

1957

# Robert K. Dusenberry and Edith C. Dusenberry v. Taylor's : Brief of Appellants

Utah Supreme Court

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**In the Supreme Court of the  
State of Utah**

**FILED**

AUG 30 1957

ROBERT K. DUSENBERRY and  
EDITH C. DUSENBERRY, his wife,  
Plaintiffs, and Appellants,

vs.

TAYLOR'S, a corporation,  
Defendant and Respondent.

Clerk, Supreme Court, Utah

**CASE  
NO. 8712**

**UNIVERSITY UTAH**

JAN 10 1958

**APPELLANTS' BRIEF** LAW LIBRARY

**ALDRICH & BULLOCK**  
Attorneys for Appellants

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# In the Supreme Court of the State of Utah

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## **APPELLANTS' BRIEF**

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### **STATEMENT OF FACTS**

Prior to 1954, Mr. and Mrs. G. L. Miller had purchased numerous items on open account credit at Taylor's Inc., a Provo, Utah, department store, (Plaintiffs' Exhibit 1). In July, 1954, Mr. G. L. Miller purchased wall to wall carpeting, pad, tile, and linoleum to be installed in a new home and on July 9, 1954, the carpeting and pad and the labor charges for installing were charged out to G. L. Miller on open account. Credit was approved for Taylor's Inc., by

one who initialed the charge slip by the letters "pm", (Plaintiffs' Exhibit 9). On July 26, 1954, the Millers purchased a crib, playpen and mattress, and on that day they paid \$10.00 on their account. On August 30, they paid \$23.00, which was duly credited to the accounts receivable ledger, (Plaintiffs' Exhibit 1). During the months of July and August, 1954, they also purchased numerous items of furniture, consisting of bedroom set, lamps, breakfast set, bedroom screen, sofa and chair covers, and also had the linoleum and tile laid upon the floor of their home. All of these items were charged to G. L. Miller on open account, and are listed on the accounts receivable ledger, (Plaintiffs' Exhibit 1). On August 31, 1954, a payment of \$300.00 was credited to the open account, (Plaintiffs' Exhibit 1). On September 1, 1954, they purchased a bedspread, and it was charged to "G. L. Miller" and again credit was approved by "P.M." and it was charged on the open account, (Page 2 of Defendant's Exhibit 8 and Plaintiffs' Exhibit 1).

It was the practice of Taylor's Inc., to mark the charge slips with the word "Contract" if the charge was to be other than on open account, (Tr. 25). None of the above mentioned sales were so stamped or marked, (Exhibits P-9 and Page 2 of D-8). Mr. G. L. Miller had been interviewed for credit on or about July 10, 1954, by "P.M.", (Defendant's Exhibit 7).

After September 1, and prior to September 9, 1954, the Milers purchased drapes from Taylor's Inc. These items were marked "Contract" and credit was not approved by "P.M.", (Defendant's Exhibit 8, Pages 1, 3 and 4), and on September 9th, 1954, the drapery items were charged to a notes receivable account, (Page 2, Plaintiffs'

Exhibit 1). Also, on September 9, 1954, an entry was made on the accounts receivable ledger, "Trans to Note \$1,962.78" and the open account was thereby balanced as of that date, (Plaintiffs' Exhibit 1). At the same time an entry was made on the notes receivable ledger, "Trans from acct. \$1,962.78". (Page 2, Plaintiffs' Exhibit 1). On that same date Taylor's Inc., secured a promissory note in the amount of \$2,685.71, including finance charges of \$132.21 and which said note also indicated that the sum of \$2,553.50 was "trans. acct.", Plaintiffs' Exhibit P-2). Although all of the charges had been to "G. L. Miller", (Defendant's Exhibit 8 and Plaintiffs' Exhibit 9), the note was signed only by "Eva K. Miller", (Plaintiffs' Exhibit 2). On the everse side of the note, among other conditions, it was recited, "1. Title to the property mentioned herein shall remain in Taylor's until the purchaser pays this note in full and complies with all other conditions to be performed by him."

