

2001

Kesler v. Rogers : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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13915-AA

L. KESLER, a minor, by [REDACTED]
L. Kesler, [REDACTED]

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

E D

BRIEF OF APPELLANTS
WILLARD B. ROGERS AND
ROCKEFELLER LAND AND LIVESTOCK COMPANY

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

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17

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.	:	
	:	Case No.
WILLARD B. ROGERS, and	:	13915
ROCKEFELLER LAND AND	:	
LIVESTOCK COMPANY,	:	
	:	
Defendants and Appellants,	:	
	:	
and	:	
	:	
EDWARD B. ROGERS, et al.,	:	
	:	
Defendants.	:	

BRIEF OF APPELLANTS

NATURE OF CASE

Action by respondents, Marion L. Kesler and Gregory L. Kesler, for conversion of cattle and to set aside deed, assignments, bills of sale by Marion L. Kesler to Walter W. Kershaw of July 28, 1969, and by Walter W. Kershaw to Rockefeller Land & Livestock Company of the

17th day of December, 1970, covering real and personal property. Counterclaim by appellant, Rockefeller Land & Livestock Company, to quiet title to the property.

DISPOSITION OF CASE IN LOWER COURT

The lower court's judgment was that the appellant, Rockefeller Land & Livestock Company, had converted the cattle and the court set aside the conveyances, assignments, and bill of sale to Rockefeller Land & Livestock Company of the real and personal property including the cattle. The court also gave judgment of \$10,000 punitive damages to respondent for the conversion of the cattle.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's judgment setting aside deeds, assignments, and bills of sale of July 28, 1969, and December 17, 1970, and an order by the Supreme Court directing the lower court to enter judgment quieting title in appellant to the property involved in said deeds, assignments, and bills of sale.

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STATEMENT OF FACTS

1. Appellant's objections of the Parol Evidence Rule and the Statute of Frauds (Utah Code 25-5-1)

The property involved consists of some 314 acres of land in Millard County, Utah, cattle, water right, and grazing permit. This property is described in the deed, assignment, and bill of sale of July 28, 1969 (respondent, Kesler to Walter W. Kershaw) and deed, assignment and bill of sale of December 17, 1970, (Kershaw to appellant, Rockefeller Land & Livestock Company), which transfers are hereinafter more specifically referred to. (Exhibits P-5 and D-4). For convenience this property will be referred to as the "Property" unless specifically designated otherwise. The deeds and assignments and bills of sale of July 28, 1969, and December 17, 1970, also included 480 acres of land, which land was the subject of another lawsuit in the District Court of Millard County by Ronald Bradshaw against appellant,

Rockefeller Land & Livestock Company. That

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----- was an appeal in the Supreme Court of

Utah, Case No. 13502. Hence it is not the subject of this lawsuit as hereinafter mentioned.

The deeds, assignments and bills of sale relevant to this appeal are as follows:

On July 28, 1969, respondent, Kesler, by quit-claim deed, assignment, and bill of sale deeded and assigned the Property involved to Walter W. Kershaw (Exhibit P-5). The purchase price was fixed at \$12,000 and as of July, 1969, \$2,800 of the price was paid by Kershaw. (R. 31-32).

On December 17, 1970, Kershaw, by quit-claim deed, assignment, and bill of sale, deeded and assigned the Property involved to appellant, Rockefeller Land & Livestock Company. The purchase price for the December 17, 1970, deed, assignment and bill of sale was \$5,000, which was paid in escrow at the time of the closing of the December 17, 1970, transaction at the office of the Utah Title Company. (R. 386, 485).

For convenience, the transfers of the

as the "transfer of July 28, 1969" or the "transfer of December 17, 1970," as the case may be.

After the transfer of July 28, 1969, Kershaw gave an option to purchase 480 acres of the properties described in the transfer to one Ronald Bradshaw. In the district court action of Millard County mentioned above, Bradshaw v. Kershaw, the lower court ruled the option was valid and this court, case no. 13502, 529 P 2d 803 (1974) affirmed that decision. Consequently, the 480 acres is not included as part of the property involved on appeal.

