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Ronald Bradshaw v. Walter W. Kershaw And Helen G. Kershaw, His Wife, Willard B. Rogers, Edward B. Rogers, and Rockefeller Land & Livestock Company, a Utah Corporation : Reply To Brief of Respondent Ronald Bradshaw And To Brief Op Respondents, Walter W. Ke

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Reply Brief, *Bradshaw v. Kershaw*, No. 13502 (1974).
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IN THE SUPREME COURT OF THE STATE OF UTAH

RONALD BRADSHAW,
Plaintiff and Respondent,

vs.

WALTER W. KERSHAW and HELEN G. KERSHAW, his wife, WILLARD B. ROGERS, EDWARD B. ROGERS, and ROCKEFELLER LAND & LIVESTOCK COMPANY, a Utah Corporation,
Defendants and Appellants.

Case No. 13502

REPLY TO BRIEF OF RESPONDENT

RONALD BRADSHAW AND TO BRIEF OF RESPONDENTS, WALTER W. KERSHAW AND HELEN G. KERSHAW

Appeal from the Judgment of the District Court of Millard County, State of Utah
The Honorable J. Harlan Burns, Judge

GUSTIN & GUSTIN
Walker Bank Building
Salt Lake City, Utah 84111

Attorneys for Appellant,
Walter W. Kershaw

PUGSLEY, HAYES, WATKISS, CAMPBELL & COWLEY
El Paso Gas Building
Salt Lake City, Utah 84111

Attorneys for Respondent

ROBERT C. CUMMINGS
WILLIAM H. HENDERSON
MARK S. MINER
320 South 3rd East, Suite 2
Salt Lake City, Utah 84111

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

FILED
NOV 1 - 1974
Clerk, Supreme Court, Utah

Form FHA 440-34
(Rev. 12-20-68)

Position 5

511

Exhibit No. 12-A
Case No. 5777

UNITED STATES DEPARTMENT OF AGRICULTURE

FARMERS HOME ADMINISTRATION

OPTION TO PURCHASE REAL PROPERTY

1. In consideration of the sum of $ 100.00 in hand paid and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the undersigned (hereinafter called the "Seller"), who covenants that he is the owner thereof, hereby, for himself and his heirs, executors, administrators, successors and assigns, offers and agrees to sell and convey to

Milton A. Christensen Meadow, Utah
(Name and Address)

(hereinafter called the "Buyer"), and hereby grants to the said Buyer the exclusive and irrevocable option and right to purchase, under the conditions hereinafter provided, the following-described property, located in Millard County, State of Utah:

(Insert here full and complete legal description of the property including any water rights and water stock being purchased)

Parcel #1 Consisting of: SE¼ of Sec. 3; NE¼ of Sec. 10; S½ of SW¼ of Sec. 3; NE¼ of SW¼ of Sec. 3; SE¼ of SE¼ of Sec. 4; T 23S R 6W of SLB & M. Area 480 Ac. [illegible]
Salt Lake City, Utah, together with a 6 CFS well permit purchased from Milo and Boyd Watts, of Kanosh, Utah. Price $7,200.00

Parcel # 2 Consisting of: E½ of SE¼ of Sec. 10, T 23 S R 6W SLB&M. Area 80 Acres more or less. Contractual agreement between Grace W. Staples of Kanosh, Utah, and Walter W. Kershaw, Salt Lake City, Utah Balance $2850.00

511
NO. ___ RECORDED AT REQUEST OF: Marion Keeler
DATE Dec 23, 1970 TIME 4:10 PM FEE $5.50
BOOK 80 OF REC. PAGE 480-482
LaVoy Martin RECORDER OF MILLARD COUNTY, UTAH
BY ___, Deputy

(over)

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IN THE SUPREME COURT OF THE STATE OF UTAH

RONALD BRADSHAW, *Plaintiff and Respondent,* vs. WALTER W. KERSHAW and HELEN G. KERSHAW, his wife, WILLARD B. ROGERS, EDWARD B. ROGERS, and ROCKEFELLER LAND & LIVESTOCK COMPANY, a Utah Corporation, *Defendants and Appellants.*	Case No. 13502

