1980

Centurian Corporation v. A. L. Cripps and Walter Cripps et al : Brief of Respondent and Cross-Appellant Petty Motor Lease, Inc.

Utah Supreme Court

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James R. Brown; Bryce K. Bryner; Attorneys for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

CENTURIAN CORPORATION,

Plaintiff and Appellant,

vs.

A. L. CRIPPS and WALTER CRIPPS,

Defendant and Respondents.

SUPREME COURT No. 16971

PETTY MOTOR LEASE, INC.,

Plaintiff In Intervention, Respondent,

vs.

CENTURIAN CORPORATION, RICHARD NICKLES and MARGARET K. NICKLES,

Defendants in Intervention, Appellants.

BRIEF OF RESPONDENT AND CROSS-APPELLANT PETTY MOTOR LEASE, INC.

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PETER F. LEARY, JUDGE

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BRIEF OF RESPONDENT AND CROSS-APPELLANT PETTY MOTOR LEASE, INC.

NATURE OF CASE

Centurian Corporation ("Centurian") brought an action against A. L. Cripps and Walter A. Cripps ("Cripps"), claiming amounts due under an agreement wherein Centurian Corporation had given possession of a tank trailer to Cripps. Petty Motor Lease, Inc. moved to intervene in the action, claiming an interest in the tank trailer, having entered into agreements with Centurian and Richard Nickles and Margaret K. Nickles ("Nick-

les") entitled Lease and Agreement of Sale and Purchase. The motion to intervene was granted. Trial was held July 13, 1976. The trial court, in a memorandum decision and the judgment, entered a judgment in favor of Centurian Corporation against Cripps and held that it was without jurisdiction of the complaint of Petty Motor Lease against the Defendants in Intervention, Centurian Corporation, Richard Nickles and Margaret K. Nickles.

In Centurian Corporation v. A. L. Cripps, et al., Petty Motor Lease, Inc. v. Centurian Corporation, et al., 577 P.2d 955 (Utah 1978), this Court reversed the order of the District Court denying jurisdiction of the complaint of Petty Motor Lease, Inc. against the Defendants in Intervention, Centurian and Nickles. This Court held and stated as follows:

> We hold that the matter of intervention was properly before the Court and that it was error for the Court to rule as it did.
>
> This matter is reversed and remanded to the District Court for Salt Lake County with instructions to enter judgment in accordance with the evidence presented at trial in the actions relating to both files. We leave it to the discretion of the Court as to whether it should open the case and take further evidence in this matter.

On remand, judgment was entered April 9, 1979 in favor of Petty Motor Lease, Inc. against Centurian and Nickles. The previous judgment in favor of Centurian against Cripps was affirmed. Petty Motor Lease, Inc., Centurian and Nickles sought additional relief of the District Court by way of motions to amend, but such motions were denied.

RELIEF SOUGHT ON APPEAL

Respondent and Cross-Appellant, Petty Motor Lease, Inc., prays that the judgment of the District Court be affirmed as to the liability of Centurian and the Nickles, but that the amount of such liability be corrected, that the rate of interest applicable to the amounts due Petty Motor Lease, Inc. be corrected, and for an award of attorneys fees subsequent to the first trial of this matter, including fees on appeal, fees incurred after the remand of the case to the District Court, and attorney's fees in the present appeal.

STATEMENT OF FACTS

In February 1973, Petty Motor Lease, Inc. entered into agreements with Centurian and Nickles regarding a 1973 Trans-liner semi-tank trailer. The agreements consisted of a Lease (Exhibit 7-I) and an Agreement of Sale and Purchase (Exhibit 8-I). Several of the provisions of the Lease are pertinent, but because of the length of the Lease, those provisions are not quoted here. The Lease was executed by Centurian Corporation and Petty Motor Lease, Inc. and was guaranteed by Richard Nickles and Margaret K. Nickles. The Agreement of Sale and Purchase provides as follows:

> This agreement made and entered into between Petty Motor Lease, Inc., hereinafter called "Owner"; and Centurian Corporation, hereinafter called "User"; to-wit:
>
> 1. User has leased from Owner a 1973 Trans-liner semi-tank trailer, serial number 151472, and desires to purchase said unit at the termination of lease, after all payments called for by the lease have been paid, and the Owner desires to sell unit to User at that time.

2. It is agreed that the User will pay to the Owner the sum of Six Hundred Twenty One and 00/100 Dollars, plus applicable sales tax and interest at six percent per annum (6%), plus any deposits or advance payments made and Owner shall keep all payments made or monies paid or deposited under the terms of the lease referred to above.

