

1949

Le Roy Shelby and Adan Thornock v. Nick Chournos : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

LE ROY SHELBY and
ADAN THORNOCK,

Plaintiffs and Respondents,

VS.

NICK CHOURNOS,

Defendant and Appellant.

Appellant's Brief

FILED

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THATCHER & YOUNG

Attorneys for Appellant

CLERK, SUPREME COURT, UTAH

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UPON FOR REVERSAL

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

LE ROY SHELBY and
ADAN THORNOCK,

Plaintiffs and Respondents,
Plaintiff,

vs.

NICK CHOURNOS,

Defendant and Appellant

STATEMENT OF CASE

This appeal involves the question “What rights, if any, has the owner of grazing lands to protect the same against wilful and continuous trespassing of livestock?”

Plaintiffs, as co-owners of 36 head of steers, filed this action against defendant, seeking to recover damages alleged to have been sustained and caused by defendant when he allegedly wilfully, maliciously and intentionally drove said steers for a space of many miles, and wilfully, maliciously and intentionally scattered said steers over a wide area of land. Plaintiffs further alleged that steers, when driven by defendant, were ready for market, and that when they were found some weeks later they were footsore and in poor condition,

caused by insufficient pasturage and water, and that said steers lost an average weight of 125 pounds each. It is to be noted that plaintiffs base their right to recover upon two separate propositions, each of which it is alleged contributed to their loss: First, that defendant wilfully, maliciously and intentionally drove the steers off his premises; and Second, that he failed to furnish them sufficient feed and water to keep them in tip-top shape after they were driven off, and that as a result of both concurring causes the steers lost an average weight of 125 pounds each. This matter will be more fully discussed under the subject of Damages.

The defendant filed his answer and counterclaim. In his answer defendant alleged that from about June 10, 1946, plaintiffs turned the steers loose, knowing that they would trespass upon defendant's premises, and that said steers continuously trespassed upon his premises until they were removed. Defendant admitted that on several occasions he had driven said steers off his property to prevent further trespasses and averred that he adopted the usual and ordinary methods required in driving steers off the range.

As a counterclaim, defendant sought to recover damages caused by said wilful, continuous trespasses from about July 1, 1946 until the latter part of October, 1946. The Court sustained plaintiff's demurrer to the counterclaim on the theory the trespasses complained of did not arise out of the transaction set forth in the complaint, nor was it connected with the subject of the action. The counterclaim was thereupon dismissed and the case proceeded to trial on plaintiffs' amended complaint. No question is raised on this appeal as

to the Court's sustaining of said demurrer, although we do believe much can be said in favor of the fact that the trespasses complained of were connected with the subject of this action. The case was tried to the Court sitting without a jury and the Court entered findings and judgement in favor of plaintiffs and assessed damages in the sum of \$534.60.

STATEMENT OF FACTS

The evidence, construed most favorably in favor of plaintiffs, disclosed that defendant is the owner or lessee of approximately 16,000 acres of grazing land situate in the mountainous area to the West of Woodruff, Rich County, Utah. This land extends from the lower foothills to the top of Monte Cristo. It is adaptable for Spring, Summer and Fall grazing for his sheep.

Plaintiff Shelby is the owner of approximately one section of land located entirely within the defendant's holdings. See defendant's Exhibit 2 and plaintiffs' Exhibit B.

Shelby has no water of any kind or character upon his land. Defendant has springs and watering places on his property on practically all sides of plaintiff's lands. Plaintiff had a portion of his land fenced, which he referred to as his pasture. The rest of his land has a one wire fence on two sides and the other sides were left entirely open. Plaintiff purchased the steers in question on June 10, 1946. At that time they averaged 786 pounds. The steers were shipped and trucked to the Shelby homestead and turned into the pasture. They were sold on October 26, 1946, averaging 932

pounds and sold for \$16.50 per hundred. (Tr. 3-4) On September 29, 1946 (the day of the alleged driving) it was estimated that they had gained about 240 pounds, which, if correct, would have made them average 1026 pounds, or 96 pounds more than their actual weight when sold on October 26th. (Tr. 6)

Plaintiff Thornock estimated that the steers lost between 90 and 100 pounds between September 29th and October 26th. (Tr. 7) Plaintiff Shelby estimated that on September 29th they would average 1000 pounds. (Tr. 66) (Note that when sold they averaged 932 pounds, or a difference of 68 pounds each.)

The actual weights produced by plaintiff showed that when sold the steers weighed 33,560 pounds, or an average of 932 pounds each. Therefore they made an average gain from June 10th of 146 pounds.

