

1952

Rulon M. Keller v. R. V. Wixom : Brief of Appellant

Utah Supreme Court

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Case No. 7778

IN THE SUPREME COURT
of the
STATE OF UTAH

RULON M. KELLER,
Plaintiff and Respondent,

— vs. —

R. V. WIXOM,
Defendant and Appellant.

APPELLANT'S BRIEF

FILE

MAY 2 - 1982

Clerk, Supreme Court, Utah

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RULON M. KELLER,

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APPELLANT'S BRIEF

STATEMENT OF FACTS

This action is for an accounting between the respective parties hereto resulting out of their livestock and ranching operations, particularly in the state of Nevada and also in the states of Utah and Idaho during the time beginning with March 19, 1947, and continuing to about June 18, 1950.

For the purpose of clarity and conciseness, the defendant and appellant shall hereafter refer to the parties hereto by their respective names, that is: Keller being the plaintiff and respondent and Wixom the defendant and appellant.

The facts in the matter are as follows :

March 19, 1947, Wixom was the owner of certain real and personal property and livestock located in the county of Elko, State of Nevada. ("Exhibits B, 3 and 4").

That on March 19, 1947, Wixom and wife entered into an agreement to sell certain real and personal property to Ivan Kimber; the contract was executed March 20, 1947. ("Exhibit B"). That also on March 19, 1947, Wixom and Keller entered into a "preliminary agreement of partnership involving certain real property and 407 head of steers, all located in Elko County, Nevada." The real property herein concerned is specifically described in "Schedule B, Exhibit 3" and the personal property herein concerned in "Exhibit 4." It was the definite understanding that a detailed agreement of partnership regarding the proposed partnership would be executed, but this agreement was never executed or completed. (Tr. 40, 41, 46, 89, 160, 171, 183, 313 and "Exhibit B").

Pursuant to the terms of "Exhibit B," Wixom and Keller agreed to enter into a detailed partnership agreement whereby Wixom would sell and Keller agreed to buy a one-half interest in certain real estate and 407 head of cattle. For a specific description of the real estate and cattle reference is made to "Schedule B," "Exhibit B" and "Exhibit 4."

In consideration of the foregoing facts and pursuant to the agreement, it was agreed that Keller was to acquire the interest in the real estate and 407 head of steers, hereinabove specified, upon the following terms, to-wit:

IN THE SUPREME COURT of the STATE OF UTAH

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Plaintiff and Respondent,

— vs. —

R. V. WIXOM,

Defendant and Appellant.

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In consideration of the foregoing facts and pursuant to the agreement, it was agreed that Keller was to acquire the interest in the real estate and 407 head of steers, hereinabove specified, upon the following terms, to-wit:

"NOW THEREFORE, it is agreed that the parties hereto shall enter into a formal partnership agreement whereby the second party shall acquire one-half ($\frac{1}{2}$) interest in approximately four hundred (400) head of cattle and the range land, Railroad Lease and Grazing rights for the principal sum of Thirty-four Thousand (\$34,000.00) Dollars. Said range land however to be subject to a mortgage in favor of the American National Insurance Company.

"That said second party shall assume one-half ($\frac{1}{2}$) of the mortgage covering the livestock payable to the Wasatch Livestock Loan Company in the sum of Thirty-two Thousand Two Hundred Fifty-two and $\frac{77}{100}$ (\$32, 252.77) Dollars, plus one-half ($\frac{1}{2}$) of the accrued interest on the loan; and shall pay to the first party the sum of Ten Thousand (\$10,000.00) Dollars cash upon the execution of this preliminary agreement, the balance of said \$34,000.00 which is Seven Thousand Eight Hundred Seventy-three and $\frac{62}{100}$ (\$7,873.62) Dollars, shall be evidenced by a promissory note executed by the second party in favor of the first party, as payee, and shall be payable on or before December 1, 1947, and shall bear interest at the rate of seven (7%) percent per annum from date hereof until paid."

The sum of \$10,000.00, pursuant to "Exhibit B" was paid to Wixom by Keller on March 19, 1947. The deferred balance which was to be evidenced by a promissory note in the principal amount of \$7,873.62, as agreed upon in "Exhibit B," was never executed by Keller and delivered to Wixom, and there were never any funds beyond the money required for capital investment for

the partnership operation and expenses until the consummation of the sale of the real property on or about June 18, 1950. Further, said deferred principal sum with interest as provided by said agreement "Exhibit B" was never paid to Wixom by Keller. (Tr. 9, 313, 315, 464 and 465 and Keller's deposition "Exhibit 36" page 54).