3. This agreement is binding upon both parties.

The Agreement of Sale and Purchase was executed by Centurian Corporation and Petty Motor Lease, Inc. and guaranteed by Richard Nickles.

Centurian received and took possession of the trailer on or about February 1, 1973 (Finding 5, R. 196).

At the trial of the claim of Centurian Corporation against Cripps, Richard Nickles, President of Centurian, testified as follows:

Q. (By Mr. Brown) Mr. Nickles are you familiar with a tank trailer similar to this one?

A. Yes.

Q. Did you purchase this particular tank trailer new?

A. Yes, I did.

Q. What was the purchase price new?

A. Approximately $18,000.

Q. . . . When did you purchase the unit? I should have asked that.

A. Gosh, its been so many years I forgot.

Q. Is it 1973?

A. January.

. . .

Q. Would you have purchased that unit say thirty days prior to that time?

A. No, I purchased it on the first of February. This is when we negotiated the agreement when we bought the equipment. (Tr. 12, 13; R. 244, 245)

In May, 1973, Centurian entered into an agreement with Cripps regarding the trailer (Finding 6, R. 196). The Agreement (Exhibit 1-P) refers to Centurian as "Seller" and Cripps as "Purchaser". Attached to the Agreement are a copy of the Lease and a duplicate original of the Agreement of Sale and Purchase between Petty Motor Lease and Centurian.

Shortly thereafter, Cripps leased the trailer to P.I.E. (Finding 7, R. 196). In December, 1973, Centurian notified P.I.E. to ground the trailer. P.I.E., acting on the request of Centurian Corporation, grounded the trailer. Because of the conduct of Centurian, Cripps lost their lease with P.I.E. and were effectively prevented from using the trailer to obtain earnings from which to pay Centurian. Cripps were unable to lease or register the trailer for the year 1974 (Finding 11, R. 196-97).

Centurian Corporation made payments to Petty Motor Lease pursuant to the Lease for the first twelve payments thereof due through February, 1974. Centurian made no payments required by the Lease after March, 1974 (Finding 8, R. 196). On or about March 15, 1974, the trailer was stolen. On March 29, 1974, Walter Cripps reported the theft (Ex. 4-P) (Finding 10, R. 196). Exhibit 3-P indicates that on April 4, 1974, the location of the trailer was known by the New Mexico State Police. Exhibit 3 was mailed April 8, 1974 and postmarked April 9, 1974.

The pertinent conclusions of law of the District Court are as follows:

> 1. The Lease and Agreement of Sale and Purchase, construed together, constitute an agreement of sale and purchase, and include all of the terms of the Lease insofar as consistent with the Agreement of Sale and Purchase. Centurian Corporation was obligated to perform the provisions of the Lease and thereupon purchase the trailer. Centurian Corporation breached its obligations thereunder.
>
> 2. Centurian Corporation received possession of the trailer and accepted delivery thereof. Upon said receipt, the risk of loss, as between Petty Motor Lease, Inc. and Centurian Corporation, passed to Centurian Corporation.
>
> 3. Petty Motor Lease, Inc. is entitled to the amount which it would have received had the Lease and Agreement of Sale and Purchase been performed, namely, (a) the remaining twenty lease payments at $580, or $11,600, together with sales tax and interest at the rate of six percent per annum from the date of theft of the trailer in the amount of $3,512 to the date of judgment, and (b) $621, together with sales tax and interest at the rate of six percent per annum from February 6, 1973, in the amount of $229 to the date of judgment, and (c) less the amount deposited by Centurian Corporation with Petty Motor Lease, Inc., $3,594.63. Petty Motor Lease, Inc. is entitled to the sum of $12,367.37, together with sales tax at the applicable rate at the time of payment.
>
> . . .
>
> 5. Petty Motor Lease, Inc. is entitled to its reasonable attorney's fees. A reasonable sum to be awarded Petty Motor Lease, Inc. for the use and benefit of its attorney is the sum of $540.

ARGUMENT

POINT I. THE LEASE (EXHIBIT 7-I) AND THE AGREEMENT OF SALE AND PURCHASE (EXHIBIT 8-I) CONSTITUTE A CONTRACT OF SALE.

