2000

MARION L. KESLER and GREGORY L. KESLER, a minor, by Marion L. Kesler v. WILLARD B. ROGERS and ROCKEFELLER LAND AND LIVESTOCK COMPANY : Petition for Rehearing and Brief in Support Thereof of Appellants, Rockefeller Land and Livestock Company and Willard B. Rogers

Utah Supreme Court

Pugsley, Hayes, Watkiss, Campbell & Cowley; Attorneys for Respondent.
Gustin & Gustin; Attorneys for Defendant, Walter W. Kershaw; Robert C Cummings, William H Henderson, Mark S Miner; Attorneys for Appellants Willard B. Rogers and Rockefeller Land and Livestock Company.

IN THE SUPREME COURT OF THE STATE OF UTAH

MARION L. KESLER and GREGORY L. KESLER, a minor, by Marion L. Kesler, Plaintiffs and Respondents, vs. WILLARD B. ROGERS and ROCKEFELLER LAND AND LIVESTOCK COMPANY, Defendants and Appellants, and EDWARD B. ROGERS, et al., Defendants.	Case No. 13915

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF OF APPELLANTS, ROCKEFELLER LAND AND LIVESTOCK COMPANY AND WILLARD B. ROGERS

Appeal from the Judgment of the District Court
of Millard County, Utah
The Honorable H. Maurice Harding, Judge

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CASES AND AUTHORITIES CITED

IN THE SUPREME COURT

OF THE

STATE OF UTAH

MARION L. KESLER and GREGORY L. KESLER, minor, by Marion L. Kesler,	:	
Plaintiffs - Respondents,	:	
vs.	:	
WILLARD B. ROGERS and ROCKEFELLER LAND AND LIVESTOCK COMPANY,	:	Case No. 13915
Defendants - Appellants,	:	
and	:	
EDWARD B. ROGERS, et al.,	:	
Defendants.	:	

PETITION FOR REHEARING TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

Come now petitioners, Rockefeller Land and Livestock Company and Willard B. Rogers, and hereby respectfully request a rehearing in the above-entitled cause and that the Decision and Opinion of this Honorable Court filed herein on October 24, 1975, be reversed for the reason that the Supreme Court has erred in the following particulars:

POINT I. THE COURT OVERLOOKED WELL SETTLED LAW IN RULING THAT IT HAD "NO REASON TO BE CONCERNED WITH THE STATUTE OF FRAUDS HERE. WE ARE DEALING WITH WRITTEN CONVEYANCES SIGNED BY THE PARTIES TO BE CHARGED THEREBY."

POINT II. THE COURT MISREAD THE RECORD WHEN IT STATED THAT "KESLER AND KERSHAW ENTERED INTO AN AGREEMENT BY WHICH KESLER WOULD TRANSFER HIS ENTIRE PURCHASE UNDER THE STAPLES ESCROW TO INSURE THAT THE TITLE TO THE 480-ACRE TRACT WOULD LATER BE CLEARED AND TRANSFERRED TO KERSHAW" AND "AS SOON AS TITLE TO THE 480-ACRE TRACT HAD BEEN CONVEYED TO KERSHAW HIS SECURITY INTEREST IN THE REMAINDER OF THE STAPLES ESCROW OWNED BY KESLER WOULD TERMINATE."

POINT III. THE COURT ERRED IN HOLDING THAT THIS CASE WAS TRIED BY THE TRIAL COURT WITH AN ADVISORY JURY AND THAT, THEREFORE, IN EFFECT THE TRIAL COURT HAD NO DUTY TO MAKE ANY "NICE DISTINCTIONS" IN THE JURY INSTRUCTIONS AS TO THE BURDEN OF PROOF.

POINT IV. THE COURT ERRED IN ALLOWING A JUDGMENT FOR $5,000 PUNITIVE DAMAGES TO STAND.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

NATURE OF THE CASE

This action involves the property in the Staples Escrow (other than the 480 acres), and the main thrust of the case was that respondents as plaintiffs in the lower court sought the return of the cattle, or damages if return could not be had, and sought to quiet title in themselves to the remainder of the property of the Staples Escrow. Appellant and defendant, Rockefeller Land and Livestock Company, sought to quiet title in itself to the said property.

