

2000

Gary J. Witherspoon v. Walter T. Stewart : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Walter T. Stewart; Defendant-Appellant.

Richard Richards; Attorney for plaintiff-Respondent.

Recommended Citation

Legal Brief, *Witherspoon v. Stewart*, No. 14285.00 (Utah Supreme Court, 2000).
https://digitalcommons.law.byu.edu/byu_sc2/238

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

GARY J. WITHERSPOON,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 14285
WALTER T. STEWART, et al.,	:	
Defendant-Appellant.	:	

APPELLANT'S PETITION FOR REHEARING

Appeal from the Judgment of the Fourth Judicial
Court of the State of Utah, in and for Utah County

The Honorable Allen B. Sorenson, Judge

Walter T. Stewart, pro se
RFD #2, Box 199
Spanish Fork, Utah 84660

Defendant-Appellant

Richard Richards
670 28th Street
Ogden, Utah 84403

Attorney for Plaintiff-Respondent

[illegible]

••

22

2

2

• •

●●

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
1990	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010

The Honorable Allen B. Sorenson, Judge

1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298	2299	2300	2301	2302	2303	2304	2305	2306	2307	2308	2309	2310	2311	2312	2313	2314	2315	2316	2317	2318	2319	2320	2321	2322	2323	2324	2325	2326	2327	2328	2329	2330	2331	2332	2333	2334	2335	2336	2337	2338	2339	2340	2341	2342	2343	2344	2345	2346	2347	2348	2349	2350	2351	2352	2353	2354	2355	2356	2357	2358	2359	2360	2361	2362	2363	2364	2365	2366	2367	2368	2369	2370	2371	2372	2373	2374	2375	2376	2377	2378	2379	2380	2381	2382	2383	2384	2385	2386	2387	2388	2389	2390	2391	2392	2393	2394	2395	2396	2397	2398	2399	2400	2401	2402	2403	2404	2405	2406	2407	2408	2409	2410	2411	2412	2413	2414	2415	2416	2417	2418	2419	2420	2421	2422	2423	2424	2425	2426	2427	2428	2429	2430	2431	2432	2433	2434	2435	2436	2437	2438	2439	2440	2441	2442	2443	2444	2445	2446	2447
------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------

Defendant-Appellant

Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

	<u>Page</u>
PETITION FOR REHEARING	1
ARGUMENT	
POINT I - THE COURT'S INTERPRETATION OF SECTION 4-13-17 UTAH CODE ANNOTATED IS CONTRARY TO THE EXRESS WORDING OF THE STATUTE	1
POINT II - THE COURT ERRED IN ITS UNDERSTANDING OF THE PURPOSES AND MEANING OF THE STATE BRAND REGISTRATION CERTIFICATE	4
CONCLUSION	7
CERTIFICATE OF MAILING	7

IN THE SUPREME COURT OF THE STATE OF UTAH

GARY J. WITHERSPOON, :
Plaintiff-Respondent, :
vs. : Case No. 14285
WALTER T. STEWART. et al., :
Defendant-Appellant. :

APPELLANT'S PETITION FOR REHEARING

Defendant-Appellant respectfully petitions the Court for a rehearing of the appeal for the grounds and reasons that the opinion of the Court herein is expressly based upon two inaccurate interpretations of Utah law, i.e., the Court's opinion is based on an incorrect reading of the Utah Livestock Brand and Anti-Theft Act, and upon an erroneous notion of the nature and function of a brand certificate.

ARGUMENT

POINT I

THE COURT'S INTERPRETATION OF SECTION 4-13-17 UTAH CODE ANNOTATED IS CONTRARY TO THE EXPRESS WORDING OF THE STATUTE

The key issue of this case is whether the bill of sale was legally sufficient to convey title to the cattle. In setting forth the requisite elements of a valid bill of sale, the opinion of the Court stated that the bill of sale must provide proof of ownership;

Title 4-13-17 provides that upon sale of livestock, its delivery shall be accompanied by a written bill of sale, describing each animal, . . . proof of ownership of

anyone from whom it was acquired and the time of possession thereof. (emphasis added)

This statement is incorrect. On the contrary, after the elements of a bill of sale are set forth, the statute provides that the Seller shall provide proof of ownership.

. . . provided, that any person so selling or transferring title to said livestock which are branded and marked with any brand and mark not the recorded brand and mark of the person selling, shall provide proof of ownership from whom the livestock was purchased and the length of time held in his possession. (emphasis added) 4-13-17 Utah Code Ann. §4-13-17 (1953)

This error affected the outcome of the case in that proof of ownership was furnished by the seller as shown by the following facts:

Appellant went to the corral where the branded cattle were shown by the Respondent's representative. At this time, before any cash had changed hands, Appellant's seller, Deseret Distributing Company presented him its bill of sale which contained all of the requirements of a bill of sale in Utah, and displayed proof of purchase from American Federal Company by displaying a copy of its bill of sale from Respondent Witherspoon. Moreover, Appellant received further assurance from Seth McPherson who was feeding the cattle while the Appellant was there. McPherson showed how to load the cattle, offered to help do so, and stated that they would be alright there for a week or so. After this visit Appellant paid market price, i.e., 50 cents per pound for the steer feeders and 47 cents per pound for the heifers.

If the Appellant was the innocent victim of a con game as intimated by the Court, it is important to determine when that con game began.

