

1975

L. Kesler v. Willard B. Rogers : Brief of Appellant

Utah Supreme Court

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Pugsley, Hayes, Watkiss, Campbell & Cowley; Attorneys for Respondent.

Gustin & Gustin; Attorneys for Defendant; Robert C Cummings, William H Henderson, Mark S Miner; Attorneys for Appellants.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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MARION L. KESLER and GREGORY
L. KESLER, a minor, by Marion
L. Kesler,

DEC 9 1975

Plaintiffs and Respondents,

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

vs.

Case No.
13915

WILLARD B. ROGERS, and
ROCKEFELLER LAND AND
LIVESTOCK COMPANY,

Defendants and Appellants,

and

WILLARD B. ROGERS, et al.,

Defendants.

Clerk, Supreme Court, Utah

ABSTRACT OF RECORD OF APPELLANTS

WILLARD B. ROGERS AND
ROCKEFELLER LAND AND LIVESTOCK COMPANY

Appeals from the Judgment of the District Court
Marshall County, State of Utah,
Honorable H. Maurice Harding, Judge

by, Hayes, Watkiss
Phillips & Cowley
Petro Gas Building
Salt Lake City, Utah

Robert C. Cummings
William H. Henderson
Mark S. Miner
320 South Third East
Salt Lake City, Utah

84111
Attorneys for Respondents

84110
Attorneys for
Appellants,
Willard B. Rogers
and Rockefeller
Land & Livestock

by, Gustin
Bank Building
Salt Lake City, Utah
84111

Attorneys for Defendants
W. Kershner
J. Reuben Clark Law School, BYU.
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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,	:	ABSTRACT O
	:	RECORD
vs.	:	
	:	Case No.
WILLARD B. ROGERS, and	:	13915
ROCKEFELLER LAND AND	:	
LIVESTOCK COMPANY,	:	
	:	
Defendants and Appellants,	:	
and	:	
EDWARD B. ROGERS, et al.,	:	
	:	
Defendants.	:	

EVIDENCE RELATING TO THE PAROL EVIDENCE RULE
AND THE
STATUTE OF FRAUDS

(APPELLANTS' ARGUMENT POINT ONE, OPENING BRIEF)

The Property Involved

The property involved is some 314 acres of land in Millard County, a grazing permit, livestock, irrigation water. This property is described in the various conveyances and assignments involved in this case which are

assignments are 480 additional acres of land in Millard County. The 480 additional acres of land are not involved in this law suit. They were the subject of another law suit which was on appeal in this court, Bradshaw v. Kershaw and Rogers, case No. 13502, as hereinafter mentioned. The 314 acres, the grazing permit, livestock, and the irrigation water rights will be referred to inclusively as the "Property" unless the property is otherwise separately mentioned and identified.

The Conveyances And Assignments Involved

There were successive conveyances, assignments, and transfers of the Property as follows:

1. On March 1, 1966 by escrow agreement and contract of sale, Grant D. Staples and Grace W. Staples, as Sellers, and Ray A. Huber and his wife Ina M. Huber, and Marion L. Kesler and his wife Carol Ray Kesler as Buyers. The Staples agreed to sell the properties involved

(Exhibit P-3). Bills of sale and warranty deeds and certificates of title were deposited in escrow with the Richfield State Bank, escrow agent, until payment of the purchase price of the contract (R.65-66).

On July 28, 1969, Carol Ray Kesler and Ray Huber and Ina Huber transferred and assigned their rights to the escrow agreement to Marion Kesler (Exhibit P-4).

2. On July 28, 1969 Marion L. Kesler (respondent herein) by assignment, quit-claim deed, and bill of sale, conveyed and assigned all of the rights to the escrow agreement to Walter W. Kershaw (Exhibit P-5, R. 20).

3. On December 17, 1970, by assignment, quit-claim deed, and bill of sale, Kershaw conveyed and assigned all the rights to the escrow agreement to appellant Rockefeller Land & Livestock Company (Exhibit D-4).