DISPOSITION OF THE CASE BY THE SUPREME COURT

The Supreme Court sustained the lower court's decision which quieted title to the property in respondents and which awarded them compensatory damages for the cattle taken by defendants and appellants. The Supreme Court also reduced from $10,000 to $5,000 the judgment for punitive damages against the defendants and appellants.

RELIEF SOUGHT ON PETITION FOR REHEARING

Petitioners seek a decision on rehearing quieting the title to the property in Rockefeller Land and Livestock Company, and vacating compensatory damages and vacacting in its entirety the judgment for punitive damages.

ARGUMENT

POINT I. THE COURT OVERLOOKED WELL SETTLED LAW IN RULING THAT IT HAD "NO REASON TO BE CONCERNED WITH THE STATUTE OF FRAUDS HERE. WE ARE DEALING WITH WRITTEN CONVEYANCES SIGNED BY THE PARTIES TO BE CHARGED THEREBY."

This ruling by the court appears to be contrary to authority on the force of the statute of frauds. Appellants invoked the statute of frauds because conveyances absolute on their face were involved. Respondents' position was that parol evidence could be adduced to show that the absolute conveyances were intended as security.

The law seems clear that an equitable interest in land is as much prohibited by the statute of frauds as is an outright conveyance. That is, a party can no more create an equitable interest by parol than he can create an outright conveyance, in the absence of fraud, duress, mistake or the like. In 55 Am. Jur. 2d Subject Title: Mortgages, Section 49, page 225, it is stated:

> "Since the conversion of an absolute conveyance into a mortgage by means of parol evidence involved in effect the establishment of an interest in land, it is obvious that literally construed, the provision of the statute of frauds declaring that no person shall be charged upon any "contract or sale of land, or any interest in or concerning the same", unless the agreement, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or some other person by him lawfully authorized, would constitute an effectual barrier to the operation of the

unrestricted doctrine of the admissibility of parol evidence. Soon after the statute of frauds came into force in England, however, Lord Nottingham (who, it should be noted, had himself framed it) explicitly rejected this view, on the ground that a grantee who repudiated his promise to allow redemption was guilty of fraud, parol proof of which the statute was not designed to inhibit. That ruling has been consistently followed in England and has been adopted without dissent in other jurisdictions where statutes of similar tenor prevail."

In 37 C. J. S. Title: Frauds, Statute of, Section 82, page 587, it is stated:

"81. Equitable Interests.

Equitable estates in land are within the statute of frauds and their creation or transfer by parol is therefore, prohibited.

It is well settled that the statute of frauds embraces equitable estates in land, inasmuch as they are, even more than legal estates, exposed to the mischiefs which that statute was designed to remedy. Thus, under the statute of frauds, an equitable interest in, or title to, land cannot be created, transferred, sold, conveyed, or assigned by parol."

As as stated in Deseret Centers, Inc. v. Glen Canyon Inc., 11 Utah 2d, 166, 35 Pac. 2d 286 (1960), it is stated:

"Absent fraud, duress, mistake, or the like attributable to the grantee, a competent grantor will not be permitted to attack or impeach his own deed."

Appellants also invoked the parol evidence rule as part of the property involved was personal property. The parol evidence rule likewise protects against varying the terms of written documents complete on their face by parol evidence "in the absence of fraud or mistake". Fox Film Corp. v. Ogden Theater Co., 82 Utah 279, 17 Pac 2d 294 (1934); Jewell v. Horner, 12 Ut 2d 328, 366 Pac 2d 594 (1961).

POINT II. THE COURT MISREAD THE RECORD WHEN IT STATED THAT "KESLER AND KERSHAW ENTERED INTO AN AGREEMENT BY WHICH KESLER WOULD TRANSER HIS ENTIRE PURCHASE UNDER THE STAPLES ESCROW TO INSURE THAT THE TITLE TO THE 480-ACRE TRACT WOULD LATER BE CLEARED AND TRANSFERRED TO KERSHAW" AND "AS SOON AS TITLE TO THE 480-ACRE TRACT HAD BEEN CONVEYED TO KERSHAW HIS SECURITY INTEREST IN THE REMAINDER OF THE STAPLES ESCROW OWNED BY KESLER WOULD TERMINATE".

