

2001

# Holmgren Brothers Inc v. Gerald Ballard aka Thomas G. Ballard and Winona Ballard and Setmour Greaves : Brief of Appellant

Utah Supreme Court

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

HOLMGREN BROTHERS, INC., a  
Utah Corporation,  
*Plaintiff and Respondent,*  
vs.  
GERALD BALLARD a/k/a THOMAS  
G. BALLARD & WINONA BAL-  
LARD, his wife & SEYMOUR  
GREAVES, a single man,  
*Defendants and Appellants.*

Case No.  
13844

REPLY BRIEF OF APPELLANTS

Appeal from Judgment of the First Judicial  
District Court for Box Elder County  
Honorable VeNoy Christofferson, Judge

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## TABLE OF CONTENTS

	Page
ARGUMENT .....	1
POINT I. THE COURT'S POWER TO COMPEL SPECIFIC PERFORMANCE OF ORAL AGREEMENTS IN CASES OF PART PER- FORMANCE THEREOF IS TOO BROADLY STATED BY PLAINTIFF .....	1
POINT II. PLAINTIFF DID NOT HAVE POS- SESSION OF THE PROPERTY WITH THE CONSENT OF DEFENDANT .....	2
POINT III. PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW IN DAMAGES, IF ANY	5
CONCLUSION .....	6

### AUTHORITIES

#### CASES CITED

In Re Madsen's Estate, 123 Utah 327, 340, 259 P. 2d 595, 601 (1953) .....	2
In Re Roth's Estate, 2 Utah 2d 40, 44; 269 P. 2d 278, 281 (1954) .....	3, 6
Price v. Lloyd, 31 Utah 86, 86 P. 767, 771 (1906) .....	3
Utah Mercur Gold Mining Company v. Herschel Gold Mining Company, 103 Utah 249, 134 P. 2d 1094..	2, 6

#### OTHER

ANNO. — ORAL LAND CONTRACT — PART PERFORMANCE, 101 A. L. R. 923 at 971, 1004 (1936) .....	3, 6
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GREAVES, a single man,  
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REPLY BRIEF OF APPELLANTS

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ARGUMENT

Appellants affirm the arguments of their first brief and in reply to new matter set forth in Respondent's brief argue as follows:

POINT I.

THE COURT'S POWER TO COMPEL SPECIFIC PERFORMANCE OF ORAL AGREEMENTS IN CASES OF PART PERFORMANCE THEREOF IS TOO BROADLY STATED BY PLAINTIFF.

Reply to Respondent's Point I. Defendants agree that under certain narrow circumstances the Courts have power to compel specific performance of oral agreements, but take issue with Plaintiff's broad statement that, "part performance puts such performing party in such position that non-performance by the other party would constitute a fraud" (Resp. Brief 4). Not all performance by Plaintiff automatically acts as such. The Plaintiff has the burden of demonstrating that his part performance *was such that* non-performance by Defendants would constitute a fraud upon him.

Part performance which will avoid statute of frauds may consist of any act which puts party performing in such position that nonperformance by other would constitute fraud. *In Re Madsen's Estate*, 123 Utah 327, 340, 259 P. 2d 595, 601 (1953); *citing, Utah Mercur Gold Mining Company v. Herschel Gold Mining Company*, 103 Utah 249, 134 P. 2d 1094 and other cases.

As discussed in detail in Defendants' brief, Plaintiff has not shown such fraud.

## POINT II.

### PLAINTIFF DID NOT HAVE POSSESSION OF THE PROPERTY WITH THE CONSENT OF DEFENDANT.

Mere presence on the land does not constitute possession. Possession must be actual, open, notorious and exclusive, with the acquiescence or consent of the seller.

See, *Price v. Lloyd*, 31 Utah 86, 86 P. 767, 771 (1906); *In Re Roth's Estate*, 2 Utah 2d 40, 44; 269 P. 2d 278, 281 (1954); ANNO. — ORAL LAND CONTRACT — PART PERFORMANCE, 101 A. L. R. 923 at 971, 1004 (1936).

The only two possible possessory acts of Plaintiff were the weeding of the property and later, planting of the property. In weeding the property, Plaintiff did not rely on an oral contract of sale but first went to Defendant and discussed the weeding with him because at that time the sale was uncertain (Tr. 9, 46). Defendants' testimony is that Plaintiff was told that he would be paid for the weeding if the deal fell through (Tr. 9).

As to the discing and planting, the record is absolutely clear from the testimony of both Plaintiff and Defendant that such cultivation was performed after the contract was repudiated and not in reliance upon it (Tr. 38, 39, 48, 49, 50). At trial Mr. Nyman Holmgren admitted that he knew the sale had fallen through before he planted the property:

Q. You heard Mr. Ballard testify that he notified you sometime that the deal was off?

A. Yes.

Q. Did you in fact get notice from him?

A. Yes.

Q. When?

A. It was about I guess a week *before we drilled the grain.*

Q. And can you tell us when you drilled the grain?

A. No. It was the latter part of September. Maybe the first of October. I don't know, but I think it was the latter part of September.

Q. And you say about one week prior to that?

A. Yes.

Q. Where were you?

A. In Tremonton, down to Gerald's shop.

Q. Who was present?

A. Gerald and his boy Brent.

Q. What if anything was said?

A. Well, I asked him what was the deal on it, and he said that he didn't want to sell the ground at that time.

Q. Say anything else?

A. No, he just says he didn't want to sell it. He did say that he would pay us. (Tr. 38, 39, emphasis added.)

Moreover, Mr. Holmgren further admitted that the purpose of the drilling was to try and establish part performance after he knew the sale had fallen through.

Q. When you were drilling that, did you think that would have any effect in maybe enforcing this contract if you drilled it?

A. Yes, I had that in mind.

Q. You had that in mind. Wasn't this clear at the end of the summer now that you're drilling?

A. Yes. Fall.

Q. When you were out there drilling it, did you see Ballard's tractor and other equipment out there?

A. Yes.

Q. Did you tell him you were going out to drill before you drilled?

A. No.

Q. And in fact had you had a falling out at that point?

A. Yes.

Q. And been told there was no deal?

A. Right. (Tr. 49, 50.)

Plaintiff simply did not have open, notorious and exclusive possession of the property with the acquiescence and consent of the Vendor. His acts in weeding and planting the property should not be considered as partial performance.

### POINT III.

#### PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW IN DAMAGES, IF ANY.

Reply to Respondent's Point IV. The damage issue in this case is not as stated by Plaintiff, but rather whether or not Plaintiff can be adequately compensated for his partial performance. If so, there is no reason for compelling specific performance and the Statute of Frauds should be enforced.



“A parol contract for the sale of land will not be specifically enforced on the ground of part performance where it is capable of full pecuniary measurement.” ANNO. — 101 A. L. R. 923, *Supra*, at 948; *See also, Mercur Gold Mining Company and In Re Roth's Estate, Supra.*

In the instant case, the acts of weeding, discing and planting by Plaintiff are completely compensable. Plaintiff has already admitted at trial that the expenses of weeding and discing the property can be “figured out” (Tr. 38).

#### CONCLUSION

Plaintiff's acts in planting the property were performed after he knew the sale had fallen through and do not establish part performance. Moreover, the weeding of the property is capable of full pecuniary measurement and Plaintiff undertook to weed the property knowing very well that the sale may not be completed. Enforcement of the Statute of Frauds under the circumstances here would clearly not work a fraud on Plaintiff.

Respectfully submitted,

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