The Agreement of Sale and Purchase specifically refers to the Lease and clearly expresses the parties' intentions. It provides that Centurian desires to purchase the trailer at the termination of the Lease and that Petty Motor Lease desires to sell the trailer. The Agreement further provides Centurian will

pay a specified amount to complete the purchase and sale to which both parties expressed their intention. The Lease and Agreement of Sale and Purchase, viewed together, clearly require Centurian to make the payments and perform the other obligations required by the Lease, and thereupon pay $621, with six percent interest thereon, to buy the trailer.

The construction of a contract requires the ascertainment of the intent and purpose of the contract. The intentions of the parties are controlling and normally those intentions are determined from the written contract. This rule is stated in Mark Steel Corporation v. Eimco Corporation, 548 P.2d 892 (Utah 1976):

> The primary rule in interpreting a contract is to determine what the parties intended by what they said. We do not add, ignore or discard words in this process; but attempt to render certain the meaning of the provision in dispute by an objective and reasonable construction of the whole contract. (Footnote omitted.)

The agreements are clear and free of ambiguity. The District Court's construction of the documents was objective and reasonable. The decision of the District Court is entitled to a presumption of validity. This Court is required to view the evidence and any inferences to be drawn therefrom in the light most favorable to sustaining the decision. Cutler v. Bowen, 543 P.2d 1349 (Utah 1975). If there is any ambiguity in the agreements (Petty Motor Lease submits there is not), the District Court may resort to parol evidence to determine the parties' intentions and eliminate the ambiguity. Big Butte Ranch, Inc. v. Holm, 570 P.2d 690 (Utah 1977); Mathis v. Madsen, 1

U.2d 46, 261 P.2d 952 (1953). Richard Nickles' testimony at trial clearly indicates that the agreements constituted a purchase:

> Q. Did you purchase this particular tank trailer new?
>
> A. Yes, I did.
>
> Q. What was the purchase price new?
>
> A. Approximately $18,000.
>
> Q. Would you have purchased that unit say thirty (30) days prior to that time?
>
> A. No, I purchased it on the first day of February. This is when we negotiated the agreement when we bought the equipment. (Emphasis added; Tr. 12, 13, R. 244, 245.)

This clearly establishes that Centurian and Nickles understood the arrangement to be a purchase.

Appellants, without any explanation or reference to authority, imply that the Lease and Agreement of Sale and Purchase constitute an option or a conditional sale. The agreements do not support this theory. The intentions of the parties, Centurian to purchase and Petty Motor Lease to sell, are clear. There is no language of option or condition. Centurian's obligation is unconditional. The District Court correctly construed the agreements as an agreement of sale and purchase. This construction must be affirmed.

POINT II. THE RISK OF LOSS OF THE TRAILER, BY FIRE, THEFT OR OTHERWISE, PASSED TO CENTURIAN CORPORATION UPON ITS RECEIPT OF THE TRAILER.

Centurian Corporation received the semi-tank trailer on or about February 1, 1973. When Petty Motor Lease delivered possession of the trailer to Centurian Corporation and Centur-

ian Corporation received and accepted delivery, the risk of loss passed to Centurian. Chapter 2 of the Uniform Commercial Code, at Section 70A-2-509(3), provides as follows:

> In any case not within Section (1) [where the contract requires or authorizes the seller to ship the goods by carrier] or (2) [where the goods are held by a bailee to be delivered without being moved], the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise, the risk passes to the buyer on tender of delivery.

Since the buyer, Centurian Corporation, received the trailer, it is irrelevant whether the seller, Petty Motor Lease, Inc., is a merchant or not.

In White Motor Corp. v. Bronx-Westchester White Trucks, Inc., 18 U.C.C. Reporting Service 382 (N.Y.S.Ct. 1975), the Court, in a case similar to the matter before this Court, stated:

> Plaintiff, a manufacturer of trucks, delivered to defendant an Autocar truck, pursuant to order by defendant. Plaintiff received a receipt from the manager of defendant's garage for delivery of the truck. It also invoiced the defendant for the agreed price of the truck. After the truck was delivered and invoiced to defendant and while it was in possession of defendant, it was stolen from defendant's garage.
>
> As appears from the answer and from the papers submitted by defendant, defendant's position is that title to the truck was never in its name. This contention is based on the agreement between the parties which it is asserted by defendant reserved to plaintiff a security title pending payment, or in part that title papers were not delivered to defendant until after the theft of the truck. The title papers in question were the manufacturer's statement of origin and assignment of title.
>
> The questions presented in this case are (1) whether title to the truck at the time of the theft was material, and (2) assuming that the location of title as between the parties was material, whether title had, or had not, passed to defendant.