REPLY TO BRIEF OF RESPONDENT

RONALD BRADSHAW AND REPLY TO BRIEFS OF RESPONDENTS WALTER W. KERSHAW AND HELEN G. KERSHAW

---

1. RESPONDENT'S ARGUMENT (POINT 1) THAT THE OPTION AGREEMENT WAS VALID AND ENFORCEABLE IS ERRONEOUS, AS CHRISTENSEN'S AGENCY WAS LIMITED TO OBTAINING A FARM LOAN

AND BRADSHAW TOOK WITH KNOWLEDGE OF SUCH LIMITATION.

Respondent Bradshaw fails to answer Rogers' contentions that Christensen's agency to use the option was limited to obtaining a Federal Farm Loan and as Bradshaw took it (the option) with full knowledge of such limitation the option consequently was invalid as to Rogers. Bradshaw does not dispute—indeed he does not mention—that the option was executed and limited for the single purpose of obtaining a Federal Farm Loan. He could not dispute, of course, for the option so provides on its face:

> 2. This option is given to enable the Buyer to obtain a loan insured or made by the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, and its duly authorized representatives, (hereinafter called the "Government"), for the purchase of said property. It is agreed that the Buyer's efforts to obtain a loan constitute a part of the consideration for this option. (Paragraph 2, Exhibit P-4)

For the convenience of the court and counsel, a copy of the option is attached to this brief.

The extensive relationship of trust, confidence and agency between Christensen and Kershaw emphasizes why he limited Christensen's agency on the option. Christensen's and Kershaw's relationship of trust continued up until the confrontation between Kershaw and Christensen November, 1970 (herein mentioned), as shown throughout the uncontradicted testimony. At

the time of the option transaction, Kershaw describes his relationship as that of a "compatriot" (Tr. 534). Christensen undertook to build a "big cattle operation" for Kershaw (Tr. 33). Christensen took possession of the property "on behalf of Kershaw and worked them until late 1970" (Tr. 49:151. See also page 6, Rogers' Opening Brief, showing the extensive agency relationship between Rogers and Christensen).

Nor does Christensen (or Bradshaw) anywhere in their testimony deny that Christensen was Kershaw's agent in procuring the loan and that at the time the option was signed Christensen was operating the 560 acres of property as Kershaw's agent. That Christensen had defaulted in his payments to Kershaw whom he listed as a creditor in his bankruptcy papers in the amount of some $150,000 (Tr. 196:20-25). Christensen had filed bankruptcy in May, 1970, which was prior to the purported exercise of the option.

Essentially, the option was a mere form of agency. As stated in 2A C.J.S. "Agency", Sec. 11, p. 569:

> Where intent to create an agency appears, the contract will be so construed although it purports to be an option, as where the option is a mere form of agency *given to secure to the agent control of the negotiations*, or to lend him the appearance and character of the purchaser for the effect it may have on others, and it is not intended that he shall acquire title or become a purchaser. (Our emphasis)

The only authority under the option was to obtain a farm loan so that Christensen might so order his affairs

that he could take over *all* Kershaw's holdings in Millard County. This required a very substantial loan, not just $10,050, and the benefit of the loan was to go to Kershaw by Christensen taking over all of these properties and their associated debts. Christensen did not obtain the loan from FHA (and never obtained it from anyone else.) *The consideration for the option totally failed.* When Christensen was not able to take over any of Kershaw's properties he conspired with Bradshaw to transfer the option to Bradshaw, gambling that Bradshaw could make it stick.

