

1951

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Seamons v. Andersen*, No. 7691 (Utah Supreme Court, 1951).
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In the Supreme Court of the State of Utah

NATHAN SEAMONS as the surviving partner of **SEAMONS & LOVE-
LAND,**

Plaintiff and Cross-Appellant.

-vs-

LARRY D. ANDERSON and
HANS P. ANDERSON,

Defendants and Appellants,
and **RICHARD PETERSON,**

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
RESPONDENT AND
CROSS-APPELLANT
RICHARD PETERSON**

Case No. 7691

FILED
OCT 27 1951

Appeal from the District Court of Cache County, Utah

Clerk, Supreme Court, Utah

Honorable Lewis Jones, District Judge

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Richard Peterson

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Paragraph b, Rule 15 pp. 24, Utah Rules of Civil Procedure.

Rule 54 c. pp. 77, Utah Rules of Civil Procedure.

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 PETERSON**,

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

RESPONDENT AND

CROSS-APPELLANT

RICHARD PETERSON

Case No. 7691

STATEMENT OF FACTS

The appeal of the Andersons is confined to the record without the transcript of the evidence. For our purpose, however, it is necessary to state the facts not only from the record relied on by the appellants but upon the evidence transcribed by the reporter.

In regard to the appellants Andersons observations of fact contained in their brief as to the Court allowing Peterson, as cross-complainant, to amend his pleading so as to ask for pecuniary relief against said Andersons,

it will be observed that while through an inadvertancy we failed to ask for such relief in our amended cross-complaint, we did do so in our first (pp. 10). The Andersons were given leave to amend their pleading (tr. 347), but failed to avail themselves of the opportunity. The transcript of the evidence shows by Andersons' own testimony that they still owed \$117.00 on the \$267.00 postdated check (tr. 199 exhibit A2), and the findings of the Court show that they knew of the agreement between the Valley Car Market and Peterson (pp. 113 paragraph 18 of the findings), and which they do not attack.

As to the issue not being formed by the pleadings as urged by counsel for the Andersons, we believe it is sufficient to point out that sub-paragraph b of Rule 15, Utah Rules of Civil Procedure on page 24 thereof reads: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they have been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion by any party at any time, even after judgment, but failure to so amend does not affect the result of the trial of these issues." **SEE ALSO RULE 54**

Counsel for the Andersons points out also that nothing was said in the Peterson brief in the Court below as to the Andersons being indebted to Peterson. Counsel

fails to observe that we said at the end of that brief that more points could be raised or discussed but we could carry the same in argument before the Court, which we did.

With these added observations as to the Andersons statement of fact, so far as they are not here modified, they are substantially correct.

Plaintiff Seamons as appellant relates, finally filed a second amended complaint (pp. 40) whereby among other things he sought, so far as this counter-claimant is concerned, to have him set forth his claim as to the Mercury car which Peterson had placed in the hands of the Market for purposes of sale.

The facts as we further see them are that the Market was to sell the Mercury for Peterson, with the stipulation and understanding that the Market was to have all over the sum of \$1950.00 that they received from the car (tr. 45, 247, 248, 249, 250), and only when Peterson had received in his own hands the said \$1950.00 was title to pass to the buyer, and only when he received said money was he to acknowledge his signature before a Notary Public on the certificate of title (tr. 250).

Notwithstanding this agreement, Peterson received only \$1300.00 through Mr. Neilsen of the \$1400.00 that Neilsen received from Seamons, and later received \$100.00 more when the Market, through Neilsen, got a \$150.00 check from Larry Anderson to take up the post-

dated check of \$267.00. This is admitted in the Market's brief. Thus Peterson received a total of \$1400.00 leaving a balance of \$550.00 due him.