Kesler's ownership of the property which he conveyed to Kershaw in the transfer of July 28, 1969, was derived under an escrow contract between Grant D. Staples and Grace W. Staples, Sellers, and Ray A. Huber and Ina M. Huber, his wife, and Marion L. Kesler, and Carol Kesler, his wife, the Buyers, of March 1, 1966 (Exhibit P-3). In that transaction, warranty deed, assignment, and

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Richfield State Bank as escrow agent to be delivered upon full payment of the purchase price provided in the escrow contract (R. 65-66). Thus, clear title to the Property involved either by Kershaw (under the transfer of July 28, 1969) or by Rockefeller (under the transfer of December 17, 1970) was subject to payment of the balance due under the Staples' escrow agreement of March 1, 1966. Kesler by assignments of Carol Kesler and the Hubers obtained all rights of the escrow contract at the time of the July 28, 1969 transfer to Kershaw. The papers for the transfer of July 28, 1969 (from Kesler to Kershaw) were professionally drawn by attorney Carvel Mattson, practicing attorney at Richfield, Utah, who, at the request of Kershaw and Kesler who provided Mattson with the descriptions and the information prepared such papers (R. 261-265).

The papers for the December 17, 1970 transfer from Kershaw to Rockefeller Land & Livestock Company were drawn by the Utah Title

forms were used as were used in the transfer from Kesler to Kershaw of July 28, 1969, and the papers for the same were furnished to Utah Title Company by Carvel Mattson. Both the deeds, assignments, and bills of sale for the transfers of July 28, 1969, and December 17, 1970, were clear, definite, and complete on their face without the slightest ambiguity. (Exhibits P-5, D-4).

The closing of the transfer of July 28, 1969, (Kesler to Kershaw) was at attorney Carvel Mattson's office in Richfield, Utah. The closing of the transfer of December 17, 1970 (Kershaw to Rockefeller) was at Utah Title Company, Salt Lake City, Utah (R. 469-473).

Kesler admitted that when he executed the July 28, 1969 transfer papers he knew that the papers contained the Properties involved in addition to the 480 acres involved in the Bradshaw v. Kershaw action (R. 83-84).

that the papers contained the property involved in addition to the said 480 acres. Indeed, prior to the execution of the documents, Edward Rogers (who was at the closing) had talked to Kershaw concerning certain letters by Carvel Mattson dated December 10, 1970, and November 11, 1970 (Exhibits D-5K, P-7). These letters indicated there might be some understanding for a buy-back or option by Kesler to purchase the Property involved. Kershaw had advised Rogers flatly that no such agreement existed and appeared insulted at such question (R. 485).

Kesler's testimony of an oral understanding with Kershaw for an option to buy back the Property is given credence by the testimony of Carvel Mattson. Mattson testified that when Kesler gave instructions to draw the documents for the transfer of July 28, 1969, there was a discussion, although vague, as to Kesler having some option to get the Property (other than the 480 acres) if Kesler came up with some money, but that no agree-

ment had been written or finalized on same.
(R. 280-281).

Also giving credence to Kesler's testimony are Mattson's letter to Kershaw of December 7, 1970 (Exhibit D-5K) and his letter to Edward Rogers of November 11, 1970 (Exhibit P-7) respecting "some confusion" on such option or buy-back agreement. Edward Rogers who received the letter of November 11, 1970 and a copy of the letter of December 7, 1970, talked to Mattson about the letters prior to the transfer of December 17, 1970 and was advised there was a rumor. He also talked to Kershaw before the December 17, 1970 closing and, as mentioned above, Kershaw advised that there was no buy-back agreement and was insulted by the suggestion.

The lower court overruled appellants' objections of the parol evidence rule and the statute of frauds and ruled that the December 17 1970 transfer of the properties from Kershaw to Rockefeller was invalid.