Appellants on page 2 of their opening Brief challenged that there was such evidence, stating:

> "There is not a single word of testimony by either Kesler or Kershaw of any agreement between Kesler and Kershaw to pay off the Staples Escrow Agreement -- not to mention total lack of evidence of fraud, breach of confidential relationship by Kershaw in the transaction."

Respondents in answer to this challenge in their Brief (page 15) cited transcript references, pages 25, 26, 227, 282, 283 and 458, as containing testimony of such an agreement.

In Appellants' Reply Brief (pp. 2-4) we specifically refer to these pages and summarize the testimony. Again we respectfully submit there is not a single word of testimony by either Kesler or Kershaw of any such agreement between Kesler and Kershaw. The lack of such evidence we believe is the hub of this case. The rulings of the court on the effect of the statute of frauds and parol evidence rule might not be of such consequence to appellants if there was such evidence of such an agreement. We respectfully ask the court to again refer to the record citations.

POINT III. THE COURT ERRED IN HOLDING THAT THIS CASE WAS TRIED BY THE TRIAL COURT WITH AN ADVISORY JURY AND THAT, THEREFORE, IN EFFECT THE TRIAL COURT HAD NO DUTY TO MAKE ANY "NICE DISTINCTIONS" IN THE JURY INSTRUCTIONS AS TO THE BURDEN OF PROOF.

It is respectfully submitted that the Supreme Court has erroneously ruled that the jury involved in this action was an advisory jury only. Careful reading of the proceedings will, we believe, disclose that there is no reference whatever to this jury as having been advisory only. The Judgment as entered by the court is totally devoid of any such references. There are no findings of fact (contrary to the opinion of the court). The thrust of this case was for the recovery of cattle on the part of the plaintiffs and for quiet title on the part of the defendants, both of which are legal matters entitling the parties to trial by jury. Even respondents in their own Brief at page 1 state that the nature of this case is: "This action was initiated in 1971 for the purpose of compelling the return of certain livestock, recovering damages based upon the sale of other livestock and quieting title to real and personal property located in Millard County, Utah." The parties did not ask for the reformation of any documents in the pleadings, and even if they had, it would have been within the sound discretion of the trial court to determine whether the predominant issue was legal or equitable in any event, and in trying it to a jury of right, the trial court so exercised its discretion.

The holding of the Supreme Court is contrary to Rule 39 of the Utah Rules of Civil Procedure. That rule provides

that whenever a jury is demanded, which was the case in this action, the issues shall be tried by the jury unless (1) the parties stipulate otherwise, or (2) the court finds that a right of trial by jury does not exist. The trial court never made such a finding, nor have the parties ever so stipulated and, in fact, the court clearly considered and treated this as a trial by jury as a matter of right. Furthermore, Rule 39(c) provides that even in situations where there is no right to a jury, the parties, by consent, may try the action as though it were a jury trial as a matter of right. Certainly where neither party objects and the court makes no finding that it is other than a jury trial of right, the action should be construed to have been tried with the consent of the parties by jury action as a matter of right.

Although we feel that it is bad law to indicate in a decision of the Supreme Court that "nice distinctions" do not have to be observed even with regard to advisory juries, certainly that is not good law where the jury is a matter of right. It is indeed the duty of all juries to be cognizant of and to take into consideration "nice distinctions". We cannot help but observe that the use of the words "nice distinctions" is an open invitation to the trial judges of this state to look down upon juries, to treat them as inferiors, and that it is indeed a serious depreciation of the right to trial by jury. We further think it serious error to state in an opinion of this Honorable Court in effect that the distinction between a preponderance of

the evidence and clear and convincing evidence is a "nice distinction". Perhaps the Supreme Court did not intend that result, but we submit that that is the conclusion a fair reading of the decision of the Supreme Court yields. Quite aside from the merits of this case, it is not a sound statement of law and will not have a salutory effect upon the future course of the law in this state.