> Under the Uniform Commercial Code, § 2-509, passage of title is immaterial and the risk of loss is upon defendant irrespective of title. Under subdivision (3) the risk of loss passed to the defendant on receipt and possession of the truck. (Emphasis added.)

In Nordstrom, Law of Sales, referring to Section 2-509, the author states:

> After the contract and after conforming goods have been placed in the possession of the buyer, the buyer bears the risk. (Page 394.)

Similarly, at Page 405:

> The merchant rule [2-509(3)] conforms to the general code policy of placing the risk on the party who has control of the goods at the time of their loss. Risk does not pass until the buyer has received the goods; however, the non-merchant seller can shift the risk even though he retains control of the goods - risk passes when the non-merchant seller tenders delivery. (Emphasis in original.)

The policy behind this rule is to place the risk upon the party which controls possession of the goods. That is sound policy. Petty Motor Lease had no control over the trailer, having delivered possession to Centurian.

Centurian is obligated to perform the terms of the agreements, to pay the amounts required to purchase the trailer.

POINT III. THE TRIAL COURT ERRED IN DEDUCTING THE AMOUNT OF THE DEPOSIT FROM THE AMOUNTS DUE PETTY MOTOR LEASE.

The District Court was correct in construing the Lease and Agreement of Sale and Purchase together and in its determination that together they constitute an agreement of sale. (See Point I, above.) The integrated agreement required Centurian Corporation to make all payments called for by the Lease and thereupon to:

> . . . pay to the owner the sum of Six Hundred Twenty One and 00/100 Dollars plus applicable sales tax and interest at six percent per annum (6%), plus any deposits or advance payments made and owner shall keep all payments made or monies paid or deposited under the terms of the lease referred to above. (Exhibit 8-I; emphasis added.)

Petty Motor Lease, Inc. is entitled to the remaining lease payments (twenty lease payments at $580 equals $11,060), plus the amount of the sale and purchase of the trailer ($621), plus applicable sales tax and interest. The trial court entered judgment consistent with the foregoing except that it provided for deduction of the deposit made by Centurian Corporation in the sum of $3,094.63. The Agreement of Sale and Purchase specifically provides that the purchase amount of $621 is in addition to any deposit or advance payments made "and owner shall keep all payments made or monies deposited under the terms of the lease referred to above." From the foregoing provisions of the agreement of sale and purchase, it is clear that the trial court erred in deducting the amount of the deposit which had been made under the lease.

POINT IV. THE LEASE PLACES THE RISK OF LOSS ON CENTURIAN.

Even if the Lease and Agreement of Sale and Purchase were construed to be a lease with a condition or option of sale and purchase, Centurian Corporation is responsible for the safe keeping and return to Petty Motor Lease of the trailer. This obligation and liability arises because of (1) the lease agreement and (2) the failure of Centurian Corporation to rebut the presumption that the theft was due to its negligence.

The Lease between Petty Motor Lease, Inc. and Centurian Corporation provides, in pertinent part, as follows:

> 2. User agrees to deposit with Owner the sum of $3,594.63 until all terms of this lease have been faithfully performed and the property returned to owner in a satisfactory condition, whereupon said deposit will be returned to User. However, if User violates any condition of this agreement, Owner may retain such portion of said deposit as may be necessary to compensate Owner for the loss or damage caused by such violation, and should the sum deposited be insufficient to compensate Owner for the loss or damage caused by such violation, User agrees to pay the deficiency to Owner.
>
> 3. User agrees to continually maintain said property in good condition and repair . . .
>
> 7. Upon expiration or termination of this agreement, User shall surrender the unit to Owner in good mechanical condition and repair, with tires having at least 50 percent of original tread and free from body damage, scratched or chipped paint, or torn or frayed upholstery. Any expense by Owner to bring unit to the above described condition shall be paid for by User.
>
> 8. If User fails to make payments when due, or if User fails to perform any other condition of this lease, . . . User agrees to pay all costs and expenses including reasonable attorney's fees, incurred by Owner in enforcement of its rights under this agreement . . . .