ARGUMENT

POINT

- I. THE COURT ERRED IN PERMITTING AND ACCEPTING PAROL TESTIMONY TO SET ASIDE THE WRITTEN TRANSFERS OF KESLER OF JULY 28, 1969, AND KERSHAW TO ROCKEFELLER OF DECEMBER 17, 1970

Appellant Rockefeller invoked the parol evidence rule and the Utah statute of frauds (Utah Code 25-5-1) at every stage in the evidence and the proceedings. As stated by Kesler's attorney, such objections were "laid out on the record like a slab of cement" (R. 187). The lower court stated that "the character of the instrument is determined by the intentions of the parties" and if they were intended as a security agreement that is binding on all the world" (R. 108-109). The lower court in denying appellant's motion to strike Kesler's testimony on the parol evidence rule and the statute of frauds stated that as both parties to the transfer of

July 28, 1969 (Kesler to Kershaw) intended it

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Such agreement, such intention was

the pleadings admitted (as far as Kershaw and Kesler were concerned) that it was a security agreement, the court would have to hold this was the case and whether or not Rockefeller was bound depended on whether he took the property without notice of Kershaw and Kesler's intentions (R. 151-161).

We challenge the court's rulings overruling appellant's objections of the parol evidence rule and the statute of frauds.

We submit that the parol evidence rule and the statute of frauds can be invoked by anyone down the chain of title. That it is even more important that the last grantee in the chain of title should be able to rely on these rules. Otherwise his title could be challenged by any previous grantor who cries at the last closing: "I had an oral agreement!"

As to Kershaw and Kesler intending a "security agreement"-- Security for what? Security presupposes some sort of debt or obligation for the property held as security.

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Kesler owed no money or obligation to Kershaw

that was to be secured by the properties conveyed. And, as pointed out above, Kershaw had no obligation to pay off the balance due under the Staples escrow agreement. By the transfers of July 28, 1969, and December 17, 1970, both transferees took the properties subject to the escrow agreement (Exhibits P-5, D-4). And Rockefeller in order to preserve the rights under the escrow contract made two payments under the escrow agreement amounting to approximately \$6,600 after the transfer to Rockefeller (R. 386).

It was argued below that possession by Kesler gave notice although Kesler admitted that he had actually never possessed the farm. But even so--assume possession--knowledge of what? Possession only gives knowledge and makes the buyer subject to what rights the possessor may have. If it is a year's lease, the purchaser takes subject to that lease. If it is a prior deed, he takes subject to such prior deed. But Kesler had no rights whatsoever.

understanding with Kershaw negated by the statute of frauds and the parol evidence rule. For the understanding with Kershaw (whatever it was) was never reduced to writing.

Certainly it may be that Kesler had a cause of action against Kershaw relating to the July 28, 1969 transfer. Kesler filed claim in his complaint in the lower court against Kershaw. The basis of this complaint was never revealed, and for that reason the court dismissed the action against Kershaw. Kesler chose only to pursue Rockefeller. Certainly no possible cause of action (fraud, or whatever) was mentioned by Kershaw to Rogers, for Kesler never even told Rogers about the unwritten promise mentioned in Exhibits P-7 and D-5K (R. 64).

The lower court stated, "I think there are some things that haven't been revealed . . . And I don't blame myself on dismissing Kershaw (R. 495).

should have been sustained and judgment entered in favor of appellant for all the properties covered by the December 17, 1970 transfers.

The reasoning and ruling of the lower court is not the law of this court, nor of any court of any jurisdiction that we have been able to find.

The Statute of Frauds

The only exception to Utah Code 25-5-1 (applicable to this case) is Utah Code 25-5-2, when a trust arises by implication or operation of law. In such cases, there must be an intentional, false, or fraudulent purpose. There must be fraud or at least breach of confidential relationship. There was no evidence showing fraud, or confidential relationship between defendants and the grantors in the 1969 and 1970 conveyances.

As stated in Deseret Centers, Inc. v. Glen Canyon, Inc. 11 Utah 2d 166, 35 P 286 (1960): "Absent fraud, duress, mistake, or

or impeach his own deed." In the 1969 conveyances Kesler attempted to impeach his own deed. In the 1970 conveyances, Kershaw attempted to impeach his own deed.

See also Briggs v. Hanks 16 Utah 2d 138, 396 P 2d 871.

The Parol Evidence Rule

The Utah Supreme Court has emphatically and explicitly ruled: A written document complete on its face, unambiguous in its terms, cannot be modified or set aside by parol evidence absent fraud, mistake or the like.