During the time the steers were kept in the enclosed pasture they were driven over defendant's land to water. According to Shelby, on August 19th he turned his steers out of the pasture into his outer premises which were only partially enclosed by a one wire fence and was entirely open on two sides. (Tr. 51) From then until September 29th the steers were allowed to roam at will on and upon defendant's property.

Shelby of course knew that his steers would not remain on his property. He further knew that they would go upon defendant's property both to graze and to obtain drinking water. There can be no question that from August 19th to September 29th Shelby knowingly and wilfully allowed and permitted said steers to continuously trespass upon defendant's property, to graze

upon his lands, tramp around his springs and watering places, and otherwise damage his property. These lands are located in Woodruff Precinct, which has a fence law. Defendant maintains a tight fence along the East end of his property about one-half mile East of Shelby's homestead. (Tr. 80) It has been the custom of the defendant to ride his range in order to protect it from trespassing animals. Shelby testified that on the afternoon of September 29th he and his wife rode out to gather up the steers, preparatory to selling them; that they found 17 head. They turned them through a gate and that the steers went on down to Millie Spring (admittedly located on defendant's premises. (Tr. 55) Defendant was riding his range and came upon these steers and a few other strays. They were on his property in the vicinity of said springs. He admits he drove them Northward to the North boundary of his property. The only dispute in the evidence is that defendant contends he drove them off on the afternoon of the 28th, while plaintiff contends it was the afternoon of the 29th. The only person who saw defendant drive any of the steers was Leonard Longhurst. He was going up the Monte Cristo highway (this public highway traverses defendant's property) to a round-up. He met defendant just below Millie Spring, driving some cattle. (Tr. 20-23) He stated defendant appeared to be in a hurry. His dog was chasing the cattle and they were on the trot. Witness went on up the highway, met Shelby, told him defendant was driving his steers down the road. Other witnesses stated that they were on Strawberry Ridge fighting a fire the night of September 29th. They saw these steers about four miles from Shelby's home (Tr. 26)

Francis Frazer, called by defendant, stated he saw these steers on the evening of the fire on Cut-Off Ridge. They were then on defendant's property. No one was driving them. This was four or five miles from Shelby's home. (Note these steers were picked up by defendant on his own property down by Millie Spring, not in the vicinity of Shelby's home.)

With respect to the balance of the steers, no one saw defendant driving them. Defendant admits, however, that he drove them off his property on several occasions. This bunch was grazing on his property to the East of plaintiff's homestead. They watered at defendant's spring to the East. Defendant drove them East about one-half mile to his East fence and put them through his gate and closed the gate. (Tr. 80) Defendant testified that in driving the animals he drove them in the usual and customary manner; that this is an irregular, mountainous country; and you can't drive cattle off without the use of a dog. (Tr. 78 and 90)

Although others saw the 17 steers and plaintiff knew where they were driven, he claims that it took him several weeks to gather all of them together before they were sold on October 29th. The evidence is that he placed the steers in pasture until he had them all gathered together. This is a brief summary of the evidence except that of the expert Peart. (Tr. 28-35) Over defendant's objection, the Court permitted him to give an opinion as to how much two-year old cattle put on a range would gain in weight. (Not these steers, but just any cattle.) He further testified that cattle should not be driven over 2½ miles per hour or over twenty miles per day, and that cattle driven 2½ miles per hour will

shrink 4%. That steers should be sold by the first of October, because when frost comes the feed is not so good and they lose their bloom. (Tr. 37).

Upon the foregoing evidence, the Court found that by reason of defendant's wilful and malicious acts, the entire 36 steers lost an average of 90 pounds each, and entered judgment for the sum of \$534.60.

STATEMENT OF ERRORS

UPON WHICH THE APPELLANT RELIES FOR A REVERSAL OF THE JUDGEMENT APPEALED FROM.

1. The Court erred in making and entering Finding No. 1.

2. The Court erred in making and entering Finding No. 2.

3. The Court erred in making entering herein the following portion of Finding No. 4.

“...drove said steers therefrom and for a considerable distance beyond the boundaries of defendant's property and scattered them among the breaks and brush and into a locality where there was insufficient feed and water for their proper subsistence.”

4. The Court erred in making and entering herein the following portion of Finding No. 5.

“Defendant came upon the remaining 17 head of steers upon a public road near a water hole known as Millie Spring.”

Also the following:

“...and then and there wilfully and maliciously drove said 17 head of steers from said water hole and for a distance of four to six miles and scattered the same among the breaks and brush and in a locality where there was then and there insufficient feed and water for their proper subsistence.”