Considering the Lease only, the foregoing provisions clearly indicate that the User, Centurian Corporation, was responsible for the care, maintenance and return of the trailer. By agreement, Centurian Corporation agreed to be responsible for the condition and return of the trailer. As stated at 8 Am.Jur.2d, Bailment, Section 200: "It is the general rule that unless made so by statute or by express contract, an ordinary bailee, no matter to what class he belongs, is not an insurer of safety of

goods delivered into his keeping." (Emphasis added, footnote omitted.) Similarly, in Section 201 the rule is stated:

> Unless a bailee has violated his contract he will not be liable in the absence of negligence, for loss or injury in respect of the thing bailed, resulting from the inherent nature of the property itself or some infirmity thereof, from disaster or accidental casualty, or from robbery, burglary, or theft. Nor is he liable for loss of the property because the process of law directed against his bailor, confiscation or taking by superior force, the act or negligence of a third person, or the negligence or contributory negligence of the bailor, his servants, or agents. Of course, such duties and the liability or failure to perform them may also be imposed on the bailee by virtue of special contract. The exercise of the required degree of care may be found in many instances to anticipate and guard against the occurrence of loss or injury, theft, fire, and similar contingencies, and he may be held liable for losses proximately resulting from a lack of due care in this respect. (Emphasis added, footnotes omitted.)

A bailee is held to his agreement, express or implied, even if the agreement exceeds the responsibility created by law. As stated at 8 Am.Jur.2d, Bailment, Section 137:

> A bailee may enlarge his legal responsibility for the subject of the bailment by contract, express or implied, even to the extent of making himself absolutely liable as insurer for the loss or destruction of goods committed to his care; this is true even of gratuitous bailees. As a general rule, if there is an express or implied agreement by the bailee which clearly goes beyond his ordinary obligation as implied by law, he will be held to this agreement. In such cases the bailment contract is controlling and must be enforced according to its terms, irrespective of the fact that a less onerous liability is imposed by law on bailees of the same class generally. For such an undertaking, the bailment itself or the compensation to be paid for it, is a sufficient consideration.

As stated by this court in Sumsion v. Streator-Smith, Inc., 103 Utah 44, 132 P.2d 680 (1943):

> It is to be noted that in any event [whether the bailor pleads trover, in case, or assumpsit] the bailor must prove a duty and the breach of that duty. Here, as in the ordinary bailment, that duty rests entirely on the bailment contract. 132 P.2d at 683.
>
> . . .
>
> Today, regardless of the type of action brought, the entire duty of the bailee with respect to the bailed chattel is based on the bailment contract. 132 P.2d at 685.

In the Sumsion case, there was no express contract. The plaintiff, after damaging his automobile, engaged the defendant to take the automobile to the defendant's garage. En route to the garage, a loaded coal truck crashed into the rear end of the plaintiff's car, causing considerable damage. Regarding the contract, this Court stated:

> No express contract was made. It is therefore a contract which is implied by law from a conduct of the parties. The plaintiff requested that defendant tow plaintiff's car to the garage. Defendant agreed to do so. Nothing was said concerning the obligation of the defendant to return the car. We must, therefore, determine what kind of contract the law will imply from this conduct. 132 P.2d at 683-684.

In the present case, the same rules apply, although the facts are different. The duty of Centurian Corporation rests on the agreement of the parties. If the agreement of the parties constitutes a lease or a lease with a conditional or optional contract of purchase or sale as opposed to an agreement of sale as held by the District Court, the Lease agreement (Exhibit 7-I) contains the agreement of the parties. That agreement is quoted above and provides that Centurian Corporation would return the trailer upon termination or expiration of the lease.

Paragraph 2 of the Lease provides that Centurian deposit a sum to assure performance of the Lease. Paragraph 3 of the Lease requires Centurian to maintain the property in good condition and repair. Paragraph 7 requires Centurian, upon expiration or termination of the Lease, to surrender the trailer in good mechanical condition and repair, with tires of designated tread, and free from body damage, scratched or chipped paint, and torn or frayed upholstery. These contractual provisions conclusively establish the liability of Centurian Corporation for the loss of the trailer. Centurian Corporation, in its brief, totally ignores the contractual provisions between the parties which establish its liability. The rule is clearly stated at 8 Am.Jur.2d, Bailment, Section 140, and therefore quoted at length:

> An express agreement by the bailee not merely to return the subject of the bailment in good condition, but to repair all damages occasioned by accident or casualty, or to be "responsible" for, or to repair, any loss or damage, barring ordinary wear and tear, creates an unconditional obligation, and for loss or damage not excepted the bailee is liable irrespective of his negligence or fault. The bailee becomes an insurer also where he enters into a special contract to return the property in good condition or to pay its value and is liable for any loss which occurs while it is in his possession, even though without his fault. And where he contracts specially to return the bailed property in as good condition as when received saving some other exception or exceptions than ordinary wear and tear, such exceptions may be regarded as exclusive, and he may be liable as an insurer for loss from other causes, although without his fault.
>
> The view is generally taken that the fact that the bailee deposits a sum of money or gives a bond as security for the return of the bailment in good condition evidences an intention to extend the common-law liability of the bailee. There is, moreover, authority for the view that whenever the bailee is deemed to