For convenience, the assignment of the escrow agreement from Kesler to Kershaw on July 28, 1969, and from Kershaw to Rockefeller

transfer" and "the December 17, 1970 transfer, as the case may be.

Testimony of Respondent Marion L. Kesler

Respecting the July 28, 1969 transfer (from Kesler to Kershaw) Kesler testified that in a conversation between Kesler, Kershaw, and Carvel Mattson, that there would be documents prepared, signed, fixed to turn the Property back to Kesler when the title was cleared on the 480 acres. That these documents were never executed (R. 29-31). That his understanding was that Kershaw was only purchasing the 480 acres (R. 64). Kesler admitted that he had no conversation with Will Rogers, president and sole owner of appellant Rockefeller Land & Livestock Company as to such understanding (R. 64).

Kesler testified that when he signed the July 28, 1969 transfer documents he knew that they listed all the Property (the 314 acres and other properties) but said that the 314

that the July 28, 1969 transfer contained every bit of property, the cattle and everything, and he signed it. But "there was to be another set." (R. 83-84) That he has never lived on any of the Property but he has farmed it (R.84). That they were going to get a written agreement (another written agreement); that he thought such a document was "in the bank." That he never did get a written agreement (R. 85) ("changing your bill of sale, your deeds, and your assignments"); that "there never was one made up and put in the bank like this was to have been" (R. 85).

Testimony of Walter W. Kershaw

Regarding the July 28, 1969 transfer (from Kesler to Kershaw), Kershaw testified that he first became aware of the transferred documents "now" (in court) (R. 181). However he then testified that he first became aware of the original of the document December 17, 1970 (the time of the execution of the December 17, 1970 Machine-generated OCR, may contain errors.

Edward Rogers that both the documents in the July 28, 1969 transfer and the December 17, 1970 transfer included the property in this law suit as well as the 480 acre tract (R. 181-182).

He testified that the agreements were strictly with his attorney, Carvel Mattson.

Regarding the December 17, 1970 transfer (Kershaw to Rockefeller Land & Livestock Company), he testified as follows:

That in conversation with his attorney Carvel Mattson between November 17, 1970 and December 17, 1970 there was no discussion about the Property involved--the 314 acres, etc. That he told Carvel Mattson that he wanted to convey all his right, title, and interest to all and any of the property in Millard County but "nothing more and nothing less than what I actually owned and possessed. . . . I don't want to retain anything for myself" (R. 190-191).

Rockefeller) he testified that title search showed that he owned not only the 480 acres but all the Property involved. That the closing officers showed him the documents and records showing that he did own the property and he testified that he was selling the entire package--all his right, title, and interest--for the \$5,000, the complete package (R. 199). That he sold them the entire package and that they got all his right, title and interest in the package. That at the time every property was in default under the Staples escrow (R. 199-200). That he had never met with Kesler concerning the Staples escrow prior to the time he bought it. That he had no other agreement with Kesler or Christensen on the property. That all agreements were strictly through Carvel Mattson, his attorney, and specifically that he had no agreement of any nature--oral or written, concerning the 314 acres, the cattle, or the stock. That he and his wife signed

description which included not only the 480 acres but the Property involved. That he knew that the Properties (in addition to the 480 acres) were in the deed, assignment and bill of sale when he signed (a grazing permit and the irrigation rights, etc.) That he knew that the 314 acres was in the agreement (R. 210-211, 213, 215, 226). That he conveyed the 314 acres to the Rogers people on December 17, 1970, although he had not claimed any interest in the 314 acres (R. 227) and only thought he had obtained 480 acres from Kesler (R. 232). Asked specifically on his selling them anything he said "you can't say I only bought the 480 acres, they bought everything--and that was all my equities and interest in the property" (R. 233-4).

Kershaw also testified respecting a letter that Carvel Mattson wrote to Edward Rogers on December 10, 1970 relating to the December 17, 1970 transfer (Exhibit D-5K).

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Christensen was contending that Kershaw was going to give an option to Mr. Kesler to buy back all the property except the 480 acres for \$20,000. With respect to this letter Kershaw testified that there never was any such agreement, that there never was a buy-back agreement and that he never so represented to the Rogers (R. 240).

