

1982

Walt Baker and Dave Novelle v. Kenneth Hansen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALT BAKER and DAVE
NOVELLE,

Plaintiffs and Respondents

vs.

KENNETH HANSEN,

Defendant and Appellant

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No. 18094

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiffs Walt Baker, Dave Novelle and Robert Berry filed a complaint against Defendant Hansen asserting an agistor's lien against Defendant's cows which were in Plaintiff Baker's possession. Defendant counterclaimed stating the contract for Plaintiffs' possession, care and feeding of Defendant's cows was based upon Plaintiff Baker's misrepresentations, that Plaintiffs breached the contract to care and feed Defendant's cows, and that Plaintiffs breached their duty as bailees.

DISPOSITION IN LOWER COURT

Plaintiff Robert Berry was dismissed on his own motion. The action was tried to the court which entered judgment on Plaintiffs' complaint and dismissed Defendant's counterclaim. Defendant filed a Motion to Amend the Findings of Fact and Conclusions of Law. The Court treated the Motion as one for a new trial and denied it.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Defendant Hansen is a cattle rancher at Evanston, Wyoming. Transcript, p.108. Because of a drought, in 1979 Hansen had to locate new pasture for his cattle herd. p.130 and 132. Hansen first found pasture near Preston, Idaho. p.111. The first part of October, 1979, Hansen advertised in the Salt Lake Tribune for someone to pasture and feed his herd. pp.13,44, and 110. He offered 60 percent of the 1980 calf crop as payment for one year's care. pp. 12 and 110.

Plaintiff Walt Baker responded to the advertisement by calling Hansen. pp. 13, 14, and 110. Baker and Hansen arranged for a meeting in Idaho to look at the cattle. pp. 15,68 and 111.

Plaintiffs examined the cattle in Idaho and agreed to pasture, feed and care for them at Baker's ranch near Kamas, Utah, in consideration of 60 percent of the 1980 calf crop. pp.12,17,20,44 and 112.

Plaintiffs represented to Hansen that Baker had good, excellent pasture and beautiful meadows. p. 112. Although at trial the Plaintiffs denied making any representations as to the pasture and meadows. pp.19 and 83.

The parties agreed that the cows would be tested for pregnancy so that Baker would not be caring for barren cows. The testing was to be done at Baker's ranch and Baker was to provide the equipment necessary for the testing. pp. 17, 18, 129, 141-142. Baker failed to provide the equipment. pp. 141-142.

The cows had been impregnated during three and a half summer months. p.113. Eight bulls had been run with 214 cows. p.113. Dr. Stanly Hull testified at trial that under these conditions 90 percent of the cows should have born calves unless the cows were ill or became malnourished. pp.102 and 105.

Each cow was examined by Dr. Hull prior to leaving Idaho. p. 100. He testified that they were in very good condition, in reasonably full flank, strong and vigorous. pp.101 and 104. Plaintiffs' expert witness, Robert Beall, testified that the cows were in good enough shape to survive the winter with proper feeding. p.64.

Baker stated that the cows looked poor but were sufficiently good for him to agree to a split of the calf crop for consideration pp.16,20 and 111.

The cows arrived at Baker's ranch on October 16 and 24, 1979. p.117. There were 125 cows, pp.21,113-114, 85 yearlings, p.22, five calves, pp.21,114,115, and one bull, pp.22 and 115.

The cattle looked poorly when they arrived at Baker's ranch because of the long truck trip. pp.117,118,142-143. However, witnesses who saw them shortly after the trip testified that they were healthy animals and would survive the winter. pp.64,151,165-166.

Hansen examined the pasture on October 24 and 30, 1979, and testified that it was well grubbed and fed out. pp.119-120. The pastures had just been vacated by another herd of cows. pp.38,44 and 150. Baker testified that the pastures were only fair. p.23.

Hansen testified that had he known the actual condition of the pastures at the time he contracted he would not have contracted with the Plaintiffs. He had entered the contract on the Plaintiffs' representations of the pastures. pp.19,83,112,119-120.