> have entered into a special engagement to return the property at a certain time in good order, he will not be released therefrom even where it appears that the property was damaged or destroyed without his fault. The principle that lies at the foundation of the authorities on the question imposing liability, irrespective of fault of the bailee where he contracts to return the property or be responsible for its loss, is that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he must have provided against it by his own contract. However, respectable authority exists for the proposition that bailees, with or without a special contract, are excused when they show loss or injury by an act of God or of public enemies. Thieves, tramps and robbers are not deemed to be public enemies in the legal sense of those words, so that losses occasioned by them do not come within the meaning of such an alleged exception. (Emphasis added, footnotes omitted.)

In conclusion, the Lease clearly places on Centurian the obligation of returning the trailer and, therefore, of assuming the risk of loss of the trailer.

In addition, the law creates a presumption regarding the loss of bailed goods after delivery by the bailor to the bailee. Once the bailor has shown delivery of the bailed goods to the bailee and a failure to return or the return of the bailed goods in a damaged condition, the bailee has the burden of proof that it was not negligent in the care of the bailed goods. This rule is well established and has been followed in a number of cases in this state, commencing with Romney v. Covey Garage, 100 Utah 167, 111 P.2d 545 (1941), followed by Sumsion v. Streator-Smith, Inc., supra. In Sumsion this court stated:

> In Romney v. Covey Garage, supra, we held that in an action ex delicto by the bailor against the bailee, the ultimate burden of proof at all times remains on the bailor, but we further held that he could meet this burden in the ordinary bailment case by showing the bailment and the failure to return or the return in a damaged condition. This showing gave rise to an inference of negligence which required the bailee to come forward with an explanation to show that the injury or loss was not due to his negligence. Unless bailee conclusively proved due care so that a directed verdict was required the jury would be allowed to consider both the inference and the evidence so produced by the bailee. . . .
>
> Ordinarily, under the rule of the Romney case, supra, the plaintiff can meet this burden by showing, as the plaintiff did here, the bailment and the return in a damaged condition. Upon this showing, the law arbitrarily raises a presumption of negligence which makes a prima facie case for the plaintiff sufficient, unless the bailee conclusively proves due care, to carry the case to the jury. . . . This presumption is one of necessity which arises only because of the peculiar facts ordinarily present in a bailment case. The cases hold that it would be unreasonable to require the bailor to prove negligence specifically when the bailee has exclusive possession of the facts and the means for ascertaining them.

The foregoing rule is also followed in Clack-Nomah Flying Club v. Sterling Aircraft, Inc., 17 U.2d 245, 408 P.2d 904 (1965) and Barlow Upholstery & Furniture Co. v. Emmel, 533 P.2d 900 (Utah 1975).

Petty Motor Lease, Inc. established its prima facie case by establishing delivery of the trailer to Centurian and the failure of Centurian to return the same. Centurian Corporation failed to meet its burden of proof that it was not negligent in the loss of the trailer. Furthermore, the District Court held that Centurian, in breach of its agreement with Cripps, interfered with Cripps' relationship with P.I.E., preventing Cripps from using the trailer. The District Court

could have found this action negligent on the part of Centurian, causing or contributing to the theft of the trailer. Therefore, even if the agreement of the parties is construed to be solely a lease or a lease with a condition or option, Centurian is nevertheless liable for the loss of the trailer.

If the agreement of Centurian and Petty Motor Lease is determined to be a lease, Centurian would be obligated to Petty Motor Lease in an amount in excess of that determined by the Trial Court or urged by Petty Motor Lease on appeal. Paragraph 6 of the Lease provides as follows:

> This Lease may be terminated by User at any time during the period of the Lease or, if User violates any of the terms of this Agreement, Owner may, without notice, terminate this Lease. If this Lease is terminated by either Owner or User for any reason or expires as provided in paragraph 1, hereof, User agrees to pay to Owner any and all past due payments or other sums then due under the terms of this lease, including, but not limited to, the cost of repairs required to bring the property to good condition, plus the final lease payment in full, and, in addition thereof, to pay 45 percent of the monthly rental multiplied by the number of months the Lease has yet to run, which sum is to compensate Owner for the greater costs and depreciation occurring during the first part of the Lease as compared to the last part of the Lease.

