

1957

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

Utah Supreme Court

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Thomas S. Taylor;

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

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

vs.

TAYLOR'S, a corporation,  
Defendant and Respondent.

**CASE  
NO. 8712**

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**Brief of Defendant and Respondent**

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CASE  
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## Brief of Defendant and Respondent

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### STATEMENT OF FACTS

Respondent cannot accept the Statement of Facts set out in Appellants' Brief as a complete or proper statement. It is confined largely to that testimony which supports appellants' theory, disregarding the great weight of the evidence as found by the lower court. Appellants' Brief dramatically omits all of the testimony and evidence concerning the intention of the original contract parties, the general practice of defendant in sales of his kind, and the actual practice used by defendant in this particular sale.

This action was brought by plaintiffs praying for a Declaratory Judgment to determine the true owner of the carpets and drapes in question (Prayer of Plaintiffs' Complaint). Defendant prayed for the same relief in its Answer (Prayer of defendant's Answer). The only relief requested by either party was pertaining to the title of the carpets and drapes (Complaint and Answer). There is no evidence or issue before this Court or the lower court that the merchandise in issue is a fixture in any way, manner, or form, of any building. The term "wall-to-wall carpeting" is used for the first time in Appellants' Brief.

Prior to August 31, 1954, Mrs. G. L. Miller purchased various items of merchandise from defendant upon an open account. Mrs. Miller periodically requested defendant to hold merchandise until she had finally determined she wanted to purchase said merchandise (Plaintiffs' Exhibit No. 1). Mrs. Miller selected various items of furniture, including carpets, linoleum and drapes, all of which were invoiced as stated on Plaintiffs' Exhibit No. 9 and page 2 of Defendant's Exhibit 8. That sometime after that a down payment of \$300.00 was made on merchandise selected by Mrs. Miller (Tr. 51). That during the selection of the merchandise by Mrs. Miller, she told defendant's salesman, Mr. Steadman, that she intended to purchase and finance the merchandise she was selecting upon defendant's contract (Tr. 20). Defendant has only one contract form and that this form contains a title retaining provision in it. On or about July 10, 1954, Mr. G. L. Miller was interviewed for credit by "P.M.", one of defendant's employees (Defendant's Exhibit No. 7). On August 31, 1954, the carpets in question, together with linoleum and other items, were posted upon defendant's Accounts Receivable Ledger (Plaintiffs'



Exhibit No. 1) for purposes of a bookkeeping entry (Tr. 39). That the cash payment of \$300.00 made by Mrs. Miller to defendant was transferred from the hold sheets to the Accounts Receivable Ledger on August 31, 1954 (Plaintiffs' Exhibit No. 1). On September 9, 1954, Mrs. Miller executed defendant's contract, and defendant posted the carpets in question, together with other items, to defendant's Notes Receivable Ledger (Plaintiffs' Exhibit No. 1, page 2). That on the same day, September 9, 1954, Mrs. Miller purchased drapes from defendant (Page 2, Plaintiffs' Exhibit No. 1) and executed a Conditional Sales Contract (Plaintiffs' Exhibit No. 2) which specifically retained title.

Subsequent to the making of the invoice and the execution of the Conditional Sales Contract by Mrs. Miller (Plaintiffs' Exhibit No. 2) (Tr. 35), and prior to September 30, 1954, the carpeting and drapes in issue herein were delivered and installed by defendant in the home of Mrs. Miller (Plaintiffs' Exhibit No. 1). That on September 30, 1954, the final determination was made of the purchase price of said carpeting and drapes, and Mrs. Miller was given credit upon her Account Receivable Ledger (Plaintiffs' Exhibit No. 1) for the carpet pad not used in the Miller house and labor not used (Tr. 24).

It was the custom and practice of defendant to post selected merchandise to its Accounts Receivable Ledger of its customers as a bookkeeping entry for the purposes of its records until the customer executed the intended contract (Tr. 43); that the invoice of said merchandise was either marked "charge" or "Contract" (Tr. 32) after delivery of the merchandise to the customer (Tr. 43). That in the case of carpeting and floor covering and drapes, the

final purchase price was not determined until after the merchandise was installed whenever defendant was to make the installation, and the amount of material used, plus the labor charge, was finally determined and then charged (Tr. 24).