Despite the lack of grass in the pastures, Baker did not start feeding hay until November. pp.24 and 26. Witnesses who observed the cattle testified that they lacked feed and were not being fed hay. pp.153,157,159,166,168.

In late November Baker was running out of feed and money and had to seek the financial support of Plaintiff Novelle. pp.69 and 139.

Hansen went to Baker's ranch on December 31, 1979, and discovered that two yearlings had died and that the cows and calves had lost weight. pp.26,27,121,122 and 153. Further, there was nothing for the animals to eat. pp.121-122.

The next day, January 1, 1980, Hansen took 10 cows, 83 yearlings, and five calves from Baker's ranch.

Baker admitted at trial that it was his fault the cows were doing poorly. He testified that he was not feeding them enough hay. p.27.

In February, 1980, Summit County Sheriff, Ronald Robinson, began to receive complaints that the cattle were being starved. p.93. Sheriff Robinson went to the Baker ranch, examined the cattle and testified that the cattle were starved and that some had died. p.95. He called Hansen and recommended that Hansen come and pick the animals up. p.94.

A neighbor rancher who had observed the cows testified that they were not being adequately taken care of. p.155.

Hansen went to the ranch in February, 1980, and found the cattle in terrible shape, very poor, and with little flesh. pp.122,130, and 170. The animals were not fed. pp.126,170-171. There were five dead carcasses in the field. p.170. One witness testified that he had seen between 13 and 15 dead cows in the field. p.157.

James E. Williams, a veterinarian examined one of the cows and found it to be emaciated, malnourished, and suffering from a torn hip. p.162. Baker claimed that the animal had fallen against a car. pp.173-174.

Hansen asked Baker to allow him to take the cattle home so they would not die. pp.53,54,124,127. Baker replied that Hansen could not have the cows but that Baker would feed the cattle to see that they did better. pp.124-125.

The cattle did somewhat better after that. Witnesses who saw them later in the spring said they looked healthier. pp.63,88,98,125. However, only 65 of the cows were able to bear live calves. Findings of Fact.

Under its terms, the agreement terminated on October 16, 1980. However, Baker did not deliver the cows on that date. On December 6, 1980, Baker allowed Hansen to take 64 cows. Still Baker retained 30 cows, and 24 calves that were born in the spring of 1980. Those animals were still being retained by Baker when the Plaintiffs commenced this action in April, 1981. Findings of Facts 15-18.

Baker did not deliver, nor does he have possession of 26 cows, five yearlings, and one bull or approximately 20 percent of the mature cows delivered to him.

Baker did not deliver the cattle to Hansen in February, 1980, when Hansen requested them, on October 16, 1980, when the contract expired, or on December 6, 1980, because he was claiming an agistor's lien pursuant to Utah Code Ann. §38-2-1 (Cum. Supp. 1974).

Baker bases his claim for feed for the animals on \$20 per yearling per month and \$30 per cow per month. pp.73-74. He had charged the

ARGUMENT

POINT I

THERE IS NO EVIDENCE AS TO THE REASONABLENESS OF PLAINTIFFS' CHARGES FOR FEED, THEREFORE THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF REASONABLE CHARGES FOR FEED.

Hughs v Yardley, 19 Utah 2d 166,428,P.2d 158 (1967), holds that an agistor may claim the reasonable cost of feeding cattle.

In the present case Baker testified that he was charging Hansen \$20 per month per yearling and \$30 per month per cow.

Defendant's counsel objected to the admission of this evidence because there was no foundation as to its reasonableness. p.29. The Court admitted the testimony subject to later proof that the charge was reasonable p.29. No further evidence was presented on the reasonableness of charging Hansen that amount for the care and feeding of the cattle.

On cross examination Baker admitted that he had not charged the previous occupant of the pasture more than seven dollars per head per month.

The evidence shows that while the cattle were in Baker's possession there was not sufficient grass, they were not fed sufficient hay, and that they were being starved during the winter. Twenty percent of the herd died or was lost.

Despite this, the Court entered findings that the amount was reasonable and awarded the Plaintiffs judgment on that amount. Findings of Fact, Conclusions of Law and Judgment.