Thus in Fox Film Corp. v. Ogden Theater Co. 82 Utah 279, 17 P 2d 294 (1934) (applying the parol evidence rule) the court had before it written contracts between plaintiff (Fox Film) and defendant (Ogden Theater) under which plaintiff agreed to provide motion picture films for rental and license fee. The court below ruled against plaintiff by reason of parol evidence of agreements modifying the terms of

instant case) the competency of the parol evidence was challenged under the parol evidence rule. The court reversed the lower court ruling:

In the absence of fraud or mistake, the classical rule to the effect that parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a valid written instrument is generally applied in cases of this kind.

(The court will notice that following this quotation, there are exceptions to this, such as writings that do not purport to set forth the entire contract. None of the exceptions apply to the instant case.)

As stated in Jewell v. Horner 12 Utah 2d 328, 366 P.2d 594 (1961) pp. 333-334:

With respect to the standard and quality of evidence required to establish an oral trust, this court in the case of Chambers v. Emery stated:

"In such event the proof must be strong, clear, and convincing, such as to leave no doubt of the existence of the trust. Such a case is similar to one where it is attempted to convert a deed absolute into a mortgage, or where the reformation of a written instrument is sought on the ground of accident, mistake, or fraud. In all

plaintiff must fail unless it is clear, definite, unequivocal, and conclusive. Public policy, and the safety and security of titles to real estate demand this rule, because such evidence is offered to overcome the strong presumption, arising from the terms and conditions of an instrument in writing, which is always the best evidence of title. If it were once established that the effect of the terms of a written instrument could be avoided by a bare preponderance of parol evidence, the gates to perjury would soon be wide open, and no person could longer rest in the security of his title to property, however solemn might be the instrument on which it was founded.

(Our emphasis)

The authorities are uniform. As stated in 32 C.J.S. "Evidence" Sec. 851, pp. 216,
" . . . a different rule would greatly increase the temptation to commit perjury."

POINT II. THE LOWER COURT ERRED IN AWARDING
JUDGMENT FOR \$10,000 PUNITIVE DAMAGES
AGAINST DEFENDANTS, WILLARD B. ROGERS
AND ROCKEFELLER LAND & LIVESTOCK COMPANY.

The record in this case does not support an award of punitive damages against the defendants, Willard B. Rogers and Rockefeller

Land & Livestock Company, in the sum of

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210 000 on this sum and it was error for

the court to enter such a judgment as it did at Paragraph 6 of the Judgment (ff 149). It was likewise error on the part of the court to instruct the jury on the matter of punitive damages as it did in Instruction No. 9, which instruction was given over the objection of the said defendants. (R. 514).

Defendant, Rockefeller Land & Livestock Company, acting through Willard B. Rogers, took possession of the cattle in question in reliance upon written documents (deed, assignment and bill of sale with warranties) which, on their face, were absolute and unconditional. We submit that defendants, under the facts of this case, were entitled to rely thereon, and even if ultimately that reliance is held by the courts to be erroneous, we submit that it cannot by its very nature be wilful and malicious. The defendants had every justification to assert what they have felt to be their rights under said documents. It is enough in view of the vicissitudes of life to assume the risk of "error" and its consequences without

assuming the added burden of "malice" in relying on the efficacy of unequivocal documents

In a Memorandum Decision of Judge Maurice H. Harding, found in the record at page SS 172, the Judge made this observation:

"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 appear 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..."

If the learned trial judge found the resolution of this matter difficult, then how can it be said that defendants, as laymen, and unlearned in the law, acted maliciously. As a matter of law, they could not have done so, could not knowingly, wilfully and maliciously have so acted. To have done so would be beyond their powers.

It should also be noted that the cattle were not taken in secret or by deception, but rather as stated above under claim of right. Defendants sought and obtained the help of the Sheriff of Millard County, and the cattle

supervision of the sheriff and with the assistance of third parties. (R. 378). This is undisputed. (The sheriff and said third parties were originally joined in this action, but were dismissed from the action.)

In the case of Calhoun v. Universal Credit, 106 Ut 166, 146 Pac 2d 284 (1944), the court cites with approval the following language:

"The party must know that the act is wrongful and must do it intentionally without just cause or excuse. If he acts in good faith and in the honest belief that his act is lawful, he is not liable for punitive damages even though he may be mistaken as to the legality of his act." (Page 175 Utah Reports).