Christensen and Bradshaw's utilization of the option was a calculated gamble. Christensen testified Bradshaw was to pay $5,000 for the 560 acres and that $500 was paid. (Tr. 194:16-22). He further testified:

> A. Yes, Mr. Bradshaw is to pay me the balance on it.
>
> Q. Does it have anything to do with the outcome to this lawsuit?
>
> A. It would have, yes.
>
> Q. And, in other words, if Mr. Bradshaw doesn't prevail in this case you don't get the balance of that consideration?
>
> (Tr. 229: 2-8. See Assignment, Exhibit 5)

Thus, Bradshaw's purported purchase of the option (and Christensen's tender to Kershaw) was similar to the tender of performance in *Fischer v. Johnson* (Su-

preme Court of Utah, Case No. 13530, August 6, 1974) which tender the court ruled insufficient for the reason:

> However, it is conceded that the plaintiffs were not then prepared to tender, and that they did not tender the $3,000 payment prerequisite to entering into the contract of sale. Neither did they indicate that they had available the $75,000 which was to be paid upon the execution of the contract.

In November of 1970 Christensen was not able to come up with the money to reinstate the debts upon which he had defaulted. This situation had not changed two weeks later at the time he purported to exercise the option. He had no money to tender to Kershaw.

Bradshaw connived with Christensen and Kesler in the face of knowledge that Kershaw had, on December 17, 1970, conveyed the 560 acres to Rogers by deeds and assignments (Exhibits D-7, D-9). Bradshaw took the assignment from Christensen January 7, 1971 (Tr. 143; Exhibits P-5, P-4).

Further Bradshaw took assignment of the option from Christensen with full knowledge that Kershaw denounced the option. Kershaw had a confrontation with Christensen in Kesler's and Bradshaw's presence. *Consequently, there was more than knowledge of the limitation of the option by Bradshaw.*

Christensen and Bradshaw (and apparently Kesler) were wheeling and dealing to obtain the 560 acres from under Kershaw knowing that Kershaw had denounced the option.

Bradshaw testified that at a meeting in Kesler's apartment in Provo, in early November, 1970, Kershaw claimed ownership of the 560 acres and proposed selling the property to Bradshaw. But Bradshaw countered with the argument that Christensen's option looked like a good option and he would check it out (See Bradshaw's testimony re meeting between Kesler, Kershaw and Bradshaw in Kesler's apartment in Provo early November, 1970) [Tr. 362].

Another meeting followed between Christensen, Kesler ,Bradshaw and Kershaw later in November 1970 at the Rodeway Inn in Provo where again confrontation was had between Christensen and Kershaw over the validity of the option and who had the right to sell the property and receive the money for the sale. Bradshaw testified:

> ". . . that Mr. Christensen said that he still had the option and he should be the one to receive it and Mr. Kershaw said he was. And finally they argued with it and Mr. Kershaw said, "I have got to go to Salt Lake, get out of the car, you fellows." [Tr. 368]

Rogers (unlike Bradshaw) spurned the spurious option that Christensen was peddling although he could have picked it up for $2,500. [Tr. 282:22-27]

In the light of these unchallenged facts, respondent's purported "Statements of Fact" are significant by reason of its omissions. On page 6 of Respondent's brief, where he purports to summarize the salient pro-

visions of the option, he fails utterly to mention that the option was only:

> to enable the Buyer to obtain a loan through the Farmers' Home Administration.

And on page 10 of his brief, where he purports to summarize his own testimony, he fails to mention the confrontation between Christensen and Kershaw on the validity of the option at Kesler's apartment in Provo and at the Rodeway Inn in Salt Lake.

The law is clear. It is always competent for a principal (Kershaw) to limit the authority of his agent (Christensen). And where such limitation is brought to the attention of the party with whom the agent is dealing (Bradshaw) such third party is bound by the limitations.

As stated in *Dohrmann Hotel Supply Co. v Beau Brummel Inc.* 99 U. 188, 103 Pac. 2d 650 (1940):

> One dealing with a supposed agent is under the duty to ascertain just what his capacity is.

In the instant case, as above mentioned, Bradshaw admitted that Kershaw disputed Christensen's authority under the option. *Thus Bradshaw had actual knowledge of the limitations of the option.*

Brutinel v. Nygren, 17 Ariz 491, 154 Pac 1042 (1916) is illustrative: Agent Dunn was specially authorized to find a purchaser for a drugstore for his principal upon terms and conditions satisfactory to the

principal. In an action for services by Nygren, (who negotiated the sale for Dunn), the trial court ruled for Nygren ,holding the agent had authority to bind his principal to the third party. In reversing the lower court's decision, the appellate court stated:

> The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and, like a railroad crossing, suggests the duty to "stop, look, and listen," and if he would bind the principal is bound to ascertain, not only the fact of agency, but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises.