It will be observed from this statement that we disagree with the statement of counsel for Nielsen and Bitters as to who was taking the chance on the Packard car and as to what it might bring on resale; and we further point out the fact that the pleading of the Market (pp. 53) does not deny the allegations contained in paragraph 2 of Peterson's cross-complaint that Peterson was to have \$1950.00 before the Market was to have anything at all (pp. 50); and it may be further pointed out that the jury further found in the advisory verdict to question No. 3 submitted to them that Peterson stated to Nielsen when he handed the title to him that said Nielsen was not to deliver the same until he, Peterson, had actually received \$1950.00 in money (pp. 76).

That plaintiff and cross-appellant Seamons knew of the arrangement whereby title was not to pass until Peterson had received the full amount of \$1950.00 was found by the jury in answering question No. 8 (pp. 77). Notwithstanding this knowledge, Seamons placed his notary stamp and signature upon the certificate of title without any authorization from Peterson (tr. 134, Peterson exhibit 2), in an attempt to take title out of Peterson without the conditions imposed having been met. Seamons did this some weeks after making a purported

loan to Andersons, the appellants, who purported to give the Mercury as security (tr. 10), and as mentioned before, cross appellant Nielsen put one hundred dollars of this in his own pocket and gave Peterson \$1300.00 (tr. 249, 250). This is perhaps an abbreviated statement facts, but in the discussion in support of our points and in defense to claims by the other parties to the action, we will enlarge thereon.

STATEMENT OF POINTS

1. That the Court erred in making and entering paragraph 1 of its judgment, dated April 9th, 1951, limiting defendant and cross appellant, Richard Peterson, recovery against cross-appellees Ray Bitters and Clayton Nielsen, severally and jointly to the sum of \$300.00 and failing to award the sum of \$550.00 to this cross-appellant, Richard Peterson, against said parties severally and jointly.

2. In making and entering paragraph 2 of its judgment limiting Richard Peterson, cross-appellant, to the sum of \$117.00 against Larry D. Anderson and Hans P. Anderson severally and jointly and failing to award the sum of \$550.00 to this cross-appellant, Richard Peterson, against said parties severally and jointly.

3. In making and entering paragraph three of its judgment limiting cross-appellant, Richard Peterson, to the sum of \$25.00 against plaintiff, Nathan Seamons, and failing to award judgment in the sum of \$550.00 against said Seamons severally and jointly with Ray Bitters and Clayton E. Nielsen in favor of said Richard Peterson.

4. In making and entering paragraph 4 of said judgment awarding title to the Mercury and Packard

cars and the proceeds on the sales therefrom to Nathan Seamons without giving this cross-appellant a lien on said cars to the amount of \$550.00.

5. By making and entering conclusions number 1, 2 and 3 limiting the same to \$300.00, \$117.00 and \$25.00 respectively as to the amounts recoverable by cross-appellant, Richard Peterson, as against Clayton E. Nielsen, Ray Bitters, Hans P. Anderson and Larry D. Anderson and Nathan Seamons respectively, and failing to conclude that said Richard Peterson was entitled to a judgment against said parties jointly and severally in the sum of \$550.00 and entitling said Richard Peterson to a lien on the above mentioned Mercury and Packard cars up to that sum.

6. By making and entering conclusion number 6 concluding that \$300.00, \$117.00 and \$25.00 is equivalent to the sum of \$550.00 and only these sums should be awarded to said Richard Peterson, and failing to award said Richard Peterson the sum heretofore stated.

7. The Court erred in submitting question number 2 to the jury in that the defendants Ray Bitters and Clayton Nielsen in their answer to cross-appellant's Amended Cross-Complaint admitted the sum of \$1950.00 was the sum to be paid said Richard Peterson before they were entitled to any money on said agreement heretofore found in findings of fact by the Court and as alleged in said Peterson's Amended Answer and Cross-Complaint.

8. The Court erred in failing to find in its Finding of Fact that plaintiff, Nathan Seamons, and defendants, Ray Bitters and Clayton Nielsen, were jointly and severally indebted to said Richard Peterson in the sum of \$550.00 or in lieu thereof, the owner of said Mercury and Packard cars or \$550.00 of the proceeds from the sale thereof.