Even if this were an advisory jury, we submit that it was error for the case to be disposed of without being sent back for the trial judge to make findings. If, indeed, this was an advisory jury, the trial judge should have been so informed by this court so that he could exercise his independent judgment for that of the jury, which he has never done. It is true that the trial judge refused to grant a new trial and did permit the jury verdict to be filed, but this does not say that he approved of the same, nor is it the equivalent of saying that he agreed therewith. Out of respect for the jury system, a judge should not ordinarily interfere with the jury verdict even though his own feelings would have produced a different result had the judge been trying the facts. In this case the Supreme Court has held apparently that since the trial judge did not grant a new trial that he thereby is saying that he agrees with the jury. That simply does not follow.

The jury was instructed that the burden of proof was a "preponderance of the evidence" rather than "clear and convincing evidence". This appellants have claimed as error on appeal. The Supreme Court does not seem to disagree with this position, but seems to feel the error was not prejudicial since it found the jury to be advisory only. Appellants urge hereinabove

that the jury was not merely advisory, and we submit that the Supreme Court should reconsider the matter of this erroneous instruction. Further reasons for reconsideration thereof are: (1) We submit that the trial judge was properly advised of the defendants' objection to the Court's proposed instruction with regard to burden of proof. Perhaps it could have been done more artfully,but in all fairness it was duly presented and called to the Court's attention. (2) Although the recordsof this action in the Supreme Court do not appear to contain the requested instructions of any party, our files show and appellants did unequivocally request in their first requested instruction "that executed deeds and contracts will not be disturbed or set aside unless there is a strong,clear and convincing evidence of fraud or mistake." If the Court has any question whatsoever on whether appellants did request that instruction , then we hereby request of the Supreme Court permission to complete the record on appeal by showing the requested instructions in this action. No such request has been made before, because the point of whether appellants requested such instruction was not raised by respondents , b ut was raised by the Supreme Court for the first time in its opinion. There has been no question by the court below or by the respondents but that appellants did request said instruction and that appellants did object to the instruction given by the court setting out the burden as mere preponderence of the evidence. We respectfully submit that the Supreme Court commits error in denying to defendants and appellants their objection to said instruction. Defendants requested an instruction calling for a burden of "clear and convincing" as the test of the evidence and objected to one calling only for a"pre-ponderence " of the evidence as the test. In all fairness defendants should not be foreclosed from this assignment of prejudicial error.

POINT IV. THE COURT ERRED IN ALLOWING A JUDGMENT FOR $5,000 PUNITIVE DAMAGES TO STAND.

Defendant, Willard Rogers, is of course, grateful for the reduction by the Supreme Court of the Judgment for punitive damages from $10,000 to $5,000. It is, however, respectfully submitted that no matter what else may be decided in this action, it is unfair to imposean added burden of any punitive damages upon defendants. We of course seek reversal of the lower court as to the entire judgment, but if that relief is denied to defendants then we submit that this is not a proper case for imposition of punitive damages , and even if it were the sting imposed by the judgment in its other aspects contains more that sufficient strength in this case. In support of our position that punitive damages should not be awarded in this action defendants contend:

The conduct of the defendants was open and above board. Defendants took the cattle under claim of right. They were taken in broad daylight. They were taken under the supervision of the sheriff of Millard County, being the county where the cattle were located. The assistance of other respected members of the community was utilized. At least some of these were initially joined in the action along with the sheriff, but have been dismissed from the action and rightly so.

Next, we submit that the aforesaid opinion of the Supreme Court erroneously mistakes the situation which exists in this case, with another vastlydifferent situation. The situation which exists when one takes with knowledge of a claim is not the same as the

that claim. We submit that these are completely separate and distinct situations and should be treated differently. Even if it is held that Willard Rogers took with knowledge of some claim on the part of Kesler, this certainly does not impose upon him a knowledge of its truth and validity. The Supreme Court, we think, erroneously states in effect that Willard Rogers took with knowledge of the validity of Kesler's claim because of information received from "Kershaw, Kesler and from Kershaw's attorney, Mr. Carvel Mattsson". We respectfully submit that the most that could have been acquired from any of these three sources upon the record in this case is a notice of a claim of some kind and not notice of the validity of that claim, particularly where the validity of that claim depended upon documents absolute on their face and involving complicated and difficult legal problems.