In Ranch Homes, Inc. v Greater Park City Corporation, 592 p.2d 620 (Utah 1979), the Court held that findings must be supported by substantial evidence and reversed the trial court's finding of the amount of damages.

There is no substantial evidence in the present case that \$20 and \$30 is a reasonable charge for the care and feeding of Hansen's cattle. The only evidence is Baker's testimony that \$20 and \$30 is the amount being charged.

The trial court's finding of the amount of damages should be reversed.

POINT II

PLAINTIFFS' FRAUD ON DEFENDANT PREVENTS THEM FROM RECOVERING DAMAGES FROM DEFENDANT.

Equity demands that parties to a transaction deal with each other fairly and not gain advantage through fraud, misrepresentation, concealment or bad faith. Horiwitz v Davis, 250 P.2d 435 (Olk. 1952). When a party is damaged by the others fraud, equity will provide a remedy. Hilburn v Broadhead, 79 N.M.460, 444 P.2d 971 (1968).

In Hilburn a cotton allotment was sold along with real and personal property. The cotton allotment was less than that represented. The Court, as a matter of equity, decreased the purchase price.

In the present case, Plaintiffs made representations of their ability to perform with the intent of inducing Hansen into the contract. They knew or reasonably should have known that they could not perform as promised. Hansen justifiably relied on the Plaintiffs, entered the contract and was damaged by the loss of his cattle and by the reduction in the calf crop.

The trial court failed to enter a finding in favor of Hansen on the issue of fraud, against the weight of the evidence.

The Supreme Court has the right to review the trial court's findings in equity cases. Utah Code Ann. Utah Constitution, Art. 8, §9. (Cum. Supp. 1971).

In Reed v Alvey, 610 P.2d 1374 (Utah 1980), the trial court ruled a contract was not sufficiently definite to require one of the parties to perform specifically. The Court held that in equity cases it would examine the facts, and in this case reversed the trial court. The standard that is applied on review is that the preponderance of the evidence must support the finding. Coombs v Ouzouman, 24 Utah 2d 39, 465 P.2d 356 (1970).

The preponderance of the evidence in this case is that plaintiffs acted in bad faith, concealed facts from Hansen and misrepresented facts.

They represented that they had adequate pasture for the cows and implicitly represented that they could care for the cows through the winter.

Baker himself later testified at trial that the pasture was only fair. All other witnesses testified that there was no grass in the pasture. Baker admitted that within a month he was out of hay and money.

Further, Plaintiffs concealed the fact that there had been other cows in the pasture.

Baker admitted that he had not been feeding the cows enough hay. Other witnesses testified that they were not fed enough, that they were not fed at all and that they were starved.

Rather than redeliver the animals when Hansen requested, Baker insisted on keeping the animals, thus, increasing Hansen's damages, a clear indication of bad faith.

As a result, Hansen lost 20 per cent of his cows and the calf crop was reduced. Because of the Plaintiffs' fraud, misrepresentation, concealment and bad faith, equity should prevent the plaintiffs from recovering any damages from Hansen and should rescind the contract.

POINT III

FORECLOSURE OF AN AGISTER'S LIEN BY JUDICIAL SALE IS A SUIT IN EQUITY AND EQUITY DOES NOT ALLOW LIENOR TO HOLD ANIMALS INDEFINITELY, CHARGING THE COSTS TO LIENEE.

Utah Code Ann. §38-2-1 (Cum. Supp. 1974) grants a lien to agistors. Enforcement of the lien by private or public sale is also provided for. 1977 Utah Laws, ch. 272 §49. Plaintiffs chose not to enforce by sale. Instead, they sought enforcement by judicial suit.

Judicial enforcement of a statutory lien is a suit in equity. In Perera Company, Inc. v. Goldstone, 491 F. 2d 386 (9th Cir. 1974), a party claimed an inventory lien on personal property. A jury had been demanded to try the case. The court held that judicial enforcement of the lien was in equity; thus, there was no right to a jury.

Washington Asphalt Company v Boyd, 63 Wash2d 690, 388 P. 2d 965 (1964), was a suit to foreclose a mechanic's lien. The court held that the suit was in equity. See also Moral Insurance Company v Cooksey, 285 P. 2d 223 (Okl. 1955).