5. The Court erred in making and entering Finding No. 6.

6. The Court erred in making and entering herein Finding No. 7.

7. The Court erred in making and entering herein Finding No. 8.

8. The Court erred in making and entering herein Finding No. 9.

9. The Court erred in making and entering herein Finding No. 10.

10. The Court erred in entering its Conclusion of Law No. 1.

11. The Court erred in entering its judgment in favor of plaintiffs and against defendant and in assessing their damages in the sum of \$534.60.

ARGUMENT

Assignments No. 1 to 9 inclusive.

We desire to first discuss as a group Assignment No. 1 to 9. While we admit that this is an action at law, yet it is our contention that there is no competent evidence to support these findings. We shall briefly consider the same.

1. Finding No. 1 can find no support in the evidence. Shelby testified himself that on August 19th he turned the steers out of the enclosure, while defendant claimed it was much earlier, but there certainly is no evidence that he kept the steers in an enclosure up to September 29th, nor is there any evidence that the steers were not released except for driving them down a public road to water prior to September 29th. In the first place there is no proof of the existance of any public road leading from Shelby's property to any water over which plaintiff could drive said steers without trespassing upon defendant's property. This must not be confused with the Monte Cristo highway, which admittedly is a public highway.

Shelby himself admits that after August 19th and continuing to Septemebrr 29th the steers were turned out of the pasture, and into an unenclosed area which contained no water, and that they could and did roam at will over and upon defendant's property.

2. There is no evidence that on September 29th plaintiff released the steers from the enclosure. The evidence is that on September 29th he and his wife rode out to gather the steers, not in his enclosure, but wherever they could be found, and that they found the 17 head and brought them back to plaintiff's enclosure.

3. We don't know what the Court means by the use of the word "maliciously" in Finding No. 4, nor can we see its materiality. We admit the defendant intentionally drove the steers off his premises. Is it a malicious act to drive trespassing cattle off one's property? If so, can it make any difference whether the

driver acts maliciously or not? We readily admit that there apparently was no great mutual love existing between plaintiff and defendant, probably they hated each other, but do their feelings in any way control one's right to remove trespassing animals? There is no evidence that defendant drove any of said steers a considerable distance beyond the boundaries of his property. All of the witnesses who saw the 17 head on the night of September 29th placed them as being on defendant's property near his Northern boundary. There is no competent evidence that defendant drove the other steers beyond his enclosure on the East. Nor is there any evidence that defendant scattered the steers among breaks or brush. If they became scattered among brush and breaks, it is certain that this happened after defendant ceased driving them, because the 17 head were seen on the night of September 29th all together and not in brush or breaks but on the ridge, working back toward Shelby's property. Nor is there any evidence that defendant left the steers where there was insufficient feed or water. The plaintiff himself testified that the steers became mixed with other cattle. Clearly they were grazing upon adjoining grazing lands.

4. There certainly is no evidence that the 17 head of steers were on a public road near Millie Spring when the defendant drove them off. Millie Spring is located on defendant's land. The evidence is uncontradicted that the steers were trespassing upon his lands when he drove them off. Nor is there any evidence that defendant drove these steers four to six miles. The evidence is that the steers were seen on the ridge on the night of September 29th, about four miles from Shelby's home. (Tr. 26 and 69) Defendant did not drive the

steers from Shelby's home. They were picked up by him in the vicinity of the Spring and there is no evidence as to the distance from the spring to where the steers were seen. It is clear, however, that it would be less than the distance from Shelby's homestead, and we have already called attention to the fact that there is not a scintilla of evidence that these 17 steers were scattered by defendant among the breaks and brush or placed in an area where there was insufficient water or food.

5. We submit that there is no evidence that the defendant drove the second bunch, 19 head, which he turned through his East gate, at an excessive rate of speed or that he caused them to run or become overheated, exhausted or footsore. Plaintiff claims that he found these 19 head some weeks later in the brush and breaks. He doesn't even suggest that they were either overheated, exhausted or footsore, nor does he suggest that there was any evidence that these 19 head had been abused while driving and we submit there is little evidence to sustain the finding as to the 17 head which were driven to the North. It is interesting to note that no witness who saw the steers on the night of September 29th on the ridge while fighting the fire even suggested that they had any appearance of being abused. They were grazing unmolested on the ridge.