Carvel Mattsson testified at the trial that there was a discussion about an option or buy-back, but that it was vague (see Record 281), and Mr. Mattsson likewise referred to the existing situation in his letters of Nov.11,1970 andDec.10,1970(Ex. D-5K and P-7) as a buy-backor option.He made no statements regarding a security agreement. The distinction between a security agreement and a buy-back agreement was, we think, well-stated by Justice Henriod in his dissenting opinion in the case of Young v. Saunders, 24 Ut 2d 284., 470 P. 2d 388 (1970) at page 287:

> "No chattel mortgage was ever executed or given. Although the opinion talks about Saunders having some sort of a "security" interest in the boat, this is not true. He had title to the boat. There simply was an independent promise to reconvey the boat if $1500 were paid for it, and there is no recorded chattel mortgage to indicate otherwise. "

valid one and is the very point which we have contended from the beginning in this action, but is the point which seems to be totally ignored by the Supreme Court. Even if the court does not find a buy-back in this case, it certainly illustrates the error of assessing punitive damages on a theory that Rogers had to know of a "security agreement", when he had been advised of a buy-back.

It cannot be said that Willard Rogers is acting maliciously in relying upon the statement of attorney Carvel Mattsson that there was some kind of a buy-back or option which, however, had never been finalized. Mattsson is a distinguised and respected lawyer of many years of experience. Is Rogers not entitled to that interpretation of the situation without being deemed willful and malicious? Is Rogers malicious in concluding that until the buy-back was executed, he would be entitled to possession of the assets? We respectfully submit that he is not. We submit that the court imposes a burden upon Mr. Rogers which is too severe, requires him, at the penalty of sustaining punitive damages, to deduce from these documents the legal effect thereof. The risk of compensatory damages is enough. He is not an attorney and is unable to do that and he should not be penalized with punitive damages.

This further observation, we feel, should be made: In the third to last paragraph of the Opinion, the court says that "under the facts as found by the jury and the trial court, we are obliged to assume these facts bearing on the issue of

punitive damages: that defendant willfully set about and persisted in claiming land, cattle, and other property when he knew that in equity and good conscience he had no legitimate claim to them." We respectfully submit that if this is indeed an equity case, that the Supreme Court is not "obliged" to adhere to the findings of the lower court, but rather has the duty to independently evaluate the evidence in the interests of justice. In the light of Mattsson's statements, equity cannot assess punitive damages we submit.

In this same paragraph, the Supreme Court stated: "It seems quite incontrovertable that the representations he made to the auctioneer and the brand inspector concerning his ownership of the animals and the brand at the Delta livestock action were knowingly false." We submit that that is not a fair statement of the facts of this case. It is the recollection of the undersigned that at the hearing of this matter before the Supreme Court, one of the Honorable Justices inquired in substance as to whether it would be particularly unusual for a person who thought he had purchased an entire escrow package involving cattle to likewise assume that he had purchased the brands involved? We think this observation very perceptive, and we respectfully submit that the record in regard to the Delta cattle auction cannot fairly support a judgment for punitive damages. First of all Rogers obtained nothing, but merely had the proceeds held in escrow pending determination of ownership, and furthermore we submit the record fairly shows

that Rogers was only asserting what he believed to be his rights by virtue of having acquired the entire escrow, at least as he thought.

It should be further observed, we feel, that the trial judge in his Memorandum Decision Denying a Motion for a New Trial stated, "This has been a difficult case, partially because of the sharp conflict in the evidence, but mostly by reason of the fact that the basic documents involved appeared to be absolute transfers of title to property on their face, yet are claimed to be absolute only in part, and in part security transactions." (Emphasis added.) The trial judge thus considered the resolution of the problem presented by the written documents as being difficult. The Supreme Court in its Decision on page 2 observed, "A fundamental difficulty in this case is that the documents used in implementing the foregoing agreement did not spell out the security aspect of the agreement just recited, but simply recited conveyance of the property to Mr. Kershaw." (Emphasis added.) Here again it appears the Supreme Court has acknowledged the difficulty created by the wording of these documents, which wording was directed by Kesler. It would be unfair to attorney Carvel Mattsson to blame him for these problems. These problems were purposely created by Kesler for whatever reason. He should not be rewarded with punitive damages for the difficulties which his own obscure dealings brought about.

