

1951

Nathan Seamons v. Larry D. Anderson et al : Brief of Defendants and Appellants Andersons to Plaintiff's Brief

Utah Supreme Court

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Geo. D. Preston; Attorney for Appellants;

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7691

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,**
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
DEFENDANTS AND
APPELLANTS
ANDERSONS TO
PLAINTIFF'S BRIEF**

Case No. 7691

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

Geo. D. Preston
205 Cache Valley Bank Bldg.
Logan, Utah.
Attorney for Appellants.

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TABLE OF CONTENTS

	Page
Statement of Facts	1
Statement of Points	
Point 1	
That the Court did not err in making it's	
Conclusion of Law, (R. 115) No. 7	2
Argument	
Point 1	2

INDEX OF CASES AND AUTHORITIES CITED

UCA 1943, 13-0-8	2
UCA 1943, 13-0-10.....	2
UCA 1943, Chap. 55	2
UCA 1943, 104-55-1	2
175 A.L.R. 1374 14 C.J.S.P. 578, Par. 3	3, 4
Campbell vs. Peter (Utah) 162 P. 2d 754	3
Stillman vs. Lynch (Utah) 192 P. 272	3

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,
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
DEFENDANTS AND
APPELLANTS
ANDERSONS TO
PLAINTIFF'S BRIEF
Case No. 7691**

STATEMENT OF FACTS

The Mercury car was repossessed from appellants on May 23, 1949 by Valley Car Market and turned to the possession of plaintiff on August 15, 1949 (R. 2), and plaintiff held possession thereof until commencement of the action until at least December 11, 1950 (R. 152). He did not commence the action until April 17, 1950 (See filing date on back of complaint R. 3).

The plaintiff by his original complaint sought to

foreclose a mortgage (R. 3), but it cannot be ascertained whether he was preceding under 104-55-1 UCA, 1943, or under Title 13, UCA, 1943. His first amended complaint sounding in declaratory judgment was abandoned, and then his second amended complaint appears to revert to the foreclosure theory in equity (R. 40).

ARGUMENT — POINT ONE

The plaintiff cannot recover against appellants in any event. If he proceeded as in case of real property foreclosure he is barred by Chapter 55, UCA, 1943, because he must have judgment before seizure, deficiency judgment after execution and sheriff's sale, and is also barred by 13-0-10, UCA, 1943 because he failed to make a sale within 30 days after seizure.

He is barred from foreclosure by advertisement because he failed to give notice of the sale, 13-0-8, UCA, 1943.

Suppose he had sold the car within 30 days after seizure. He asked judgment against appellants in the sum of \$1648.06 (R. 4), and it was worth between \$1700.00 and \$1800.00 (R. 141). The jury so found, and plaintiff has not appealed from this finding.

Plaintiff now contends this to be a chattel mortgage. He cites a case on page 5 of his brief. This was on mining property and real property providing for execution of a deed. Ours was a conditional sales agreement and is so called through all of the pleadings of plaintiff.

Plaintiff states on page 6 of his brief that he sold the paper to Commercial Credit Company. The forms were furnished by the Company.

The character of the instrument is fixed by the intention of the parties to it at the time of it's execution.
14 C. J. S. p. 578, par. 3,

... "the character of the transaction is fixed at its inception, and if an instrument is a mortgage when executed its character does not afterward change, for once a mortgage always a mortgage, is a maxim of law."

It is a surprise to us that counsel does not know the common ordinary meaning of a mortgage. If Anderson had borrowed money from Valley or plaintiff, and executed the document in question, then it could have been a mortgage regardless of the form of it. But, he bought a car, and the document merely represented the balance of the unpaid purchase price. The question here presented was set at rest in the Utah case of Campbell vs. Peter (1945), 162 P. 2d 754 overruling a former case, and approving the case of Stillman v. Lynch, (Utah) 192 P. 272. The Lynch case stated flatly, saying:

"As we read the statutes of Utah, a title retaining note is neither in fact nor in law a chattel mortgage. It has none of the characteristics, indicia, or elements of a chattel mortgage, except that of security". (See other Utah cases therein cited.)

A long line of Annotations appear in A. L. R. term-

inating at 175 A. L. R. 1374. The distinction is well put by the annotator at page 1379,

. . . "it is not the office of a conditional bill of sale to secure a loan of money; its purpose rather is to permit an owner of personal property to make a bona fide sale on credit reserving title in himself, for security until the purchase price is fully paid."

SUMMARY — Plaintiff cannot recover against appellants under any theory. If it is a conditional sales contract, the car was worth more when seized than the obligation. He treated it as his own property and not for security. It was held for nearly a year and a half before final sale, and it was driven 7000 miles. The foreclosure of a chattel mortgage must be accomplished strictly under the provisions of the statute, and this was not done. I have carefully and more fully briefed all points to the District Court, and desire to shorten this and save costs by referring thereto (R. 92).

Respectfully submitted

GEO. D. PRESTON

Attorney for Appellants