6. There certainly is no evidence to sustain Finding No. 7. Plaintiff and his wife intentionally permitted the 17 head to stray upon defendant's premises without any herder. As to the other 19 head, the evidence is clear that they were not driving nor herding them when defendant drove them off his premises.

7. There is not a scintilla of evidence that on September 29th, the day it is claimed defendant drove said steers, that the market value was 16½c or any other sum. The only evidence in this record is that on October 29th when the steers were sold, they were sold for 16½c per pound.

8 and 9. There is evidence, if believed, that the steers shrank about 90 pounds between September 29th and October 29th, when they were sold. How much, if any, was caused by excessive driving, or how much was caused by lack of proper feed and water during that month, or how much, if any, was caused by reason of the fact that the feed had lost its potency by frost, are all matters of pure speculation. This will be further discussed under the subject Damages.

Having briefly discussed the Findings and pointed out wherein they are not supported by any competent evidence, we shall now discuss briefly the law of the case. Probably as good a statement as any can be found in

3 C. J. S., page 1300, Section 189:

“Even in the jurisdictions where a land owner is bound to fence against trespassing animals, he may drive them from his lands irrespective of whether or not they are fenced, by the use, however, of only such force and means as are reasonably necessary.” Citing cases.

The author then goes on to say:

“Ordinarily if the land owner lawfully drives trespassing animals off of his premises, he is not liable because he drives them in a direction opposite to that of their owner’s premises, and if the

animals enter from the highway on remote premises the land owner may return them to the highway on unenclosed lands and will not be liable for any injury thereafter suffered by them, especially where the injury is the result of the owner's negligence in failing to care for them after notice of their situation."

The author further states:

"A land owner's right to drive off trespassing animals includes the right to use dogs for that purpose if no unnecessary injuries are occasioned thereby."

The subject is also discussed in

2 American Jurisprudence, page 786,
Sections 125 and 126.

For an interesting discussion as to the rights and responsibilities of the owner of premises against trespassing animals on quite a different state of facts, see the case of

Beinhorn vs. Griswold,
69 Pacific 557.

We doubt that there is any particular disagreement as to the law. We admit that the defendant had no right to drive the animals beyond the borders of his property and that in doing so he was required to use reasonable care, commensurate of course with the duties involved in removing the animals. We submit, however, he was not legally bound to furnish plaintiff's steers either feed or water in sufficient quantities to keep them in top-market condition. That these steers had been a constant source of annoyance cannot be questioned. That Shelby, after feeding them off his enclosed pasture, turned his steers outside the pasture upon his

unenclosed lands and intended that thereafter these steers would obtain both feed and water upon defendant's premises likewise cannot be questioned. Defendant for a number of years has been compelled to constantly ride his range to protect it from trespassing cattle. While so riding, he found, as he had on previous occasions, a bunch of these steers on his land East of plaintiff's property. He testified he drove these steers East about one-half mile, then put them through his gate and left them. There is no competent evidence to the contrary. He further testified he drove them in the customary manner. There is no evidence to the contrary. If, after driving these steers off his premises, they on their own volition wandered down into canyons where they were subsequently found, can defendant be held responsible? Was he bound to herd these steers or to furnish them feed and water comparable to his own premises after he put them through his gate? It is to be noted it is not contended that he placed them where they could obtain no feed or where they would starve. The evidence is clear that this entire area is more or less open grazing country. The plaintiffs seemed to contend, however, that the feed and water upon adjoining premises was not as good as that upon the defendant's premises and as a consequence their steers were not kept in prime condition like they would have been had they been permitted to continue grazing on defendant's property. Likewise with respect to the 17 head which he found on his property at Millie Spring. What were his rights? We submit he had a right to drive them off his property and to drive them Northward. Here again, after driving them off his premises was he responsible if they wandered off? Was

he required to furnish them feed and a herder until their owner, taking his own due time, should elect to come for them? The plaintiff knew that very night where the steers were. In fact he was told by the witness Longhurst immediately after defendant started to drive the steers, where they were. It is passing strange that it took the plaintiff a month to find all of these 17 head, and while we are on this subject, there is no evidence as to how long it took him to recover the major portion of the steers. The evidence is that they put the steers in pastures as they rounded them up, and it was not until October 29th or thereabouts when they recovered the last steer.