ARGUMENT

Points 1 to 8

All these points, we believe, can be discussed together as they all go to the matter of the Court limiting cross-appellant, Richard Peterson, recovery against all other parties to this action severally and Jointly short of \$550.00, the sum we claim is due and owing Peterson.

Referring this Court to our Statement of Facts as our starting point in this argument in support of what we believe the cause shows by the evidence, we continue thus: That there was some talk between Richard Peterson and the Market about Peterson taking the Andersons' Packard for \$425.00 (tr. 248), Peterson testifying that the Market was to take the chance of resale since he wanted \$1950.00 and no Packard (tr. 248), and no authority was sought or given Market to repair the Packard by Market's own admission (tr. 299). The trade was made by the Market, allowing Andersons \$425.00 on the Packard and Larry Anderson giving a postdated check of \$267.00. (This check is spoken of as the \$270.00 in the evidence (exhibit No. 4, Tr. 249.)) Shortly thereafter, the Market traded the Packard to Mr. Darley of Wellsville, obtaining an old Chrysler valued at \$150.00 by Nielsen, and \$300.00 in cash (tr. 26, cross-appellant's exhibit 3). (We take the testimony as controlling over exhibit 3 as to cash received).

We believe that question No. 2 (pp. 76) was erroneously submitted to the jury in view of Market's pleadings (pp. 53), as they do not deny the agreement set up in paragraph 2 of Cross-Appellant's Cross-Complaint (pp. 50) as to cross-appellant Peterson's allegation that the Market was to have all over \$1950.00, and Market is therefore concluded by said answer, for it certainly does not conform to sub-paragraph b of Rule 8, Utah Rules of Civil Procedure. But assuming for the purpose of argument only, that the question was properly submitted to the jury and further assuming that the Market had the right to sell the Packard, nowhere is there any evidence to support their action in trading for the old Chrysler car or any car as part down payment on the Packard. A right to sell is not a right to trade. So if we take the question as having been properly submitted and answered by the jury it still does not aid the Market for they took the Packard and without authority from Peterson proceeded to make a trade with Darley for a worthless old car in order that they might enrich themselves \$300.00 and which was a conversion if the Packard belonged to Peterson. But we maintain that the jury could not find any other answer nor could the court to said question No. 2 than that of "yes" because of said sub-paragraph b of said rule 8.

The Packard admittedly was worth \$450.00 as it is shown by exhibit No. 3. Under this state of facts, Peterson was certainly entitled to \$425.00; and we be-

lieve it cannot be properly disputed that Peterson was entitled to receive at least \$425.00, the price at which the Packard was taken in (tr. 26; exhibit 3); and so much more as evidenced by the posdated check of Larry Anderson to make the \$1950.00. All above that sum belonged to Market, but Market proceeded to take their commissions before Peterson had been fully paid as is shown in their brief, and their own testimony given in Court (tr. 58). It is admitted in the Market's brief that the Market took \$100.00 out of finance money and \$50.00 out of the \$150.00 check given to Nielsen by Larry Anderson in order to cancel the said \$267.00 check. That the Market was not entitled to any commission for sale of the Mercury before payment to Peterson of \$1950.00 is clear even under their own statement of the case, yet they took it.

That the Market proceeded to finance the Packard with Seamons in order to sell and trade with Darley without first obtaining authority from Peterson is another fact (we assume here that the Packard was Peterson's for purpose of argument only) and which is certainly controlling evidence to show that the Market considered that they could sell or trade the Packard or do anything else that they desired. In connection with this, it may be further observed that Peterson never saw the Packard before the deal (tr. 42.) This comes from Nielsen himself. Nielsen further testified that the deal was for \$1950.00 (tr. 42, 43), as also did

Peterson (tr. 264), who further testified that he was dealing with the Market only and didn't even know who bought the Mercury until after the deal (tr. 264). And further that he knew nothing of the postdated check until May 23, 1949 (tr. 267). However it was May 6th, 1949 that Nielsen was paid the \$150.00 check by Larry Anderson with the understanding that the \$270.00 check was to be destroyed. Nielsen instead of destroying the check held it until about August 15th, 1949 (tr. 268), when he gave it to Peterson, though he knew it was worthless, and had not even taken the trouble to endorse it.