In connection with the matter of punitive damages,

the Supreme Court in its Opinion on page 2 makes the further statement: "Upon checking with the State Brands Supervisor, the auctioneer learned that defendant Roger's claim was false; and that he did not own the "K" brand, nor the livestock." It is difficult to conceive how the auctioneer could learn that Rogers did not own the cattle nor the "K" brand and that Rogers' claim was false when indeed the resolution of those knotty problems required a sophisticated court determination and has indeed required some very intricate legal reasoning. It is submitted that the State Brands Supervisor has at no time had any basis (or right) upon which to make a determination of the ownership of the livestock involved, nor upon which to make any determination as to the "real" ownership of the "K" brand. It may be that there is a proper sphere in which that which is reflected upon the records of the Brand Inspector has some force of its own, but it cannot, and the Brand Inspector cannot, make a determination of ownership between two parties. This is for the courts to do. We respectfully submit that this auction matter does not support an award of punitve damages.

The Supreme Court apparently was concerned that the son, Gregory, had been deprived of cattle during his "formative" years and seems to use this as a basis for punitive damages. Defendants never knowingly deprived Gregory of anything. If Gregory has been deprived of a relationship with cattle, defendants truly regret that. However, if they are the cause

of it, it is not because of any malice toward Gregory or anyone else. It is because of their reliance upon what they believed to be their rights. The testimony in this action is that all of the cattle involved had the "K" brand and there was certainly no way of distinguishing or determining that any particular "K" brand cattle belonged to Gregory as opposed to anyone else. If defendants' reliance upon their supposed rights is now held to be an error, Gregory will be compensated for any actual loss by the compensatory judgment of the lower court. An award of punitive damages is not justified nor supported, we feel, by the circumstance that Gregory is a minor.

We submit that the decision in this case, particularly in the light of Bradshaw v. Kershaw, 529 Pac 2d 803 (1974),(which is the companion case to the instant case) shows a grave miscarriage of justice. Together they create the following situation: Rockefeller Land and Livestock purchases (or at least thinks it does) from Kershaw (all in one set of documents and in one transaction) the 480 acres which was dealt with in the Bradshaw case, together with the property dealt with in this case. In the Bradshaw case it is determined that Rockefeller does not get the 480 acres and in reaching that decision the court appears to favor the testimony of Milton Christensen and plaintiff Bradshaw over that of Kershaw who, in that case, absolutely denied the validity of the option claimed by his agent, Christensen (and subsequently transferred to Bradshaw). It thus appears in that case the courts finds Christensen and Bradshaw are the

believable persons and that Kershaw is not. We then come to the instant case and the court holds that all the rest of the property is likewise not available to Rockefeller, and not only that, but Rockefeller (with Rogers) is going to be subjected to a substantial punitive damages judgment. In the instant case Kershaw suddenly becomes eminently believable, the end result being that Rockefeller does not get the 480 acres, Rockefeller does not get any of the property involved in this action, Rockefeller does not even get its $5,000 back from Kershaw (this inequity was particularly referred to in Rockefeller's Petition for Rehearing in the Bradshaw case, which was denied). Not only does Rockefeller lose its money and get nothing it bargained for, but rather it (with Rogers) gets a huge judgment for punitive damages.

We sincerely urge to the Honorable Court that a grave miscarriage of justice will have been done if the judgment for punitive damages is allowed to stand (together with the rest of the judgment of the lower court.) This whole situation was the creature of Kesler, Christensen and Kershaw. We respectfully submit that Rogers and Rockefeller Land and Livestock Co. have been sorely abused. They should not receive the final indignity of punitive damages with its attendant stigma. This they do not deserve.

CONCLUSION

We believe in trial by jury, and that in the great majority of cases justice is done. But, as every trial lawyer well knows, once in a while a hometown jury can fall into the error of hometown umpiring, particularly such as in a case like the instant one where there were cattle claimed by a 13 year old boy. Then a jury sometimes can be moved by sympathy. For such cases there is provided a relief by an appeal to the Supreme Court to apply the law to the facts. When it does so, there is prevented a miscarriage of justice. We respectfully request reversal of the judgment of the lower court.

Respectfully submitted:

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