidence.

The instrument upon which plaintiff sued (Plaintiff's Exhibit 1) was, in effect, a chattel mortgage executed by defendants Andersons to plaintiff. The instrument could not be a conditional sales contract because plaintiff had no title to reserve at the time instrument was executed which reserved title is essential to a conditional sales contract.

Where the purpose and effect of a transaction is to create a lien on specific personalty as security for the payment of a debt, there is a "mortgage" irrespective of the language used. *Teeter v. Good Hope Corp.*, 93 P. 2d 112, 14 Cal. 2d 196.

The elements of a chattel mortgage are present in the facts of this case. The intent of defendants Andersons to give plaintiff a lien is evidenced by the terms of the instrument giving plaintiff right to repossess the Mercury upon default, power to sell, etc. Plaintiff contends (Point II) that title passed to the Andersons under the executed sales agreement between Valley Market and the Andersons (defendant Petersen's Exhibit 1). If

title passed to Andersons, clearly, as owners, they had a mortgageable interest.

Even a buyer under a conditional sales contract may mortgage the property which he has purchased but not paid for. 14 CJS 617.

Under UCA 13-0-6 a mortgagee may foreclose his mortgage upon chattels by an action in equity, or may advertise and sell the mortgaged property at public auction where power to sell is given in mortgage. In this case the plaintiff sought to foreclose. He was forced to so elect due to the conversion of title by Petersen. The instrument executed by defendants Andersons to plaintiff provided for a deficiency judgment in case the sale of the Mercury did not bring sufficient to satisfy the judgment. Thus plaintiff contends he has a right to a personal judgment against defendants Andersons for this deficiency and/or a personal judgment against Richard Petersen for conversion of title, (Point 1c) which conversion made a resale impossible to the damage of the plaintiff and which prevented plaintiff from minimizing damages by selling the car. Plaintiff was legally obligated to pay and did pay to Commercial Credit Company \$1,517.00 due to the Andersons' default. The deficiency between this amount and the \$950.00 brought for the Mercury under court sale is \$567.00 for which the plaintiff contends he should have judgment against the Andersons.

Mortgagee is entitled to retain a sum sufficient to repay all expenses reasonably and necessarily incurred by him in foreclosing the mortgage, even though not stipulated in the mortgage. 14 CJS 1087. Therefore, plaintiff should be allowed his costs.

Mortgagee may also have attorney's fee where mortgage terms provided for same and where the fee is reasonable. 14 CJS 1088. The instrument in suit provided for attorney's fee and evidence was given at the trial that \$200.00 was a reasonable fee for foreclosure of a chattel mortgage.

(b) That the holding plaintiff operated car approximately 7,000 miles is unsupported by the evidence.

The evidence of Petersen was that the car had been operated approximately 9,000 miles when he turned it over to the Valley Market for sale. The evidence of both Petersen and Larry Anderson was that they observed the speedometer shortly after the time plaintiff possessed the Mercury and ^(J.P. 253) that the speedometer read approximately 17,000 miles. The evidence indicates that the car was in the physical possession of the Andersons and the Valley Market Company for practically the entire period between the times these readings were made and consequently the mileage must be chargeable to the parties in possession during that period. The plaintiff's testimony was that he ran the car approximately 600 to 800 miles in attempting to resell it and in attempting ^{(J.P. 128-9) (J.P. 143-5)} to recover the title from Petersen. ¹ Thus, the conclusion

is not supported by the evidence and the waiver found against the plaintiff under this conclusion of law fails. (J. P. 2, 15, 16, 34, 91, 143-145)

(c) That retention of the Mercury between times of repossession and the time of filing suit was excused by Petersen's conversion of title making a sale impossible to the plaintiff's damage.

After default of Andersons and demand and refusal made upon them, plaintiff possessed the car under the terms of the chattel mortgage. Title was delivered to plaintiff by Valley Market, Petersen's agent. (J. P. 128, 129, 131)

A mortgagee entitled to possession of personal property covered by his mortgage may maintain an action against the third party who has converted same without first obtaining a judgment against the mortgagor and without making him a party to the suit. *Howard v. First National Bank of Hutchison*, 44 Kan. 549, 24 Pac. 983.