Plaintiffs content that in the case at bar the lien attached on October 16, 1979.

Hansen demanded delivery of the cattle in February, 1980. Delivery was refused because of the lien. The animals were not delivered to Hansen

when the contract expired because of the lien and

action in April, 1981, because of the lien. Plaintiffs claim the right to hold the cows for over one and a half years, accumulating feed bills, without sale to satisfy the lien. This position is a return to the debtor's prison where the debt can not be paid because of the creditor's attempts to enforce the debt.

Equity requires that he who seeks equity must do equity and that one must come to equity with clean hands. Kimbrough, Summary of American Law (1974) p. 266.

Plaintiffs cannot request equitable enforcement of a lien if Plaintiffs themselves are not willing to do equity. The trial court erred in granting the Plaintiffs equitable enforcement of the lien when they had used the lien to increase damages.

Since this is a suit in equity the Supreme Court may review the facts. Utah Constitution. Art. 8, 9, supra.

The facts are that Plaintiffs could have satisfied the lien by the sale of some of the yearlings in December, 1979. The cattle could have been released to Hansen when he requested in February, 1980. Plaintiffs could have sold the cows that were barren when it was apparent they were barren in the spring of 1980 instead of holding them until December, 1980, a period of at least eight months. Plaintiffs could have sold all of the cows in December, 1980, instead of holding them until April, 1981, a period of four months.

Instead, the Plaintiffs acted to increase damages and should not be provided any equitable relief.

POINT IV

PLAINTIFFS FAILED TO MITIGATE THEIR DAMAGES AND SHOULD NOT BE AWARDED DAMAGES FOR HOLDING CATTLE WHEN THEY COULD HAVE BEEN RELEASED OR SOLD.

The law does not permit an aggrieved party to recover damages when those damages could have been prevented by the aggrieved party's reasonable efforts. Casey v Nelson Brothers Construction Company, 24 Utah 2d 14, 465 P.2d 173 (1970). The aggrieved party is required to actively mitigate damages or lose the right to recover. Utah Farm Production Credit Assn's v Cox, 627 P.2d 62 (Utah 1981). See also 5 Corbin §1039.

Plaintiffs could have reduced their damages by selling animals pursuant to the agistor's lien at the earliest possible date or by delivering to Defendant all of the animals except the minimum necessary to cover the amount of the lien.

Instead the plaintiffs released the yearlings to defendant in December, 1980, and transferred the lien to the mother cows which could not be sold because Plaintiffs needed the calf crop.

Plaintiffs could have released the cows in February when the Defendant requested them, or sold a portion of the cows to satisfy the lien and released the remainder to Defendant.

The barren cows could have been sold when it was apparent they were barren so they would no longer increase the feed bill.

All of the cows and calves could have been sold after October 16, 1980, when the contract terminated, however, some cows were still being held in April, 1981.

POINT V

PLAINTIFFS FAILED TO MITIGATE THEIR DAMAGES AND SHOULD NOT BE AWARDED DAMAGES FOR FEEDING BARREN COWS WHEN PLAINTIFFS COULD HAVE PREGNANCY TESTED THE COWS.

Plaintiffs fail to mitigate their damages by having the cows tested for pregnancy and then releasing the barren cows to Defendant

or selling them pursuant to the lien.

Such action clearly comes within the legal requirement of reasonable, active effort to mitigate damages. Utah Farm Production Cred Ass'n and Casey, supra.

POINT VI

PLAINTIFF BAKER'S ACTION PREVENTED THE PREGNANCY TESTING OF THE COWS, THEREFORE PLAINTIFFS SHOULD NOT RECOVER FOR FEEDING BARREN COWS.

Contract law requires that where an obligor's action makes the obligee's performance difficult or impossible, the obligee's performance is excused, 6 Corbin §1323, and the obligor's action is a repudiation of the contract, 4 Corbin §984.