Another significant fact is that when Larry Anderson decided not to go through with the Mercury matter, he made a bill of sale to Market dated May 26, 1949 (Anderson exhibit "A"), which was the same date that Nielsen through false representation got the certificate of title from Peterson (tr. 250), and the date when the Mercury deal was called off according to Nielsen himself (tr. 35).

We believe all this goes to show, assuming that question No. 2 was properly put to the jury, that the finding of the jury is not supported by any substantial, believable evidence, and the finding of the jury and Court should have been "Yes" as to Peterson receiving \$1950.00 regardless of what the Packard sold for. But regardless of that, the Packard did sell for more than \$425.00 as heretofore pointed out, and the Market was

accountable to Peterson for \$1950.00.

The plaintiff and Cross-Appellant, Seamons, never relied on any indicia of title that Anderson had to the Mercury is conclusively established (tr. 197). He had never seen the title and only became interested in it when the finance company wanted it and Seamons got it through Nielsen, Nielsen telling Peterson that the Andersons wanted the title in order to get plates for the Mercury (tr. 250), and at which time the Andersons had already notified Nielsen that they did not want the car (tr. 35). This culminated in a bill of sale from Anderson to Market, dated May 23rd, 1949, the same date, as will be observed, that Nielsen received title from Peterson (tr. 250).

That Seamons knew of the agreement with the Valley Car Market is we believe substantiated by the evidence, and there seems to be no doubt that there were close ties existing between the Market and appellant Seamons (tr. 250; 251; 252;), which shows they were working together as against Peterson. The finding of the jury is fully supported by the evidence in answering No. 8 of the questions submitted which read, "Did Seamons and Loveland know of the terms of the original verbal agreement between Richard Petersen and the Valley Car Market covering the Mercury car within a day or so of the transaction?" Answer "yes" or "no". Answer, Yes (pp. 77). It may be added that Market was selling cars for Seamons (tr. 257).

Going to the question as to when title to the Mercury car was to pass, the Court submitted the following question No. 3: "Did Richard Peterson ever state to Clayton Nielsen and or Ray Bitters, in substance, as he signed the certificate of ownership on the Mercury and handed same to Nielsen, that said certificate was not to be delivered until said Richard Peterson had received \$1950.00 in money?" Answer "Yes" or "No". Answer: Yes (tr. 76). We believe this is very fully supported by the evidence (tr. 250), and when the Market took the certificate they were duty bound to pay Peterson the \$1950.00 upon its delivery to any other person, which they admittedly did by delivering said certificate to Seamons; and this is so regardless of any agreement that they had before. This would seem to follow as a matter of law. That the conditional delivery of the certificate of title came after April 24th cannot be doubted (tr. 250, 295).

As to any contention that appellant Seamons might make as having a claim against Peterson, we must keep in mind that Seamons knew of the deal between Peterson and Market and that Larry Anderson himself declared that he was not to have title until the Mercury had been paid for (tr. 196), nor did he think the deal was completed (tr. 207, 208). Then too, Seamons did not even have the certificate of title to the Mercury car until weeks after the money was loaned to the Andersons' the money to be paid to Peterson (tr. 250), for he

could not have had it before May 23rd, 1949, the day Nielsen received it from Peterson. The evidence further shows that Seamons put his own notary stamp on the certificate of title without authorization (tr. 253), and that he retained the certificate until Peterson discovered the unauthorized notary (tr. 253) and regained the same.