A mortgagee has such interest after breach of condition as to entitle him to maintain trover for a conversion of the chattels mortgaged. *First National Bank v. Siman*, 65 S. Dak. 514, 275 N.W. 347.

The cases indicate a mortgagee has a sufficient interest in the mortgaged property to sue a converter. Petersen's taking of title was unlawful in that title had passed to Andersons and the plaintiff as mortgagee had, through Andersons' default, succeeded to Andersons' interest in the property. This conversion made a sale

of the Mercury by plaintiff without physical evidence of title impossible. Plaintiff was damaged in that at the time of possession, August 15, 1949, the car was worth, according to the advisory verdict of the jury which the court adopted \$1700.00. The car brought \$950.00 when sold under court order. This amount of depreciation was caused by the conversion of title which prevented a sale by the plaintiff over a period during which the value of the Mercury diminished.

The plaintiff is not only entitled to deficiency judgment against the defendants Andersons as aforesaid but is entitled to a judgment against the defendant Petersen in the sum of \$750.00 for the conversion, conditioned upon the plaintiff's being unable to collect the deficiency judgment against the defendants Andersons. (J. P. 2, 15416)

POINT II

That the trial court erred in finding of fact 3 (R. 108 et. seq.) in finding, in effect, that Richard Petersen "is now" and was the owner of the Mercury and entitled to possession or payment.

ARGUMENT

Attention is called to the executed contract as discussed in statement of facts in the brief of defendants Nielsen and Bitters. The contract terms were set forth in defendant Petersen's Exhibit 1 and no mention is made therein of any reserved title in Petersen. Petersen's authorized agent to sell, Valley Market, made the

contract and Petersen assented to its terms. Strictly, the terms of statute UCA 57-3a-72 were not complied with in that no registration and title were issued by the Motor Vehicle Department to Andersons. However, there is evidence to the effect that Petersen signed the title before a notary, Mr. Bitters, who was Petersen's agent to sell, and that said agent neglected to notarize the title. Petersen himself testified that he turned the title over to Valley Market for the purpose of registration and licensing in favor of Andersons which would involve issuance of a new title. The proceedings had so far progressed towards placing the title in Andersons that on the basis of an executed contract Andersons at any time before their failure to pay could have legally forced Petersen to transfer title so that registration and a new title would have issued to Andersons. By majority opinion in *Jackson v. James*, 97 Utah 41, the Utah Supreme Court held that a completed gift of a vehicle was operative to transfer title to a car despite the words of UCA 57-3a-72. The holding was that compliance with the statute was not mandatory to pass title in that case. (J. P. 249, 250, 274, 275)

In the present case where the contract was executed and only the formality of proper notarization remained, together with the formality of issuance of new title and registration by the Motor Vehicle Department, a fair consideration of the facts should place the title in the Andersons. Petersen and the Valley Market knew of the arrangement to finance the Mercury through plaintiff

and accepted \$1400.00 on the purchase price which Andersons procured under this arrangement. Petersen's agent was instrumental in securing this financing and it was known to them that the chattel mortgage executed to secure the obligation was obtained by giving plaintiff a lien upon the car as security. The plaintiff contends that this knowledge, actual or imputed, estops Petersen from asserting that title did not pass to the Andersons. (J. P. 62, 79, 80, 87, 114)

POINT III

That the court erred in finding of fact 5 (R. 108 et. seq.) in holding, in effect, that plaintiff knew of an agreement between Petersen and Valley Market whereby Petersen was to retain title until paid.

ARGUMENT

There is no evidence in the record to support the finding that plaintiff knew of such an agreement. The evidence of plaintiff Seamons was that Loveland (Seamons' deceased partner who was alive at the time the instrument in suit, plaintiff's Exhibit 1, was executed) agreed to finance the car. The plaintiff believes that the trial court misconstrued the testimony of Seamons in finding that he knew of an agreement for conditional delivery of title by Petersen. Seamons testified that he knew of conditions in the chattel mortgage which was in form a conditional sales contract. (J. P. 166, 167)

WHEREFORE, plaintiff respectfully submits that the trial court erred in failing to enter a deficiency judgment against defendants Andersons in the amount of \$567.00, costs, attorney's fee in the amount of \$200.00 and/or erred in failing to enter a judgment against defendant Petersen for conversion of title to the plaintiff's damage in the amount of \$750.00.

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