The facts of the case show that Witherspoon sold the cattle for \$12,350.00 and received checks for this amount. He waited two days before checking with the bank to see if they were good. He thereupon called Yeck back in and demanded the bill of sale back, and also received from Yeck, either at that time or later, \$1500.00 cash which he calls "earnest money." (Although Appellant prevailed in his replevy of the cattle, no credit for the \$1500.00 was ever offered or received by Appellant toward his \$8500.00 loss.)

In Nelson v. Lewis, 53 P.2d 813 (Kan. 1936) Nelson had sold a span of mules to a buyer who gave a bad check for them. Seller helped load them in a truck. Buyer then resold them to Defendant Lewis. The first seller sued Defendant Lewis for damages alleging conversion of the mules. Therein the Kansas Supreme Court held:

"Title and possession passed to the buyer, notwithstanding the fact the buyer obtained the mules through gross fraud, and a third person who subsequently purchased the mules from the buyer for value, without notice of the fraud, was not guilty of conversion."

Witherspoon notified the Utah County Sheriff's office, the Utah Highway Patrol, the Utah County Attorney's office, and the First Security Bank. It is interesting that Witherspoon is from Weber County, Yeck is from Salt Lake County, and the cattle were in Juab and SanPete Counties.

On the other hand, Appellant's good faith is established by his cash payment and the fact that about 10 days after the cattle were replevied, the cattle were sold at the open cattle auction for just under \$8,000.00.

In Pugh v. Stratton, 450 P.2d 463, the Utah Supreme Court stated:

"Between two innocent parties the one must suffer who gave possession to the dealer."

In the opinion rendered by the Court herein, it would appear that the Court understood that Stewart purchased the cattle from Yeck and others. This is not the case. Appellant has never seen Yeck. It was Witherspoon who met with Yeck and sold and delivered the cattle to him.

The above facts show that adequate proof of ownership was shown to Appellant. Utah law does not require the bill of sale to show proof of ownership as stated by the Court. As the statute provides, evidence of ownership can be supplied by the seller as was done in this case.

POINT II

THE COURT ERRED IN ITS UNDERSTANDING OF THE PURPOSES
AND MEANING OF THE STATE BRAND REGISTRATION CERTIFICATE

In discussing Title 4-13-10 [sic 4-13-11] which provides that the brand certificate shall be prima facie evidence of ownership of the cattle so branded, the Court stated that it is significant that this certificate never left the possession of

the seller. In so stating, the Court erroneously assumes that the brand certificate should ~~shall~~ leave the possession of the seller and is, therefore, similar to the title certificate on an automobile.

Contrary to the Court's assumption, the obtaining of a brand certificate is a one-time affair. An owner of a brand, and thus brand certificate, need not own any cattle. The certificate itself is in two parts. One is to be placed in the owner's files; the other is wallet size to be carried on his person. Thus, a buyer may check it to see that the brand on the cattle is in fact registered to the seller. The seller never surrenders it to the buyer unless he is selling the right to use that particular brand. The method of transferring the brand certificate or right to use the brand has been established by the legislature. Utah Code Ann. §4-3-13 (1953) It was not the intention of the legislature to treat a brand certificate like an automobile title certificate. A man with 1000 head of cattle would have to have 1000 of these certificates. The Court has apparently confused the brand certificate with the Brand Inspector's certificate. This latter certificate is issued by a state brand inspector who checks the bill of sale and the brand on the animals and verifies the brand with his book of registered brands. It does not become his duty to look further into the validity of the sale, and, in the absence of any evidence or knowledge that anything is wrong with the bill

of sale, or any other wrong doing, he issues his brand inspection certificate.

Admittedly the brand certificate is prima facie evidence of ownership of the cattle. This means that prima facie case of ownership is established if the brand with which the cattle are marked is registered in the claimant's name. Utah Code Ann. §4-13-11 (1953) This does not mean, however, that the person owning the brand will always prevail over his transferee in an action for possession of cattle.

In Howry v. Sigel-Campion Livestock Com'n., 249 P. 658, for example, intervenor had offered in evidence a certified copy of the stock brand in her name, but the court stated:

It was prima facie evidence of ownership of the cattle so branded. C.L.1921 sec 3126. Such evidence is not conclusive (3 C.J.42) for it would result in a strange paralysis of the livestock market, if, after the brand has been on the hide of an animal, such brand should be taken as a conclusive presumption of ownership. If it were so, no branded animal could ever be sold. No such absurdity exists in the law.

Should the Court's decision stand, it would unduly change the whole method of cattle buying and selling in Utah and impose on the market a system of transferring brand certificates which was not contemplated by the legislature.

The Utah Livestock Brand and Anti-Theft Act does not require or anticipate that a seller should ever surrender possession of his brand certificate when selling cattle.

CONCLUSION

In the interests of equity and justice, the Court should set aside its decision and reverse the decision of the lower court and award a judgment in favor of Stewart in the amount of \$8500.00 plus costs.

Respectfully submitted,

Walter T. Stewart, pro se
RFD #2, Box 199
Spanish Fork, Utah 84660
Defendant-Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Rehearing, postage prepaid, to Mr. Richard Richards, Attorney for Plaintiff-Respondent, 670 28th Street, Ogden, Utah 84403, this ____ day of July, 1976.