Testimony of Willard B. Rogers

Willard Rogers testified on the execution and closing of the transfer of the properties on December 17, 1970 from Kershaw to Rogers (Exhibit D-4). That the title papers were drawn by the Utah Title Company, by Mr. McGuiness, and signed that day in the presence of McGuiness the closer, and Walter Kershaw and Kershaw's wife (R. 370-372). He testified as to paying the \$5,000 for the transfer and \$6,600 on the Staples escrow agreement, leaving a balance of \$19,282 due at that time on said agreement (R. 386).

Willard Rogers also testified that after the closing of December 17, 1970, he took possession of the cattle on the 24th of December, 1970 (R. 374), that he later went to take possession of the real property and Kesler accosted him and asked him if he didn't like to live and said if he stayed on the property he would shoot him and Rogers, not wanting to be shot, began to leave. Kesler said he was going to sue him and Rogers said, well, let's just settle it that way (R. 380).

On or about March 11, 1971 defendant and appellant Rogers and Rockefeller Land and Livestock Company were served written notice to vacate the real Properties herein involved, the demand advising that he return all the lands to Kesler, the former occupant, within three days or legal proceedings would be commenced for recovery of possession (Exhibit D-1).

Testimony of Milton Christensen

Christensen testified as to the execution of the July 28, 1969 transfer from Kesler to Kershaw. That the transaction was closed in attorney Carvel Mattson's office (R. 442-443). That there was no written agreement that Kesler was to retain any of the Property and that Mr. Mattson was to complete the documents "for the transfer to Marion [Kesler]" (R. 455).

Christensen testified that in conversations with Willard Rogers regarding Kershaw's interest in the property other than the 480 acres in September and October of 1970, that Rogers asked him what the information was and he told him that he had an option on the 480 acres (the option that went to Bradshaw), that the balance of the property had never been part of the agreement but had been taken as security until the balance could be released (R. 459-460).

the properties from Kesler to Kershaw (R.263). That Kershaw was interested in buying the 480 acres but that the tract of the properties was tied up in this complete escrow, the Staples escrow. That the documents he prepared were signed by Marion Kesler. That he was instructed by Mr. Christensen and Kesler to prepare the documents and they provided him the necessary information. That the documents were prepared to cover all the properties and not just the 480 acres, and he was instructed to prepare the documents that way by Christensen and Kesler (R. 265).

He testified that when Kesler came in and gave instructions to draw up the papers, they did discuss an option or buy-back agreement for the properties involved. That it was all vague. That Kershaw was interested primarily in the 480 acres but that all would be assigned because it was typed up in one escrow, and that on Kesler coming up with some money, he would have a right to get the

given him to get it back (R. 281). That at no time did Kershaw advise him there was an agreement--a buy-back agreement--and ask him to reduce it to writing.

He further testified that before September 21, 1970 he had conversations with Willard Rogers in Mattson's office in Richfield, Utah regarding the status of the properties and requesting information on the properties. That by reason of these conversations he wrote the letter of September 21, 1970 to Milton Christensen and the letter of November 11, 1970 to Edward Rogers mentioning the possible option or buy-back agreement, and letter of December 10, 1970 to Kershaw on the same subject (Exhibits P-6, P-7, and D-5K); that he may also have had a conversation with Edward Rogers. That these letters were written in response to these inquiries and to give information as to the status of the matter. (R. 275-279).

He further testified that Willard Rogers had asked him

was too involved and he had a conflict of interest--there was this matter of the right or option to get the property back, that "in view of the whole situation, I just didn't want to get involved" (R. 281) and flatly, that he was never requested by anyone to prepare any instruments or reconveyance or reassignment on anything" (R. 291).