Brutinel was cited and followed in *Phoenix Western Holding Corp. v. Gleeson* 18 Ariz. App. 60, 500 Pac 2d 320 (1972).

The rule that a third party with knowledge of an agent's limitation cannot hold the principal in universally accepted.

Section 166 Restatement of the Law of Agency states:

> Persons Having Notice of Limitations of Agent's Authority
>
> A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly.

In comment "b." under this section it is stated:

> b. As stated in Section 39, it is inferred that an agent has authority to act only for the principal's benefit. If, therefore the third person has reason to believe that the agent is acting for his own benefit, he cannot subject the principal to liability upon a contract which in fact is unauthorized.

In *3 Am Jur 2d, "Agency"* Sec. 77, p. 481, the principle is stated as follows:

> It is always competent for a principal to limit the authority of his agent, and if such limitations have been brought to the attention of the party with whom the agent is dealing, the power to bind the principal is defined thereby.

The purchaser of *real estate* must be particularly wary of the agent's authority. As stated in *2A C.J.S. "Agency,"* Sec. 223, p. 922:

> However, an authorization to sell land must be clear and distinct *and of such a character that a reasonable person may unhesitatingly see that the principal intended to bestow it.* (Our emphasis)

Here, the limitation of the option to obtaining a farm loan was hardly a "clear and distinct authorization" to Christensen to otherwise use the option. *And* (as pointed out above) Kershaw flatly told Bradshaw (November, 1970) before Bradshaw bought the option (January 7, 1971) that he did not intend the option other than for a farm loan.

Further, Kershaw's conveyances of the property were recorded *December 22, 1970* — Before Bradshaw

purchased the option from Christensen (January 7, 1971) Even before the recording of the purported option from Kershaw to Christensen (December 23, 1970). Under Utah Code 57-1-6 this sufficed to give Bradshaw notice of Kershaw's denouncement of the option.

We respectfully submit that as Bradshaw had knowledge of Christensen's limited authority, he was bound by such limitation and the option he purchased from Christensen was utterly worthless as against Rogers.

2. RESPONDENT'S ARGUMENT (POINT II, HIS BRIEF) THAT RESPONDENT PROPERLY EXERCISED THE OPTION, IS FUTILE INASMUCH AS CHRISTENSEN'S AUTHORITY AND AGENCY UNDER THE OPTION WAS LIMITED AND BRADSHAW WAS BOUND BY THE LIMITATION.

As pointed out above, Christensen was Kershaw's agent and fiduciary under the option which was limited for the single and sole purpose of obtaining a farm loan on the property involved and Bradshaw was aware of the limitation. He and Christensen gambled on being able to avoid it. But, as pointed out above, under the law Bradshaw was bound by the limitation. Thus, Christensen and Bradshaw's going through the motions of exercising the option were idle acts that could not breathe life into a spent option.

3. RESPONDENT'S ARGUMENT (UNDER POINT V OF HIS BRIEF) THAT, AS THE DATE OF KERSHAW'S OPTION TO CHRISTENSEN (AUGUST 8, 1970) WAS PRIOR TO KERSHAW'S CONVEYANCES TO ROGERS (DECEMBER 17, 1970) AND THAT ROGERS HAD KNOWLEDGE OF THE OPTION, IS IDLE INASMUCH AS THE OPTION WAS WITHOUT VALIDITY OTHER THAN TO OBTAIN A FARM LOAN AND ROGERS COULD ONLY HAVE HAD NOTICE OF AN INVALID OPTION.

Even if it be conceded, for the point of argument (but which Rogers does not concede—see opening brief) that Kershaw's option was dated in point of time, prior to the conveyance from Kershaw to Rockefeller and that Rockefeller had notice of the option, this would not avail respondent. For, as stated above, the option was strictly limited to obtaining a farm loan, as was well-known to Bradshaw. Therefore, Rogers' knowledge of an invalid option (which he spurned to buy) would hardly overcome the limitations of the option which were binding on respondent Bradshaw.