Thereafter, in order to avoid trouble, and compromise the matter (tr. 251), Peterson offered to give Seamons what Seamons actually had in the Mercury. Seamons refused this offer and demanded all finance charges, insurance and other charges. This of course Peterson refused, preferring to stand on his legal rights (tr. 252).

The errors here complained of as coming from the Court in its findings, conclusions and judgment are therefore well bottomed.

We respectively say that the Court below erred in not granting Peterson, a joint and several judgment against all the other parties, as the Court found that they all knew that no title was to pass from Peterson until he actually received \$1950.00. And if this is true, that is, that all the parties knew of such an agreement between the Valley Car Markt and Peterson then neither or any of them can have any claim against him as they will evidently try to maintain. To this effect is 57-3a-71 and 57-3a-72 of our Annotated Statutes, 1943, and under which the case of Swartz vs. White, 80 Utah pp

150-157, 13 Pac., (2) 643 evidently decided and which reads in part as follows: "Where the alleged owner of a car merely has possession of the certificate of ownership indorsed in blank by the true owner, with no name filled in, indicating the new owner, and he, in the presence of one advancing money to him on the car, and at request of lender signs his name in blank he acquires no title and he is merely borrowing". We believe our case is much stronger in favor of Peterson than was this cause in favor of the true owner, for here not only did Seamons and Andersons and of course the Valley Car Market have actual knowledge of the terms between Market and Peterson but no name of new buyer was ever placed in certificate of title and Peterson's signature was not even acknowledged before a notary before it came into the hands of Seamons some three weeks after the money had been advanced, as has heretofore been pointed out. And that Seamons himself placed his own Notary upon said certificate after he received this as has also been pointed out. Mr. Seamons was therefore not an innocent purchaser without notice of such facts to put him on notice for he knew, among other things, when he advanced the money that the Valley Car Market did not claim to be the owner of said Mercury and that they had limited authority.

We having received but \$1400.00 on the Mercury there is yet due under the agreement with the Valley Car Market the further sum of \$550.00. This would

work no hardship upon Seamons as under the testimony of Bitters, one of the partners in the Market, he, Bitters and Nielsen would have to make up any loss that Seamons might sustain in the transaction (tr. 99). As to Bitters and Nielsen they can suffer very little for this is what they have taken of the money received.

\$100.00 Finance money.

\$50.00 on Anderson check of \$150.00 given for cancellation postdated check in the sum of \$267.00

\$300.00 on Packard sale to Darley, Chrysler being valued at \$150.00 by Nielsen as heretofore pointed out.

\$150.00 placed on Chrysler by Nielsen's own testimony, as also heretofore pointed out.

\$600.00

To somewhat reiterate our contention in this matter amounts to this: That Peterson, the owner of the Mercury car took it to the Valley Market for said Market to sell, the Market to retain all over \$1950.00 for and as their commission for selling same. (This is evidenced by Peterson retaining the title to said Mercury and other matters appearing of record and which has been pointed out in this brief). That the buyer, whoever he might be was not to be considered the owner of said car until Peterson had actually received the \$1950.00. That Seamons and the Andersons knew of this agreement as has been pointed out. And that there is yet due and owing to said Peterson the sum of \$550.00 from all of said parties severally and jointly before either or all of

them can assert any claim to said Mercury now converted into money, it having been sold by agreement of the parties in open court.

Conclusion

In conclusion we submit that a reading of the testimony, a review of the pleadings, the issues as pleaded or as formed in court by testimony will convince this Court that the Court below erred in not making findings, conclusions and judgment against all the other parties and in favor of Mr. Peterson for the sum of \$550.00. That this judgment should have been joint and several. If we are correct in this then we say that this Court should direct the Court below to make such findings, and conclusions so as to properly bottom a judgment in the sum of \$550.00 in favor of said Richard Peterson.

Respectfully submitted,

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Cross-Appellant Richard
Peterson.