The plaintiffs purchased a home situated in Orem, Utah, from the conditional vendee, Mrs. Miller; that at the time of the purchase of the home, plaintiffs were not aware of the outstanding contract between defendant and Mrs. Miller, and had no actual knowledge until September, 1956; that at the time of the purchase of the home by plaintiffs from Mrs. Miller, Mrs. Miller attempted to sell the carpets and drapes in issue to plaintiffs; that plaintiffs made no inquiry concerning the alleged title of the subject property in Mrs. Miller, other than the fact that Mrs. Miller had possession of said property (Tr. 4).

Defendant had made numerous demands for payment upon Mrs. Miller, and received many promises that were not kept by Mrs. Miller (Plaintiffs' Exhibit No. 1) (Tr. 44). Defendant was not aware of the sale of the Miller house by Mrs. Miller to plaintiff until the summer of 1956 (Tr. 44). Plaintiffs did not obtain a Bill of Sale of any kind from Mrs. Miller to indicate ownership of the said personal property. The only written evidence before the Court is a letter purportedly written by Mrs. Miller (Plaintiffs' Exhibit No. 5) during the negotiations of the sale of the house to plaintiffs. The final contract between plaintiffs and Mrs. Miller does not indicate a transfer of title of carpets or drapes to plaintiffs. Neither the deed (Plaintiffs' Exhibit No. 3) nor the mortgage (Plaintiff's Exhibit No. 4) show any evidence of title in the plaintiffs.



## STATEMENT OF POINTS

### POINT I

THE COURT DID NOT ERR IN FINDING AND HOLDING THAT TITLE TO THE CARPETING WAS STILL VESTED IN DEFENDANT. THE COURT DID NOT RULE UPON THE TITLE TO THE TILE AND LINOLEUM.

### POINT II

THE CONDITIONAL SALES CONTRACT IS VALID AND ENFORCEABLE. IT MEETS ALL STATUTORY REQUIREMENTS AS TO ITS ENFORCEABILITY.

### POINT III

PLAINTIFFS ARE NOT PURCHASERS OF REALTY WITH FIXTURES ATTACHED. PLAINTIFFS HAVE NOT RECEIVED TITLE TO THE MERCHANDISE FROM ANY SOURCE.

### POINT IV

RUSSELL VS. HARKNESS IS AUTHORITY ON THE FACTS OF THE INSTANT CASE.

## THE ARGUMENT

### POINT I

THE COURT DID NOT ERR IN FINDING AND HOLDING THAT TITLE TO THE CARPETING WAS STILL VESTED IN DEFENDANT. THE COURT DID NOT RULE UPON THE TITLE TO THE TILE AND LINOLEUM.

The facts as determined by the lower court clearly show that Mrs. Miller, the conditional vendee of the carpets and drapes at issue, selected the carpets, made a down payment with a request to hold the merchandise; told the salesman before and during the selection of the carpets and drapes that she intended to purchase the merchandise upon a contract; that defendant had only one type of contract, which retained title in the seller until the merchandise was paid for; that Mr. Miller was interviewed for credit; that at the time of making out the invoice for the carpeting the final purchase price was not determined for the reason that the actual amount of carpeting and labor could not be determined until after it was installed and the labor performed by defendant as agreed upon. That subsequent to the delivery of the carpets a bookkeeping entry was made on defendant's Accounts Receivable Ledger, and the merchandise transferred from a hold sheet of defendant. That subsequent to this bookkeeping entry upon defendant's Accounts Receivable Ledger, Mrs. Miller executed the contract in evidence, and another bookkeeping entry was made by defendant to transfer the account to the contract ledger. That the final purchase price on the carpets was not determined until after the contract was signed by Mrs. Miller.

It was the intention of the conditional vendor and vendee that title to the subject personal property should remain in the defendant until after the said property was paid for. Property in specific goods passes when the parties so intend. (60-2-2, UCA 1953: E. C. Olsen Co. vs. Tax Commission, 109 Utah 563, 168 P. 2d 324, 331).

This was a contract to sell prior to the execution of the Conditional Sales Contract, and the final determination of the purchase price. The contract of sale was made at the

time of the execution of the Conditional Sales Contract.

Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer. (60-2-4 (1) UCA 1953.

The contract was not final until the purchase price was ascertained, and this was not done until the subject property was installed in the house and the exact amount of material and labor determined to compute the final purchase price.

When terms for payment left for future determination, the contract is incomplete. *Hi-Way Motor Company vs. Service Motors Co.*, 68 Utah 65, 249 P. 133.

The merchandise was not in a deliverable state at the time plaintiffs allege title passed, for the parties agreed that defendant was to perform the labor.