In the instant case, there is no testimony whatsoever from which the finder of facts could conclude that Willard B. Rogers knew that what he was doing was wrongful. Even if this court upholds the lower court on the matter of ownership, the most that could be said in that event would be that Willard B. Rogers was mistaken. Even carelessness or negligence won't support punitive damages.

(1911); Palombi v. D & C Builders, 22 Ut 2d 297, 452 Pac 2d 325 (1969).

The documents in question were drafted by attorney Carvel Mattson and he testified that he drafted them exactly as he was instructed to do (R. 265), all of which was either directed by or concurred in by plaintiff Kesler. Mr. Mattson testified that there was some talk of a buy-back but that it was never finalized. We submit that it appears clear that no conditions or restrictions to the absolute nature of the documents in question were ever agreed upon. It should be noted, however, that if there was such a private or secret agreement, it was a secrecy directed or concurred in by plaintiff, and to now allow him to take advantage of that secrecy to impose punitive damages upon defendants is grossly unjust. In effect, Kesler is rewarded for his sub rosa dealings by being given a \$10,000 bonus. If there were conditions or restrictions on the documents, why were they not incorporated in

some other open declaration of or reservation of Kesler's claimed rights? It must of necessity be that either there were none or the secrecy was sought in connection with some other transaction, such as Kesler's bankruptcy, perhaps (R. 67). In either case, Kesler is not entitled to punitive damages from such a situation brought about by his own lack of candor (to say the least).

Furthermore, there is no special interrogatory which would support such a judgment for punitive damages. The special interrogatories which the court submitted to this jury dealing with the question of punitive damages was No. 11, which is as follows:

11. If the answer to interrogatory 6, 8 or 9 is "yes", was the conduct of the Defendant, Willard Rogers, willful or malicious?

Answer _____

- (a) If the answer to interrogatory 10 is "yes", are the Plaintiffs entitled to recover exemplary or punitive damages as against Willard Rogers?

(b) If your answer to 11 (a) is "yes", state the amount of the exemplary or punitive damages that should be awarded.

Answer _____

Interrogatory No. 6 dealt with the taking of cattle in December of 1970. Interrogatory No. 8 dealt with the sale of two cows and two calves at the Delta auction on January 15, 1971, and Interrogatory No. 9 dealt with the taking of cattle allegedly owned by Gregory Kesler, a minor.

We submit that this interrogatory, to which defendants objected (R. 506), was misleading, slanted prejudicially in favor of plaintiffs and in effect authorized the jury to believe that if they found any malice in any of these three transactions that they could award punitive damages based upon all of the transactions even though defendants' conduct was not malicious in connection with all of said transactions. For example: plaintiff attempted to show some bad conduct

testimony was in direct conflict on this matter, but that transaction involved only \$500, and viewed at its worst, Rogers only sought to have said sum escrowed, and in fact it was. Nevertheless, under the aforesaid instruction, the jury, if it could find some "malice" in this transaction, is authorized to award punitive damages far out of proportion to that rather minor occurrence. Furthermore, interrogatory No. 10 does not call for a "yes" answer, and, therefore, would not support the answer given by the jury in 11(a).

Finally, even if punitive damages were recoverable in this action the sum of \$10,000 as awarded is grossly excessive. Plaintiffs improperly attempted to ridicule defendant Willard B. Rogers in the eyes of the jury by making fun of his overweight condition in an attempt to induce them to act against defendant in passion rather than

in reason. At page 421 of the record the

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following took place which even the trial

attorney, is interrogating Mr. Rogers:

A. No. I'm an artificial insemination technician, and I've passed the State test requirement, and I can tell whether a cow's pregnant or not.

Q. The pregnancy test is what type of a test? It's not a saliva test, is it?

A. No. It's a glove test, you might say.

Q. Where you insert your arm up the --?

A. Rectum of the cow.

Q. -- rectum of the animal, is that true?

A. Yes. Do you want me to explain it more?

Q. How much do you weigh, Mr. Rogers?

A. Oh, about two hundred and 40 some odd pounds.

Q. Did you weigh about the same at that time?

A. No, I think I probably weighed about two hundred 10 pounds then.

Q. Your arms were about as big around as they are now?

you, if you want, for a dollar.