The Utah Supreme Court has affirmed this rule. In Reed v Alvey, 610 P.2d 1374 (Utah 1980) the plaintiff brought an action for specific performance of a real estate contract. The plaintiff had not tendered the full purchase price as required by the contract. The defendant, however, had not completed a required building on the real estate. The Court held that the defendant's failure to timely perform made the plaintiff's performance difficult or impossible and excused the plaintiff's performance.

In Terris v Jennings, 595 P.2d 857 (Utah 1979), the parties had contracted for the sale of real property. The purchase price of the property was left to future negotiation. The plaintiff failed to present a proposal for the purchase price when requested to do so by the defendant. The Court held that the plaintiff's action had made defendant's purchase of the property impossible and allowed a judgment in defendant's favor.

In the present case the parties agreed that the cows would be pregnancy tested so that Baker would not be caring for barren cows. The parties also agreed that the testing was to be done at Baker's ranch and Baker was to provide the equipment necessary for testing. Baker failed to provide the equipment. None of the evidence presented by Plaintiffs controverts this agreement.

Despite Baker's failure to provide the equipment as agreed, Plaintiffs claim that Defendant should bear the cost of feeding the barren cows. This is contrary to law.

When Baker failed to provide the equipment he repudiated the contract to have the cows pregnancy tested. Plaintiffs cannot claim damages when Plaintiffs action prevent Defendant from performing. Plaintiffs bear the loss caused by the failure to have the cows tested. Defendant is not liable for it.

POINT VII

PLAINTIFFS ARE DEFENDANT'S BAILEES AND ARE LIABLE TO DEFENDANT FOR THE VALUE OF THE ANIMALS NOT ACCOUNTED FOR.

The relationship between Plaintiffs and Defendant is a bailment. In Perry Brothers v Weinberg, 150 Ariz. 406, 466 P.2d 11 (1970), the plaintiff delivered cows to the defendant for the defendant to feed. The defendant was to be compensated by the amount of weight gained by the cows. Some of the cattle disappeared. The court held that the defendants were bailees and responsible for the disappearance of the cows. The court further held that the defendant must compensate the plaintiff for the highest value of the cows unless the defendant could prove a lesser value.

Utah has adopted the same rule in regards to bailments. In

408 P.2d 904 (1965), the plaintiff landed an aircraft at defendant's airport and instructed the defendant's agent to care for the aircraft. The aircraft was destroyed. The Court held the defendant was a bailee and a bailee had the burden of showing the aircraft was not destroyed by its negligence in order to avoid liability. See also Romney v Covey Garage, 100 Utah 167, 111 P.2d 545 (1941).

This Court may reverse the trial court's findings that Plaintiffs proved their nonnegligence if there is no substantial evidence in the record that Plaintiffs proved their non negligence, or if all reasonable minds would be persuaded that the trial court erred. Hanover Limited v Fields, 568 P.2d 751 (Utah 1977) and Ranch Homes, Inc. V Greater Park City Corporation, 592 P.2d 620 (Utah 1979).

In the present case Plaintiffs presented no evidence to indicate their nonnegligence in the disappearance of the animals. Plaintiffs were able to account for the manner of death of eight of the animals but did not present any evidence that Plaintiffs were not negligent in causing their deaths. As to the other missing animals there was no evidence.

There was abundant evidence that Plaintiffs were negligent. The animals were healthy when they arrived at Baker's ranch in October. However, there was no grass for them to eat and Baker did not start to feed them until November. Witnesses testified that the cows were not fed hay, were not fed sufficient hay and that they were being starved. Further, by February the animals had little flesh, were emaciated and malnourished.

During this period of time there were up to 15 dead cows in Baker's pasture.

On these facts reasonable minds could not differ that Plaintiffs failed to prove nonnegligence and were in fact negligent.

Defendant testified at trial that the value of the mature cows was \$650, the yearlings \$280 and the bull \$2,000.00.

An accounting of the animals indicates that 26 cows, five yearlings, and one bull are unaccounted for making a total loss of \$20,300.00 for which Plaintiffs are liable to Defendant.

CONCLUSION

The facts proved at trial show that Hansen delivered a herd of healthy cows to Baker pursuant to a contract under which Baker would pasture, feed and care for the cows for one year in return for 60 per cent of the calf crop. Ninety percent of the cows should have delivered calves.