Immediately after March 19, 1947, Keller, who by his own admission is an experienced livestock man and livestock trader, moved into the picture and made plans. He invested \$10,000.00 in cash and agreed to pay Wixom \$7,873.62 plus interest at ~~7~~7% from March 19, 1947 until paid and which he did not pay. Said latter amount to be paid on or before December 1, 1947, ("Exhibit B") and he never contributed any more funds until April 6, 1949, when he made available \$2,000.00. ("Exhibit B").

Keller and Orval Benson were, before March 19, 1947, engaged in the livestock feeding business in the vicinity of Idaho Falls, Idaho, and Orval Benson, his partner, had a contract with Cudahy Packing Company for the sale of livestock, to-wit: 100 heifers at \$22.00 per cwt. and 500 steers at \$22.00 per cwt. ("Exhibit 35" and Tr. 20 to 21, 69 to 73, 76 to 78, 115, 148 to 153, 161, 166, 259 to 267, 319, 358 to 366, 395 to 399, 433 to 444, 459, 465 to 466, 641 and Keller's Deposition "Exhibit 36" pages 16, 20, 21, 23, 24, 26, 39, 46).

Keller and Wixom, on or about March 26, 1947, shipped 214 head of steers to a feed-lot in the vicinity of Idaho Falls, Idaho, for the purpose of feeding and fattening

for market, and it was agreed between Wixom and Keller that the feed cost of said steers would be \$30.00 per head. (Tr. 62 to 64, 105 to 114, 159 to 160, 192 to 198, 243, 259 to 260, 311 to 312, 432 to 433, 446 to 448, 459, 460 and Keller's Deposition, "Exhibit 36," pages 16, 17, 18, 21 and 53). Keller having under contract the required feed at the time.

In regard to the 214 steers shipped to Idaho for feeding purposes there was the sum of \$17,477.64 received by Wixom and Keller.

In this regard the facts are that Keller was in complete charge of the entire feeding and selling operation. That he weighed the steers into the feed-lot and also weighed them out and sold them under the Cudahy contract, even though the beef market at the time of the sale of said cattle was higher and these cattle were not under the Cudahy contract and that they were sold to Cudahy's although Keller and Orval Benson had on hand prior to March 19, 1947, sufficient cattle to fill the contract of Orval Benson with the Cudahy Company. (See reference to transcript and deposition of Keller heretofore referred to; also, "Exhibit 30").

The facts also show that Keller charged Wixom \$49.62 for feeding the steers at Idaho Falls instead of \$30.00 per head as agreed upon; ("Exhibit K") and upon which there was a definite misunderstanding.

In addition to the 214 head of steers that were shipped to Idaho Falls and fed for fattening and *marketed*, there were 193 head retained on the ranch property in Elko County, State of Nevada, and were marketed

through the regular channels of livestock trading—and Wixom and Keller also purchased and/or raised an additional 600 head of cattle which were sold in the customary manner other than those lost, strayed or stolen, and received from the sale of the same the sum of \$155,941.81.

All of the livestock was purchased by funds obtained by a loan from the Wasatch Livestock Loan Company; (“Exhibits R and S”) the monies received from the sale of said livestock being handled both by Keller and Wixom.

The operation, to be a going concern, required the personal effort and the financial support and the purchase of equipment and hiring labor. (Tr. 317, 318, 340 to 342, 216, 219, 337 to 342, 453 to 457, 459 to 460, 161, 238 to 240, 317 to 318, 424 to 426, 463). Wixom, however, was the principal investor, and although agreed otherwise was because of Keller’s willful refusal and neglect to perform his obligations, required to protect the interests of the partnership in the entire operation. See the depositions of Wixom and Keller. (“Exhibits 72 and 36”).

In view of Keller’s failure and refusal to perform and comply with the agreement of partnership as proposed by him, Wixom was required to expend his own funds for the purchase of equipment and the hiring of labor, other miscellaneous expenses, required to devote his entire time in the operation of said business, (“Exhibits 72 and 36”). (Tr. 216 to 219, 161, 238 to 240, 317 to 318, 424 to 426, 463, 317, 318, 340 to 342).

All livestock belonging to Wixom and Keller were sold and accounted for during the year 1949, and the real estate was sold in 1950, resulting in complete disposition of all common funds and property other than an accounting as herein required.