“Where there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done.” 60-2-3 (2) UCA 1953.

Defendant's posting upon its Accounts Receivable Ledger of the carpets was merely a bookkeeping entry for the purpose of keeping a record of where the merchandise was after delivery by defendant to the house of conditional buyer. It was not the final agreement between defendant

and conditional vendee. The defendant's method of book-keeping is not important or determinative as to the nature of the contract. *Ford Motor Company vs. National Bond & Investment Co.*, Illinois, 14 NE 2d 306, 175 ALR 1372.

There is no written evidence presented by plaintiffs upon which to base their claim of title to the property in question, the drapes and carpets. The letter to plaintiffs from Mrs. Miller was apparently written during the negotiations for the sale of the house (Plaintiffs' Exhibit No. 5). The final contract, the deed and mortgage (Plaintiffs' Exhibits Nos. 3 and 4) do not evidence any transfer of title to the carpets or drapes to plaintiffs. There is no Bill of Sale in evidence. Plaintiffs have nothing upon which to base their alleged title.

The Statute of Frauds requires that a sale of merchandise valued in excess of \$500.00 be in writing. 25-5-1 to 9, UCA 1953. There is no such writing in evidence before this Court. The original cost of the carpets alone was \$1,267.32, and they were only one year old when the purported sale was made by Mrs. Miller to plaintiffs. Defendant intended to and did comply with Statute of Frauds by the execution of the Conditional Sales Contract.

This was clearly a conditional sale and not a chattel mortgage, as argued by plaintiffs. A Conditional Sales Contract as defined in 15-1-2a (c), UCA 1953, is as follows:

(1) (a) "Any contract for sale of tangible personal property, with or without accessories, under which possession is delivered to the buyer but the title vests in the buyer thereafter only upon the payment of all or part of the price, or upon the performance of any other condition."

(1) (c) "Any contract for the sale of any tangible

personal property, with or without accessories, under which the possession is delivered to the buyer, and a lien upon the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition."

The above statute clearly defines the Conditional Sales Contract in issue as a conditional sale. The title never passed. Title was retained by defendant at all times. Title has to pass before a chattel mortgage may be obtained.

Freed Furniture and Carpet Co. vs. Sorensen, 28 Utah 419, 432, 79 P. 564, 568, defines a conditional sale as "a sale in which the transfer of title to the thing sold, to the purchaser, or retention of it, is made to depend upon the performance of some condition."

This is not a situation where the merchandise was sold for resale to a dealer who had apparent authority to sell the merchandise. Mrs. Miller had no apparent authority to sell other than possession of the merchandise itself. Possession alone is not sufficient to rely upon. Russell vs. Harkness, 4 Utah 197, 7 P. 865.

The drapes were purchased the same date the Conditional Sales Contract was executed. There is no question but what the title to the drapes remained with the defendant.

In summary, this was a conditional sale by defendant to Mrs. Miller, and not a chattel mortgage. Defendant retained title to the said property at all times and stages of the negotiations between Mrs. Miller and defendant. There was no absolute sale until the Conditional Sales Contract was executed and the final purchase price determined. Mrs. Miller had no title to convey to plaintiffs. Plaintiffs have no present evidence of title to the said personal property.

## POINT II

THE CONDITIONAL SALES CONTRACT IS VALID AND ENFORCEABLE. IT MEETS ALL STATUTORY REQUIREMENTS AS TO ITS ENFORCEABILITY.

The Conditional Sales Contract in issue herein is valid and enforceable.

The contract was signed by the original buyer, Mrs. G. L. Miller, the contracting party with defendant. Mrs. G. L. Miller was not the contracting party, as alleged by plaintiffs in their brief (Plaintiffs' Exhibit 2).

15-1-2a (B-1) is a statute regulating the rate of interest to be charged on conditional sales contracts. The lower court specifically determined that usury was not an issue in this case (Tr. 112). The evidence of defendant proved beyond doubt that there was no question of usury on the Conditional Sales Contract (Tr. 43).

The compliance of the provision of the above statute which states that the parties to the contract should both sign the contract is not mandatory. The second paragraph of 15-1-2a (B-5) states as follows: "If the seller, except as the result of an accidental or bona fide error in computation shall violate any other provision of this section, such failure shall in no way affect the validity or enforceability of the conditional sales contract."

The only forfeiture provision of the said statute is in the event seller intentionally violate the interest provisions of the chapter. 15-1-2a (B-5). Errors in computation made in good faith are excusable. The statute itself specifically states that the failure of seller to sign the conditional sales contract does not affect its validity or enforce-



ability. Plaintiffs' contention to the contrary is entirely without merit.