In the month of July, 1955, the plaintiffs, Major Robert K. Dusenberry, United States Air Force, and his wife, Edith C. Dusenberry, were seeking a home in the Provo area. Under date of July 25, 1955, they received a letter from Mrs. G. L. Miller offering to sell the Miller home and reciting among other things that "The home could be available for you by August 15," and that "It is carpeted and draped", (Plaintiffs' Exhibit 5). On August 30, 1955, they obtained a warranty deed from Eva K. Miller, (P-3) and on that same date gave a mortgage on the property to State Savings & Loan Association for \$12,500.00, (Plaintiffs' Exhibit 4).

Mrs. Dusenberry and her children lived in the home from that time until the 15th day of September, 1956, when

she and her husband leased the home to Mr. and Mrs. John W. Manning and gave the Mannings an option to purchase the property, (Plaintiffs' Exhibit 6).

Mr. and Mrs. Dusenberry did not acquire any furniture from Eva K. Miller, and at the time they took possession of the property part of the drapes had been removed. Never at any time while the plaintiffs, Mr. and Mrs. Dusenberry, occupied the premises did they know that the defendant, Taylor's Inc., claimed title to the carpeting, linoleum, tile or drapes, (Tr. 4). Sometime after Mr. and Mrs. Manning took possession of the property a representative of Taylor's Inc., called at the home and told Mrs. Manning that the carpeting, linoleum and tile on the floors and the drapes belonged to the Company, (Tr. 26). Taylor's Inc., first manifested an alleged title to these items only after they had learned that Mr. G. L. Miller had taken out bankruptcy in the state of California, (Tr. 33). Mr. Miller had gone to California prior to the time that Mrs. Miller offered to sell the house to the plaintiffs.

After the plaintiffs leased the premises to Mr. and Mrs. Manning they moved to the state of Texas, where Mr. Dusenberry was and is on active duty with the U. S. Air Force. After plaintiffs learned of the defendant's claim they filed a suit for a Declaratory Judgment against the defendant, Taylor's Inc.

The case was heard by the Honorable Maurice Harding in the Fourth Judicial District Court in Utah County, and this appeal is from his Findings of Fact, Conclusions of Law and Judgment, entered in favor of the defendant.



**STATEMENT OF POINTS****POINT I**

THE COURT ERRED IN FINDING AND HOLDING THAT TITLE TO THE CARPETING, TILE AND LINO-LEUM WAS STILL VESTED IN DEFENDANT.

**POINT II**

THE ALLEGED CONDITIONAL SALES CONTRACT IS INVALID AND UNENFORCEABLE BECAUSE IT DOES NOT MEET THE STATUTORY REQUIREMENTS.

**POINT III**

THE RIGHT OF THE PLAINTIFFS, AS PURCHASERS OF THE REALTY WITHOUT NOTICE OF THE DEFENDANT'S CLAIM TO FIXTURES, ARE UNAF- FECTED BY THE DEFENDANT'S CLAIM OF TITLE THERETO.

**POINT IV**

**RUSSELL v. HARKNESS** IS NOT AUTHORITY ON THE FACTS OF THE PRESENT CASE.

**THE ARGUMENT****POINT I**

THE COURT ERRED IN FINDING AND HOLDING THAT TITLE TO THE CARPETING, TILE AND LINO-LEUM WAS STILL VESTED IN DEFENDANT.

The ledger sheet shows a series of open account transactions consisting of charges and credits extending from October 27, 1951, (Plaintiffs' Exhibit 1). That account,

in the name of Mrs. G. L. Miller, was balanced by an entry "Trans. to note" on August 31, 1953, (P-1). In July of 1954, a carpeting job amounting to \$1,267.32 was charged out to G. L. Miller, credit was approved by "P'M.", (P-9) and that amount was entered on the accounts receivable ledger, (P-1). On that same day a credit of \$300.00 was also entered, (P-1). All of the items involved in these transactions had been charged out to G. L. Miller, (Exhibits D-8 and P-9); however, Mr. G. L. Miller did not sign the contract upon which defendant relies, (Exhibit P-2).

The foregoing clearly shows that title passed from the defendant to G. L. Miller, and that defendant, by the devise of the alleged title retaining note later obtained from Eva K. Miller, attempted to regain title for its own security. At most, such a contract could amount only to an instrument in the nature of a chattel mortgage, which was required to be filed of record before it became binding on an innocent purchaser for value. An absolute sale may not subsequently be converted into a conditional sale by the written agreement of the parties without change of possession, at least where it would be to the prejudice of a subsequent purchaser of the vendee without notice of the agreement. **Van Winkle v. Crowell**, 146 U. S. 42, 13 S. Ct. 18.