It seems to us that the only question upon which there is any substantial evidence is whether the defendant in driving these 17 head used only such means and force as were commensurate with the existing necessity. His right to use a dog is established. What evidence is there that in driving these 17 head he used unnecessary force? One witness who saw him driving the steers shortly after he started to round them up just below Millie Spring said he appeared to be in quite a hurry. He was having the dog bite the cattle and chase them. They were on the run and a few had their tongues out. The cattle were on the trot. (Tr. 20 to 23)

These steers were on a mountainous range. He was trying to gather them together to drive them down the highway to a point where he turned them North and drove them off his premises. We do not know how many members of this Court have driven cattle off a range or participated in a round-up, but we assume it to be

a matter of general knowledge of which this Court will take judicial notice that in driving cattle and in the use of a dog there may be some biting of heels and probably some running until at least the animals are gotten together and started off on a trail, and I venture the assertion that even the evidence of the witness Longhurst is insufficient to show any particular abuse. But if there was any unnecessary force used, it applied only to 17 head not the 36 head as found by the trial Court.

DAMAGES

Assuming, for the sake of argument only, that there was some liability, can this judgment for \$534.60 be sustained? Assuming defendant used unnecessary force in driving these 17 head off his premises, what would be the extent of his liability? Would it not be loss incurred as a result of the use of unnecessary force? Would he still be liable for subsequent loss of weight caused by reason of the fact that after the steers were driven off the owner failed to recover them promptly and that they lost weight during that period from insufficient feed or water? The Court, erroneously we think, has made the defendant liable for loss of weight of 36 head of steers caused, as found by the Court, by reason of the fact that they lost weight over a period of one month after they were driven off defendant's premises, by reason of the fact, as found by the Court, that they became scattered in the brush and ranged where there was insufficient feed and water for their proper subsistence. See Findings 4 and 5.

To illustrate our point, suppose the defendant had hauled these steers off his premises in trucks, so that they could not have been affected by being driven off. Then suppose he had unloaded them at his property line. Would the defendant be liable for subsequent loss suffered by the steers caused because "they became scattered among the breaks and brush in a locality where there was insufficient feed and water for their proper subsistence?" Does the defendant owe a duty to the owner of steers wilfully trespassing upon his property to see to it that they are placed in feed of sufficient kind and character to assure the owner that they will be kept fit for market so that during the ensuing month, when the owner finally gets around to collecting them, they will be ready for market? Does the defendant owe a duty, after having driven the steers off his premises, to provide a rider to see that the animals do not become mixed with other cattle or do not wander into the brush. That seems to be the duty which the Court by its finding and judgment imposed upon this defendant.

Again we state that it is not contended that the steers were left to starve, but only that they are not furnished sufficient feed to top the market. What amount of damages were caused the 17 steers by reason of any abuse in driving them and what amount by reason of insufficient feed and water from September 29th to October 29th? The record is certainly silent on this point, so the Court lumps the whole thing together and assessed it all against defendant.

With respect to the 19 head which were turned out to the East, we submit there is no evidence of any

loss from driving. They were not driven more than a half mile. If these steers did suffer any loss of weight, it was by reason of the fact that the defendant failed to furnish a herder and feed and water in sufficient quantities to keep them fit and ready for market during the thirty day period between the time they were driven off and the time they were sold. Can the defendant be held liable for such failure? We certainly contend that there can be no liability with respect to these 19 head. There is another interesting subject for discussion in connection with damages Plaintiff produced as an expert one Willard Peart. We have already called attention to the fact his opinion evidence with respect to average gain of cattle generally was improperly admitted. That if he qualified he might give an opinion as to these steers, but as to gain of cattle generally was immaterial. (Tr. 28)

But at page 35 of the transcript he testified that cattle driven even at $2\frac{1}{2}$ miles per hour will shrink 4%, so if defendant drove the steers off his premises with the utmost caution and at a speed of not to exceed $2\frac{1}{2}$ miles per hour, they would still shrink 40 pounds for every 1000 pound steer, or almost one-half the 90 pounds which the Court found the animals lost in weight, yet the defendant is assessed damages for this normal loss, *not the excess loss above normal caused by excessive driving*. In other words, no land owner can drive cattle off his premises, because to do so, no matter how careful, causes normal shrinkage of 4% for which he is liable. Such calculations lead to the absurdity of this judgment. If there was any liability, the measure of damages would have to be the

amount of loss in weight over and above or in excess of the normal amount of loss or shrinkage, caused by abuse in driving. Certainly that is not the yardstick used by the trial Court in this case to measure damages.

We submit that the findings are not supported by any competent evidence and that the judgment in favor of plaintiffs cannot be sustained, but if we are in error in this regard, we contend that there is no evidence which can support the judgment for the amount of \$534.60 as found by the Court.

Respectfully submitted,

THATCHER & YOUNG

Attorneys for Defendant and Appellant