A statute is not mandatory unless a forfeiture provision in the statute makes the mission to perform fatal. *Clark Montana Realty Company vs. Butte, etc., Copper Co.*, 233 Fed. 547, Affd. 249 U. S. 12

### POINT III

PLAINTIFFS ARE NOT PURCHASERS OF REALTY WITH FIXTURES ATTACHED. PLAINTIFFS HAVE NOT RECEIVED TITLE TO THE MERCHANDISE FROM ANY SOURCE.

There is no evidence in the entire record that the carpeting in issue is wall to wall carpeting, or that the carpeting is or was attached to a building, temporarily or otherwise. The only and first place that wall to wall carpeting is mentioned is in Appellants' Brief.

As pointed out in my Statement of Facts herein, there is no issue before the Court pertaining to linoleum or tile (See prayers of Plaintiffs' Complaint and Defendant's Answer. See Judgment).

There was no evidence taken by the lower court as to whether or not the carpets or drapes are fixtures to any building or reality. The burden of proof is on appellant to prove that the merchandise was permanently attached to the realty, and will be treated as chattels rather than as fixtures in the absence of any evidence to the contrary. *Strong vs. Sunset Copper Company*, Washington, 114 P. 2d 526, 135 ALR 423.

Even assuming the merchandise at issue was attached to realty, personal property may retain its character as such

where it is agreed by parties interested, even though annexed to realty. 42 Am. Jur. 209, Sec. 29.

#### POINT IV

#### RUSSELL VS. HARKNESS IS AUTHORITY ON THE FACTS OF THE INSTANT CASE.

Russell vs. Harkness, 4 Utah 197, 7 Pac. 865, Afd. 118 U. S. 663, is very similar to the instant case. The reports of the case do not state when possession was taken by the conditional vendee other than as described as follows on page 866 of 7 Pac. 865: "that Phelan & Ferguson took possession of the property in Idaho, where it was at date of contract, and remained in possession until the second day of December, 1882." This does not disclose whether possession was taken before, during, or after the date of the contract.

The record does not disclose any attempt on the part of plaintiffs to determine whether or not Mrs. Miller had a valid title or not to the merchandise she proposed to sell; nor did they obtain any evidence of title from her.

On page 868 of 7 Pac. 865, "every person competent to contract is presumed to know that possession alone is not sufficient to convey good title as against the owner, and if the purchaser relies upon it without inquiry, he does it at his peril." It is the duty of a purchaser to inquire and see that the vendor has good title to his property which he undertakes to sell.

The plaintiffs certainly could have protected themselves by a simple inquiry as to where the merchandise was purchased, and if it was paid for. They could have withheld payment until this was determined.

In *Russell vs. Harkness*, the Utah Supreme Court quotes with approval from *Coggill vs. Hartford & N. H. R. Co.*, 3 Gray 545, Mass, as follows:

“The vendee in such cases having no right to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary rule of carrying into effect the intention of the parties to a conditional sale and delivery. There is no good reason or equity in placing the burden of a fraudulent sale by a vendee, in violation of the condition on which he received the property, upon a bona fide vendor, rather than upon a bona fide purchaser. On the contrary, if either is to lose by his fraudulent act, it should be the latter, who has dealt with a party having no authority, instead of the former, who relies upon a valid subsisting contract as the foundation of his claim. It is the duty of the purchaser to inquire and see that his vendor has a good title to the property which he undertakes to sell:”

While it is true that in *Russell vs. Harkness* the purchaser from the conditional vendee, at the time of the purchase, knew that the merchandise was not paid for and knew that the conditional vendor claimed title thereto, the Utah Supreme Court clearly states that a purchaser cannot rely upon mere possession alone in a conditional vendee and purchase the merchandise without fulfilling his duty of inquiry to determine whether or not the conditional vendee has good title or not before he advances money on the purchase. It is the purchaser who does not perform his duty of inquiry who should suffer any loss rather than the conditional vendor who relies upon his valid contract.

## CONCLUSION

The evidence is abundant to support lower court.

The original contracting parties did not intend title to pass to vendee until merchandise was paid for. Title remained and does still remain in defendant. This was a conditional sale of personal property as intended by both parties to the contract. Plaintiffs received no title or even any evidence of title from conditional vendee.

The judgment of the trial court should be affirmed, with costs to defendant and respondent.

Respectfully submitted,

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