The chief criterion for determining the character of the transaction is the intention of the parties as disclosed by the entire contract, the circumstances attending the transaction, and the conduct of the parties. 47 Am. Jur 17. While defendant did not see fit to introduce all of the sales slips for the various items entered on the accounts receivable ledger, the one that was introduced, being the \$1,267.00 carpet item, shows a simple charge to G. L. Miller on the 9th day of July, 1954, with credit approved for the

company by "P.M.", (P-9). Defendant's witness, Mr. Steedman, stated that his company made a distinction between sales to be made on open account and those to be put on a contract, and that sales to be put on contract were stamped "contract"., (Tr. 24-25). None of the sales made prior to September 3, 1954, were so stamped, (Page 2 of D-8 and P-9), and all of these items were posted to the accounts receivable ledger, (P-1). Sales made on and after September 3, 1954, appear to have been stamped "contract", (Pages 1, 3 and 4 of D-8), and were posted to the notes receivable ledger. On September 9, 1954, the balance owing on the open account was transferred to the note ledger, (Page 2 of P-1), and on the same date that the note was executed, (P-2).

All of the charges were made to G. L. Miller, (D-8 and P-9), and G. L. Miller was the person named as credit applicant, (D-7). G. L. Miller, however, did not sign the note, (P-2).

Where property was delivered to purchaser, and there was no previous contract retaining title in seller, the fact that the delivery slip contained the words "conditional sale, title retained by vendor until paid in full" was held not sufficient to show a conditional sale. **Utah Association of Credit Men v. Buller, 57 Utah 270, 194 Pac. 127.**

The devise of a conditional sale contract has severe remedial incidents, and is not favored in the law. Such a contract must be clearly proved, and the courts tend to resolve doubts as to whether a transaction is a conditional sale or chattel mortgage in favor of the latter construction. **47 Am. Jur. 6, Paragraph 827.**

## POINT II

THE ALLEGED CONDITIONAL SALES CONTRACT IS INVALID AND UNENFORCEABLE BECAUSE IT DOES NOT MEET THE STATUTORY REQUIREMENTS.

The laws of the State of Utah with respect to conditional sales were amended in 1953, to require, among other things, that every conditional sales contract for the time sale of tangible personal property, be signed by both the buyer and the seller. 15-1-2a (10-b), U. C. A. 1953, as amended by Chapter 24, Paragraph 2, Laws of Utah, 1953. The contract here considered is not signed by either G. L. Miller or the seller and, therefore, does not even purport to meet the statutory requirement. The requirements of such statute are mandatory, and compliance therewith is indispensable. 47 Am. Jur. 40, and authorities there cited.

## POINT III

THE RIGHT OF THE PLAINTIFFS, AS PURCHASERS OF THE REALTY WITHOUT NOTICE OF THE DEFENDANT'S CLAIM TO FIXTURES, ARE UNAFFECTED BY THE DEFENDANT'S CLAIM OF TITLE THERETO.

It was well known to the defendant at the time it sold and installed the linoleum, tile and wall-to-wall carpeting involved in this case that it would be permanently attached to the house, and that upon a resale it would pass as a part of the real estate. The conditional vendor of chattels attached to realty has repeatedly been held to be without right of recovery of the fixtures, as against a subsequent

purchaser of the realty without notice of the existence of the conditional sale. **Annotation 141 ALR 1284.**

#### POINT IV

**RUSSELL v. HARKNESS IS NOT AUTHORITY ON THE FACTS OF THE PRESENT CASE.**

The Utah case, **Russell v. Harkness, 4 Utah 197, 7 Pac. 865 Aff'd 118 U. S. 663**, cited by the defendant and relied upon by the trial court, is entirely different from the instant case. In that case the seller was the owner of and had possession of the equipment at the time the conditional sale agreement was executed. The vendee took possession after the agreement was made. In addition, the purchaser from the conditional vendee, at the time of purchase, knew that the equipment had not been paid for and knew that the conditional vendor claimed title thereto. It was not a situation where a sale on open account was later changed to a conditional sale without redelivery of possession to the vendor, as in the instant case.

#### CONCLUSION

The Trial Court erred in holding that title to the items in question was vested in defendant.

Respectfully submitted,

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