The amount due Petty Motor Lease under the Lease (if the agreement between Petty Motor Lease and Centurian and is not an Agreement of Sale and Purchase) is as follows: $5,800, representing 45 percent of the balance due on the Lease as of March 15, 1973, plus the final Lease payment pursuant to paragraph 6 of the Lease (twenty Lease payments at $580.00 equals $11,600 x 45% equals $5,220, plus final payment of $580 equals $5,800); sales tax on the foregoing amount at the rate of such sales tax

applicable at the time of receipt of the foregoing amounts; interest on $5,800 to the date of judgment; less the deposit in the amount of $3,594.63; plus $15,000, the total value of the leased vehicle on March 15, 1974. The sum of the foregoing is $17,205.37, exclusive of sales tax and interest.

As to the value of the trailer as of March 15, 1974, Richard Nickles testified that in March, 1974 the value was $22,000 (Tr. 14). Walter A. Cripps testified that the value of the trailer in March, 1974 was between $14,500 and $15,000 (Tr. 38). Neuman C. Petty, President of Petty Motor Lease, Inc., testified that the value of the trailer in March, 1974 was between $15,000 and $16,000 (Tr. 47). See also Tr. 58, 62.

Petty Motor Lease claims the amount due under the Lease and Agreement of Sale and Purchase is $12,450, plus interest (see Point V), plus sales tax and attorney's fees. This is based on twenty lease payments at $580, or $11,600, the $621 purchase amount, and $229 interest as provided in the Agreement of Sale and Purchase. If this Court determines the interest rate applied by the District Court is correct, the amount due Petty Motor Lease is $15,962, plus sales tax and attorney's fees. This is based upon twenty lease payments at $580, or $11,600, interest of $3,512 as determined by the District Court, $621 plus $229 as the purchase amount with interest at six percent per annum as provided in the Agreement of Sale and Purchase. There should be no deduction for the deposit (see Point III).

Appellants rely on paragraph 5 of the Lease in an attempt to absolve them from liability. Paragraph 5 provides:

> 5. User agrees to maintain during the term of this lease not less than $25,000 property damage insurance and $100,000/$300,000 public liability insurance, which insurance shall provide protection for Owner and User. The (_____) agrees to maintain during the term of this lease, fire, theft, comprehensive and $100 deductible collision insurance on the above described property, which insurance shall provide protection for Owner and User as their interest may appear. In case of damage User agrees to pay the first $100 of the cost of replacement or repairs and all damage not covered by such insurance. Owner may have in effect at the commencement of this lease, fire, theft, comprehensive and $100 deductible collision insurance. If User furnishes Owner with evidence of satisfactory insurance coverage within fifteen days from the commencement of the lease, Owner's insurance policy shall be terminated with no expense to User. However, if evidence of satisfactory insurance coverage has not been furnished by User within fifteen days of the commencement of this lease, User shall pay to Owner the total premium under such insurance policy of Owner and that policy may be kept in full force and effect during the term of this lease. In addition, User specifically agrees to defend and hold harmless Owner from any claim or liability whatsoever arising from the use of the property herein leased during the term of this lease, including Owner's negligence. Should User now or in the future become an "assigned risk" or should a higher than average insurance premium otherwise be required, and if Owner has herein agreed to maintain insurance coverage, User agrees to pay any additional premium upon demand.

There was no reference to User or Owner in the blank provided in the second sentence as to which party would maintain fire, theft, and comprehensive insurance. This can be interpreted in two ways: (1) that the reference to User in the first sentence would apply to the second, or (2) that the parties made no agreement. In either event, the obligation of insurance is not imposed on Petty Motor Lease. Further, contrary to the assertion of Appellants, the use of the form by Petty Motor Lease

does not mean Petty Motor Lease assumed the risk by leaving the line blank. Both parties signed the Lease and had equal opportunity to insert a name on the line.

Appellants also claim Margaret Nickles did not guarantee the Agreement of Sale and Purchase. This would mean that Margaret Nickles should not be liable for the $621 purchase amount and interest thereon of $229, or a total of $850. In all other respects, Margaret Nickles is liable in the same amount as Centurian and Richard Nickles.