Baker represented that there was adequate pasture for the cows when there was not. Baker concealed the fact that other cows grazed the pasture before the arrival of Hansen's cows.

The parties agreed that the cows would be pregnancy tested but this was prevented by Baker's inaction.

While the cows were in Baker's possession they were not fed well, their health declined to the point of starvation. Twenty five cows, five yearlings and one bull died or became unaccounted for. Hansen lost 20 per cent of his cattle herd.

Plaintiffs failed to return the cows to Hansen when demand was made for them or at the end of the contract period because they asserted an agisters lien.

Plaintiffs claim \$20 per yearling per month and \$30 per cow per month as damages. However, Plaintiffs presented no evidence at trial

of such amounts as a charge for caring for

Equity prevents Plaintiffs from recovering any damages from Defendant because of Plaintiffs' misrepresentation as to the quality of the pasture, Plaintiffs' concealment that the pasture had been grazed out by a previous herd of cows and because of Plaintiffs' bad faith in failing to care for the animals resulting in a loss of 20 percent of the herd and because they failed to dispose of the animals to mitigate their damages. Further, equity rescinds the contract.

In addition, equity will not allow Plaintiffs to retain possession of the animals for over one and a half years pursuant to an agister's lien but then fail to satisfy the lien by timely sale of the cattle. This, of course, increases damages, which is contrary to the principles of law and equity.

Plaintiffs could have mitigated their damages by having the cattle pregnancy tested and disposing of the barren cows either by sale or return to Defendant.

Plaintiffs agreed that Baker would furnish equipment so that the animals could be pregnancy tested. Baker failed to do this. Defendant cannot be held liable for damages resulting from Baker's default.

Finally, Defendant lost 20 percent of his cattle herd while it was in Plaintiff's possession pursuant to the bailment. Plaintiffs presented no evidence of their nonnegligence in causing the loss. Defendant presented evidence that Plaintiffs were negligent in their care and feeding of the cows. Therefore, Plaintiffs are liable for the value of the missing cows in the amount of \$20,300.00.

Plaintiffs cannot make misrepresentations, conceal facts, act in bad faith, fail to mitigate their damages, prevent Defendant from performing his obligations under the contract.

In fact, Plaintiffs are liable to Defendant for the loss of Defendant's
COWS.

38-1-26

LIENS

excessive claim of lien more than is due him, or to procure any advantage or benefit whatever, is guilty of a misdemeanor.

History: R. S. 1898 & C. L. 1907, § 1399;
C. L. 1917, § 3749; R. S. 1933 & C. 1943,
52-1-25.

38-1-26. Assignment of lien.—All liens under this chapter shall be assignable as other choses in action, and the assignee may commence and prosecute actions thereon in his own name in the manner herein provided.

History: R. S. 1898 & C. L. 1907, § 1396;
C. L. 1917, § 3746; R. S. 1933 & C. 1943,
52-1-26.

Right to perfect lien.

Under this section, right to perfect a lien is assignable. *Smoot v. Checketts*, 41 U. 211, 125 P. 412, Ann. Cas. 1915C, 1113.

Collateral References.

Mechanics' Liens ⇨ 202.
57 C.J.S. Mechanics' Liens § 216 et seq.
53 Am. Jur. 2d 821, Mechanics' Liens
§ 284.

CHAPTER 2

MISCELLANEOUS LIENS

- Section 38-2-1. Lien on livestock—For feed and care.
38-2-2. Liens of hotels and boardinghouse keepers.
38-2-3. Repairman's lien on personal property—Lien subject to rights of holder of security interest.
38-2-3.1. Special lien on personal property for services rendered—General lien of dry cleaning establishments, laundries, and shoe repair shops.
38-2-3.2. Sale of unclaimed personal property.
38-2-4. Foreclosure by advertisement.
38-2-5. Action for deficiency.