THE COURT: That's too low.

THE WITNESS: If you go in, you deserve a dollar.

THE COURT: That's too low.

If the award of punitive damages is any indication, plaintiff was highly successful in this tactic. It is nevertheless submitted that Mr. Rogers' weight should have nothing whatsoever to do with the outcome of this case and to make fun of his overweight condition in front of the jury is improper, although apparently successful. We submit, however, that the Supreme Court should disallow any award of punitive damages founded on such a woefully poor tactic.

The compensatory judgment awarded in this action is for the sum of \$21,320 plus interest at six percent (6%) from December 24, 1970 (exclusive of the \$500 in escrow from

payments made by them on the Staples escrow. (The court in paragraph 7 of its judgment (ff - 149) ordered that said payments be offset against the punitive damages, but it is obvious that those payments in any event should be offset against the compensatory damages, particularly if, as defendants contend, no punitive damages are justified.) It, therefore, appears that the compensatory judgment awarded to the plaintiff is a net amount of approximately \$15,098 (exclusive of interest). An award of \$10,000 exemplary damages is clearly disproportionate to the amount of compensatory damages and defendants cite in support of this position the case of Wilson v. Oldroyd, 1 U. 2d 362, 267 P. 2d 759 (1954), in which the court allowed exemplary damages, but limited them to approximately ten percent (10%) of the compensatory damages.

The Supreme Court of Utah has consistently held that any award of punitive damages must

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ordinarily bear a reasonable relation to

compensatory damages, and as stated in the case of Wilson v. Oldroyd, supra:

"There is no definite formula or basis upon which punitive damages can be computed. They have to fall within the limits of reason; 'must not be so disproportionate to the injury and the actual damage as to plainly manifest that they were the result of passion and prejudice and must be correlated with the other facts and circumstances shown in evidence including defendant's wealth."

We submit that under the facts and the law, in this case no punitive damages should be awarded to plaintiffs and at all events all reasonable minds must agree that \$10,000 is excessive, arbitrary and clearly the result of prejudice and passion and should not be allowed to stand.

POINT III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 4.

The Trial Court committed prejudicial error in two respects in giving Instruction No. 4 (aa-117):

(1) In said instruction the Court stated to the jury that plaintiffs simply had the burden of proving that they were the owners

of the property in question by "a preponderance of the evidence". This is not the law. As was pointed out in the argument under Point I supra, the burden of proof is by "strong, clear, and convincing evidence". Jewell v. Horner, supra.

(2) The Court stated to the jury in Instruction No. 4 that the defendants, Rogers and Rockefeller, had the burden of proving by a preponderance of the evidence that at the time they claimed to have acquired the Kershaw interest in the property, none of its officers or agents had any notice, either actual or constructive, of the fact that Walter Kershaw acquired only a security interest in the property, other than the 480 acres. The Court thereby erroneously imposed the burden of proof of lack of knowledge on the defendants, whereas the burden of proving knowledge is, under Utah law, placed upon the plaintiff. It was held in Independent

"Before the title of the Shell Oil Company can be said to be burdened with the covenants contained in plaintiff's mortgage, the plaintiff must establish the fact that the Shell Oil Company had either actual or constructive notice of plaintiff's mortgage at or before the time title to the property vested in the Shell Oil Company." (Utah Reports, p. 396.)

Defendants took due exception to Instruction No. 4 (R. 512) and the aforesaid instruction was clearly prejudicial to defendants.

CONCLUSION

For the reasons hereinabove set forth in this brief, it is respectfully submitted that the judgment of the lower court should be reversed, and the title to the property in question should be quieted in the defendant, Rockefeller Land & Livestock Company; the judgment for punitive damages should be vacated and set aside at all events. In the alternative, the defendants should be awarded a new trial.

Dated: April 18, 1975

Respectfully submitted,

WILLIAM H. HENDERSON
ROBERT C. CUMMINGS

Mailed two copies of the foregoing Brief 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

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