POINT V. THE DISTRICT COURT ERRED IN AWARDING INTEREST IN PARAGRAPH 3(a) OF ITS CONCLUSIONS OF LAW AT THE RATE OF SIX PERCENT (6%) PER ANNUM.

Paragraph 8 of the Lease provides in pertinent part as follows:

> 8. If User fails to make payments when due, or refuses or fails to perform any other conditions of this Lease, . . . User agrees to pay all costs and expenses, including reasonable attorney's fees, incurred by owner in enforcement of its rights under this agreement and agrees to pay interest at the highest rate allowed by law upon all amounts not paid when due. (Emphasis added.)

The District Court, in its Conclusions of Law, awarded interest at the rate of six percent per annum on the payments due under the Lease. The question raised is: What is the interest rate contemplated by the terms "highest rate allowed by law"? This language is to be distinguished from "the highest legal rate." Prior to the enactment of the Uniform Consumer Credit Code in 1969, the State of Utah had a usury statute which precluded charging interest rates in excess of certain specified rates. The Uniform Consumer Credit Code repealed the usury statutes.

Section 70B-9-103, Utah Code Ann. In the place of the usury statutes, the Uniform Consumer Credit Code established maximum interests rates on certain types of loans. Section 70B-3-201 (1) provides:

> With respect to a consumer loan other than a supervised loan . . . , a lender may contract for and receive a loan finance charge, calculated according to the actuarial method, not exceeding 18 percent per year on the unpaid balances of the principal.

Although the agreements between Petty Motor Lease and Centurian are not claimed to be a consumer loan, the foregoing provision establishes what was anticipated by the parties to be the highest rate allowed by law. The Uniform Consumer Credit Code abolished the usury statute and replaced it with a statute which provided for interest at 18 percent per annum on certain consumer loans.[1] Similarly, Article II of the Uniform Consumer Credit Code involves credit sales. Section 70B-2-201(2) provides:

> The credit service charge, calculated according to the actuarial method, may not exceed the equivalent of the greater of either of the following:
>
> (a) the total of [3 different interest rates applied on unpaid balances at various levels]; or
>
> (b) 18 percent per year on the unpaid balances of the amount financed.

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[1]The Uniform Consumer Credit Code eliminated the usury statute and provided no maximum interest rate as to loans made to an organization other than a natural person. Section 70B-3-605 provides: "With respect to a loan other than a consumer loan or a consumer related loan, the parties may contract for the payment by the debtor of any loan finance charge."

Because the Uniform Consumer Credit Code abolished the usury statutes and replaced them with the foregoing provisions, the parties anticipated interest at the rate of 18 percent per annum. Petty Motor Lease submits that the applicable rate of interest, based upon the intent of the parties, is the rate of 18 percent per annum.

POINT VI. PETTY MOTOR LEASE SHOULD BE AWARDED ITS ATTORNEY'S FEES IN ALL PROCEEDINGS SINCE THE TRIAL.

Paragraph 8 of the Lease provides:

> If User fails to make payments when due, or if User fails to perform any other condition of this Lease, . . . User agrees to pay all costs and expenses including reasonable attorney's fees incurred by Owner in enforcement of its rights in this agreement and agrees to pay interest at the highest rate allowed by law on all monies not paid when due.

At the trial of this matter, Petty Motor Lease claimed an attorney's fee of $540 for time expended through trial (Tr. 54). Since the trial, Petty Motor Lease has been required to appeal the original judgment of the Court, sought entry of judgment after this Court remanded the case to the District Court, from June 2, 1978, until judgment was entered on April 9, 1979. Thereafter, the motions to amend of Petty Motor Lease and Centurian were denied on February 22, 1980. See Record, pages 171-210. Further, Petty Motor Lease has been involved in this appeal.

Attorney's fees on appeal are discretionary with the Supreme Court. Swain v. Salt Lake Real Estate & Investment Co., 3 U.2d 121, 279 P.2d 709 (1955); see also Bates v. Bates, 560 P.2d 706 (1977). Petty Motor Lease submits that it is en-

titled to an award of attorney's fees to compensate it for the employment of its attorney in these proceedings.

CONCLUSION

This Court should affirm the District Court as to the liability of Centurian and the Nickles, and should modify the judgment so as not to deduct the deposit made to Petty Motor Lease. This Court should also award interest as stated in Point V and attorney's fees, to be determined by the District Court, as stated in Point VI.

DATED this 18th day of July, 1980.

Respectfully submitted,

MOYLE & DRAPER

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of July, 1980, two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to the following:

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_____