Testimony of Edward B. Rogers

Edward B. Rogers, licensed abstractor for the Utah Title Company testified respecting the execution of the December 17, 1970 conveyances and assignments from Kesler to Rogers. He advised that the documents were prepared by the escrow officer at Utah Title at the request of Walter Kershaw who had asked him to prepare them because lawyers were too expensive. That the documents were read fully by Mr. Kershaw, and that it had been suggested that a title report should be issued but that Kershaw said he wasn't

compared the documents for some 20 minutes with some he had in his briefcase, and read them for about 20 minutes. That they were read to him. That at the closing there was no discussion whatsoever about a buy-back agreement or a security agreement on the execution.

He testified that he had received Mattson's letter of November 11, 1970 and copy of Mattson's letter of December 10, 1970 to Kershaw (Exhibits P-7 and D-5K). That thereafter (before the closing) he asked Kershaw if there was any buy-back agreement. He questioned him on whether there was an option or buy-back agreement. That he had talked to Carvel Mattson and that Carvel had advised that he had heard only rumors about one, so that he had specifically asked Kershaw. That Kershaw was emphatic that there was no buy-back agreement and was insulted by the question. (R. 485).

OBJECTIONS OF THE PAROL EVIDENCE RULE
AND THE
STATUTE OF FRAUDS

Objections of the parol evidence rule and the statute of frauds was made as to all parol evidence that attacked the validity of the transfers of the property by the transfers of July 28, 1969 and December 17, 1970 (R. 4, 13, 14, 15, 16, 20, 20-28 [continuing objection was permitted], 41, [continuing objection was permitted]. As stated by counsel for respondent, such objections were "laid on the record like a slab of concrete" (R. 185).

ABSTRACT OF THE EVIDENCE RELATING TO
THE MATTER OF PUNITIVE DAMAGES
(POINT II OF THE BRIEF)

In addition to the facts set out in the foregoing portion of the abstract, the following facts bearing particularly upon

After the execution on December 17, 1970, of the aforesaid quit-claim deed, assignment, and bill of sale, the same were recorded in the office of the Millard County Recorder on December 22, 1970. Thereafter on December 24, 1970, the defendant, Willard B. Rogers, on behalf of defendant, Rockefeller Land & Livestock Company, sought and obtained the assistance of the sheriff of Millard County to take possession of the said cattle and on that date went to the site of said cattle with said sheriff, and with Milo Watts and Scott Watts, and there took possession, Mr. Rogers testified, of 55 head of cows and one calf, the subject of this litigation (R. 378). Milo Watts also testified that 55 head were taken (R. 435).

Willard B. Rogers testified that subsequent to the 17th of December, 1970, he went to the Recorder of Brands at the State Capitol and paid the fee to have the K brand registered in his name and testified that

K brand was his, but that he had never received a written notification that the K brand had officially been transferred to Rockefeller Land & Livestock Company (R. 256). In reliance on said actions, he asked John Chugg, Branding Inspector, to hold in escrow the funds from the sale of two cows and two calves bearing the K brand at Delta, Utah. Pursuant to said request, John Chugg did so and is presently holding the said sum of \$500 from the sale of said two cows and two calves bearing the K brand. John Chugg testified that Willard Rogers told him that he had registered the K brand and that pursuant to that statement, he had placed the said funds from the aforesaid sale in escrow and further testified that upon checking later, he determined that the K brand had not been registered to Willard Rogers

as yet on the books of the State Recorder of
Brands. (R. 166-168).

Dated: April 18, 1975.

Respectfully submitted,

WILLIAM H. HENDERSON

ROBERT C. CUMMINGS

MARK S. MINER

Attorneys for Defendants and Appellants

Mailed two copies of the foregoing Abstract to Robert S. Campbell, Jr., and Philip C. Pugsley, attorneys for plaintiff, at their address, 400 El Paso Gas Building, Salt Lake City, Utah 84111, and two copies to Gustin and Gustin, attorneys for defendant, Walter W. Kershaw, at their address, 1610 Walker Bank Building, Salt Lake City, Utah 84111, and two copies to Walter W. Kershaw at his address, 1034 Oak Hills Drive, Salt Lake City, Utah, all postage prepaid, this _____ day of _____, 1975.

Attorney for Defendants and Appellants