38-2-1. Lien on livestock—For feed and care.—Every ranchman, farmer, agistor, herder of cattle, tavern keeper or livery stable keeper to whom any domestic animals shall be entrusted for the purpose of feeding, herding or pasturing shall have a lien upon such animals for the amount that may be due him for such feeding, herding or pasturing, and is authorized to retain possession of such animals until such amount is paid.

History: R. S. 1898 & C. L. 1907, § 1401;
C. L. 1917, § 3771; L. 1927, ch. 46, § 1;
R. S. 1933 & C. 1943, 52-2-1.

Creation and existence of lien.

Lien created by this section is dependent upon effective possession and a servant, by virtue of his relationship to his master, cannot have the quality of possession required and, therefore, cannot have a lien. *National Bank of the Republic of Salt Lake City v. Drulas*, 61 U. 440, 214 P. 24.

An agreement for lien under this section to be effective against chattel mortgagee of sheep must have been in nature of a pledge of the property, and to support pledge the pledgee must have clear, unequivocal, complete, and effective possession at all times, so as to give notice to third parties of the pledgee's rights. Na-

tional Bank of the Republic of Salt Lake City v. Drulas, 61 U. 440, 214 P. 24.

Negligence of agistor.

Where defendant has sold 21 horses to plaintiff, seven of which are in possession of agistor, and upon which he has claimed lien in amount of \$136, and a further lien in sum of \$252 which is incurred by plaintiff after sale, and plaintiff, claiming that through agistor's fault two of the horses have died, settled with him for sum of \$200, whereupon five horses are delivered to him; contention of defendant in action to recover amount paid to agistor that plaintiff could only recover part of \$136 and not the entire amount is without merit since such contention does not take into consideration the loss of two horses by death. *Mayer v. Chandler*, 70 U. 234, 259 P. 406.

Every person who shall make, alter or repair, or bestow labor upon, any article of personal property at the request of the owner or other person entitled to possession thereof shall have a lien upon such article for the reasonable value of the labor performed and materials furnished and used in making such article or in altering or repairing the same, and may retain possession thereof until the amount so due is paid; provided such lien and right to possession shall be subject and subordinate to the rights and interests of ~~[a conditional vendor, chattel mortgagee or other holder of a security interest]~~ any secured parties in such personal property unless such ~~[vendor, mortgagee or holder]~~ secured party has requested such person to make, alter or repair or bestow labor upon such property.

Section 49. Section repealed and reenacted.

Section 38-2-4, Utah Code Annotated 1953, as amended by Chapter 61, Laws of Utah 1953, is repealed and reenacted to read:

38-2-4. Lienholder a secured party for foreclosure—Disposal of property.

Any party holding a lien upon personal property as provided in this chapter shall be deemed to be a secured party for purposes of foreclosure and, at any time after 30 days after default in the payment of any debt secured by such lien, may dispose of such property in the manner provided for the disposal of collateral subject to a security interest.

Section 50. Section amended.

Section 38-3-2, Utah Code Annotated 1953, is amended to read:

38-3-2. Priority of lessor's lien.

The lien provided for in this chapter shall be preferred to all other liens or claims except claims for taxes and liens of mechanics under chapter 1 of this title, ~~[mortgages for purchase money]~~ perfected security interests, and claims of employees for wages which are preferred by law; provided, that when a lessee shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or when his property shall be put into the possession of a receiver, the lien herein provided for shall be limited to the rent for ninety days prior thereto.

Section 51. Section amended.

Section 38-3-5, Utah Code Annotated 1953, is amended to read:

38-3-5. When attachment will issue—Determination of priorities.

Upon the filing of such complaint, affidavit and bond it shall be the duty of the court wherein the same are filed ~~[, or the clerk thereof,]~~ to issue a writ of attachment to the proper officer, commanding him to seize the property of the defendant subject to such lien, or so much thereof as will satisfy the demand, and to make a determination of the priorities of the claims, liens, and security interests in such property.

Respectfully submitted.

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing brief of Appellant and Defendant were served on Terry L. Christiansen, attorney for the Plaintiffs and Respondents, P. O. Box 2297, Park City, Utah 84060, by mailing same, postage prepaid, this 26th day of March, 1982.

Margaret S. Thomson