4. RESPONDENT'S ARGUMENT (POINT VI OF RESPONDENT'S BRIEF) THAT CHRISTENSEN DID NOT VIOLATE ANY DUTY TO KERSHAW IS NOT TRUE, AS CHRISTENSEN, IN DEFIANCE OF THE PURPOSE AND LIMITATIONS OF THE OPTION, SOLD IT TO BRADSHAW.

We submit that what we have said in points 1-3 above, disposes of respondent Bradshaw's contention (Point VI). Christensen, in defiance of the specific terms of the option, the specific purpose of the option (to obtain a farm loan) peddled the option to Bradshaw (January 7, 1971) *after* Kershaw had conveyed the property to Rockefeller (December 22, 1970).

To say the least, this was a most flagrant violation by Christensen of his authority to use the option. (Of course, however this may be, Bradshaw's purchase, nevertheless, would fall as he took with knowledge of the limitations of the option.)

Consequently without laboring this point, we but mention the general rules governing the duties of an agent.

In *3 C.J.S. "Agency"* Sec. 271, p. 31) it is stated:

> It is the duty of an agent, in all transactions concerning or affecting the subject matter of the agency, to act with the utmost good faith and loyalty to further the principal's interests.

And in *3 Am Jur 2d "Agency"*, Sec. 199, pp. 580-581:

> 199. *Agent as a fiduciary; duties of good faith, loyalty, and honesty.*
>
> An agent is a fiduciary with respect to the matters within the scope of his agency. The very relation implies that the principal has reposed some trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honsty toward his principal or employer. The fiduciary relation-

> ship existing between an agent and his principal has been compared to that which arises upon the creation of a trust, *and the rule requiring an agent to act with the utmost good faith and loyalty toward his principal or employer applies regardless of whether the agency is one coupled with an interest,* or the compensation given the agent is small or nominal, or that it is a gratuitous agency. (Our emphasis).

Christensen's responsibility not to "SELL KERSHAW OUT" and not to attempt to sell the property to Bradshaw in antagonism of Kershaw's interest in the property is succinctly stated in 3 Am. Jur. 2d AGENCY Sec. 220 as follows:

> An agent is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto, and this is a rule not only of law but of common sense and honesty as well. In all cases the principal is entitled to the best effort and unbiased judgment of his agent, and an agent is not permitted to assume two distinct and opposite characters in the same transaction—acting for himself and pretending to act for his principal. Indeed, it has been stated that in the usual case, it is the duty of the agent to further his principal's interests even at the expense of his own in matters connected with the agency.

In light of the facts and the law, we respectfully submit that respondent's argument VI must be viewed as frivolous.

5. RESPONDENT KERSHAW'S CONTENTION (POINT 3) THAT THE ROGERS HAVE NO CLAIM FOR DAMAGES AGAINST KERSHAW AND RESPONDENT BRADSHAW'S SAME CONTENTION (POINT VII) IS NOT TRUE, AS THE UNCONTRADICTED EVIDENCE SHOWS DAMAGES TO ROGERS.

Appellant's cross claim is against Walter W. Kershaw and Helen G. Kershaw, his wife. It states a cause of action for breach of warranty in the event the court should find that appellant was not entitled to the property involved in this action.

The elements then of this cause of action are as follows:

(1.) A warranty.

(2.) A breach thereof.

(3.) Damages.

Walter and Helen Kershaw warranted good title to appellant in this language found in Ex. D-7:

> The Assignor warrants that he has succeeded to all of the rights, claims and interests of the other Buyers named in said Escrow Agreement and now stands in the position of being the sole Buyer therein and in and to the properties covered thereby, and that he is the sole and only owner of said Escrow Agreement insofar as the rights of the Buyers therein are concerned and has full power, right and authority to make, execute and deliver the instant Assignment.