ARGUMENT

POINT I.

THE COURT ERRED IN ITS FINDING IN THIS THAT SAID FINDINGS ARE INDEFINITE, ERRONEOUS, PREJUDICIAL AND UNINTELLIGIBLE AND NOT SUPPORTED BY THE EVIDENCE FOR THE REASON THAT THEY DO NOT SPECIFY PARTICULARLY THE ITEMS OF EXPENSE AND COST OF WIXOM AND KELLER, THE ITEMS OF PURCHASE AND THE TERMS OF THEIR AGREEMENT. AND AN ITEMIZED ACCOUNT OF HOW THE AMOUNT OF THE JUDGMENT WAS ARRIVED AT.

Pursuant to the Utah Rules of Civil Procedure, Rule 52(a) in cases of this nature, the trial court is required to make its findings of fact and separately state the conclusions of law.

In support of the foregoing provisions the cases are legion to the effect that there must be a specific finding as to each matter of account in controversy. (*Margolis v. Leonard and Holt*, 271 Pac. 758; *Schlieff et al. v. Bistline*, 15 Pac. (2d) 726; *Whann v. Doell*, 221 Pac. 899; *Bancroft's Code Practice and Remedies* Section 4376 at page 5815 and faction).

In view of the foregoing authorities, Wixom introduced proper evidence to establish his claim for compensation and it cannot be determined what ruling the court

made from the finding in the following particulars, to-wit:

1. That Wixom was entitled to compensation for equipment and wages expended by him in the sum of \$2500.00 for Wixom and Keller operation. (Tr. 317 to 318, 340 to 342 and "Exhibit 72").

2. That Wixom was entitled to a full accounting of the exact steers shipped from Elko County, Nevada, and fed at feed-lot near Idaho Falls, Ida. (Tr. 20 to 21, 69 to 73, 76 to 78, 115, 148 to 153, 161 to 166, 259 to 267, 319, 358 to 366, 395 to 399, 433 to 444, 459, 465 to 466 and 641, and "Exhibits 36 and 72").

3. That Wixom was entitled to a full accounting of the feed-lot operation at Idaho Falls, Ida. (Tr. 62 to 64, 105 to 114, 159 to 160, 192 to 198, 243, 259 to 260, 311 to 312, 432 to 433, 446, 448, 459 to 460, and "Exhibit 36").

4. That Wixom is entitled to a specific finding regarding the disposition of the sum of \$884.54, as itemized in "Exhibit R." (Tr. 104 to 106, 235, 269, 270, 285 and "Exhibits 36 and 72").

5. That Wixom is entitled to a specific finding on the expense covering the sale of range land. (Tr. 216 to 219).

6. That Wixom is entitled to a specific finding on legal expense and abstracts in the sum of \$592.50. (Tr. 310 and "Exhibit 72").

7. That Wixom is entitled to a specific finding on

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his expenditure made for the purpose of saving the Taylor Grazing Rights for the partnership. (Tr. 55 to 58, 60 to 61, 90, 91, 220 to 226, 245 to 249, 302 to 309, 316, 336 to 337, 357, 427, 431, 458, 459, 461, 462, 463).

POINT II.

THAT THE COURT ERRED IN REFUSING WIXOM THE OPPORTUNITY TO INTRODUCE EVIDENCE IN SUPPORT OF HIS CLAIM FOR EXTRA COMPENSATION FOR SERVICES AND WORK REQUIRED TO BE DONE FOR THE BENEFIT OF WIXOM AND KELLER IN SAID OPERATION.

The facts are clear and undisputed that Wixom, due to Keller's unwarranted conduct and default, was required to transact the full business and assume the full responsibility of the operation. (Tr. 161, 238 to 240, 317 to 318, 424 to 426, 463 and "Exhibits 36 and 72").

In support of the foregoing facts, Wixom calls to the attention of the Court: Title 69, Chap. 1, Section 15 Utah Code Annotated 1943; *George Olivier v. Carl Uleberg*, 165 A.L.R. 974.

POINT III.

THAT THE COURT ERRED IN ITS MATHEMATICAL CALCULATIONS IN ARRIVING AT SAID JUDGMENT.

Wixom calls the Court's attention to the calculations of the Court—obviously erroneous.

CONCLUSION

It is respectfully submitted that the judgment of the trial court be reversed.

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Dated at Brigham City, Utah, April 17, 1952.