> The Assignor herein covenants and agrees to make, execute and deliver to the Assignee any and all deeds, bills of sale, transfers, further assignments and waivers, and any and all other muniments of title proper and necessary in the premises to accomplish the result that the Assignee will become vested with the sole, separate and complete ownership of said Escrow Agreement and all of the rights of the Buyers therein, thereto and thereunder and in and to the properties covered thereby, and directs and authorizes the Sellers in said Escrow Agreement and the Escrow Depositary named therein to recognize the Assignee herein as the owner and holder of the rights and interests of the Buyers named in said Escrow Agreement, as the successor in interest to the rights, titles and interests of the Buyers in, to and under said Escrow Agreement and in and to the properties covered thereby.

The lower court's ruling against Rogers established breach of warranty. Also Wilber Harding testified that the 560 acres involved in this action was worth $65.00 per acre. This was uncontradicted. Bradshaw testified that the water right was worth $6,000.00 and this was not contradicted. The fact that the conveyances covered other property as well is of no consequence as it is only necessary to apply the foregoing value figures to the property actually involved in this cross claim.

Respondents, Bradshaw and Kershaw, assert in their briefs that there was no evidence of amounts to which Kershaw was entitled as an offset to damages sustained by appellant, Rockefeller, by reason of indebtedness against the properties covered by the war-

ranties. This is not the case. Respondents' witnesses testified that approximately $7,200 was owing to Kesler on the 480 acres and approximately $2,850 was owing on the 80 acre tract (Tr. 147, 152, 521). Furthermore, the proof of offset is the duty of the party claiming the benefit thereof.

6. RESPONDENT KERSHAW'S CONTENTION (UNDER POINT II OF HIS BRIEF) THAT ROGERS JOINED IN THE MOTION TO DISMISS KERSHAW IS NOT CORRECT AND THE ARGUMENT IS OUT OF CONTEXT WITH THE ACTUAL PROCEEDINGS.

We call attention to the transcript, page 492, where defendants Rogers argued that plaintiffs failed in their proof that said option was a valid option. Kershaw failed to point out that Rogers further argued that if the Court found that there was evidence of a valid option, then Rogers was entitled to have this evidence submitted to the jury.

The Court's attention is further called to the fact that Helen Kershaw was the proper party in the suit to quiet title, having signed the deed and warranty in the assignment and, therefore, was a proper party in the suit to quiet title and as such with regard to the issues in that case, there is no question that the issues as set forth in plaintiff's brief should have been submitted to the jury.

We call the Court's attention to the recent case of *Corbett* v. *Cox*, 30 Utah 2d, 361, 517 Pac 2d, 318,

1974, wherein this Court specifically held that matters involving agency and issues of fact concerning the validity of the option (i.e.) date, consideration, property, acceptance, and/or revocation—such issues and the truth thereof are customarily and traditionally submitted to the "panel of their peers"

See also 78-21-1, U.C.A., 1953, Rule 38(a).

The ultimate facts were violently disputed and involved far more than a mere reading of the option. The jury heard these facts; they should have been allowed to decide them.

CONCLUSION

It is respectfully submitted in conclusion that the judgment of the lower court in depriving these appellants of rights in and to the subject property constitutes a grave miscarriage of justice. The lower court even failed to recognize that at the least whatever interest Kershaw had in the property was transferred to Rockefeller and has failed to recognize that any money passing from Bradshaw to Kershaw should in the light of such transfer be paid to Rockefeller and not Kershaw. Assignments with warranties and quit claim deeds have meaning. Of course, ordering this money paid to these appellants will not correct this miscarriage of justice.

The miscarriage of justice can only be avoided in this case by the court's reversing the lower court and

ordering that judgment be entered in the lower court quiting title in favor of Rockefeller to the 560 acres of land and well permit. We feel the uncontradicted evidence which we have mentioned in our brief and which is revealed by the testimony and other evidence in this case should compel such a holding. If the court should feel that this cannot be, then we respectfully submit that this cause should be reversed for a new trial.

Respectfully submitted,

WILLIAM H. HENDERSON
MARK S. MINER
ROBERT C. CUMMINGS

Attorneys for Defendants-Appellants, Rockefeller Land and Livestock Co., Willard B. Rogers and Edward B. Rogers.