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

Utah Supreme Court

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NO. 7317

IN THE

SUPREME COURT

OF THE STATE OF UTAH

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CLERK, SUPREME COURT, UTAH

LE ROY SHELBY and ADAN
THORNOCK,

Respondents and Plaintiffs,

VS.

NICK CHOURNOS,

Defendant and Appellant.

Respondent's Brief

CLYDE PATTERSON,

*Attorney for Respondents
and Plaintiffs.*

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

LE ROY SHELBY and ADAN
THORNOCK,

Respondents and Plaintiffs,

vs.

NICK CHOURNOS,

Defendant and Appellant.

STATEMENT OF CASE

For convenience of the Court and counsel, the parties hereto will be referred to as they were in the lower court, wherein appellant was the defendant and respondents were plaintiffs.

The defendant, in the opening paragraph of his brief states the question involved in this appeal as being,

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

The answer to the question propounded is that an owner of grazing land has three remedies against trespassing livestock, as follows:

1. A suit for injunction against the owner of the trespassing livestock to restrain the continued trespass.

2. An action for damages caused by the trespass.

3. The right to remove the trespassing animals from his land.

This appeal involves only the third remedy, namely, the right of the owner to remove the trespassing animals, as the action below did not involve either of the first two remedies. Accordingly, the only issue involved in this appeal is whether the defendant acted within the limitations prescribed by law in his removal of plaintiff's livestock from his property. The lower court held that the manner in which defendant removed plaintiffs' livestock from his property was unlawful, with resulting damages to plaintiffs. Accordingly, the only question involved is whether there was evidence before the lower court to support the finding complained of.

STATEMENT OF FACTS

Defendant's statement of facts in this case does not adequately reflect the evidence which was before the lower court, and for that reason, we deem it advisable to review briefly the evidence.

On June 12, 1946, plaintiffs purchased thirty-six head of steers and at that time placed them on plaintiff Shelby's property, (which constitutes approximately one section of land located) in Rich County, Utah. (The defendant owned or had control of a vast amount of land, or approximately sixteen thousand acres, that substantially enclosed the land of the plaintiff.) That, on the 29th day of September, 1946, the plaintiff Le Roy Shelby had placed his stock on a portion of his lands completely

bounded by a fence on the west and north, together with almost all of the east side of his property, (Tr. 52)

“Q And your land on the east was open between yourself and Mr. Chournos?”

A No sir, it's mostly fenced with the exception of just a slight bit at the very corner there.

Q On the 19th of August.

A Yes sir, that was the day I got the fence on the west finished.”

although the southern portion of plaintiff Shelby's property was open. (Tr. 45, Plaintiffs' Exhibit C)

As late as 10:00 o'clock in the morning on that date, all of the cattle were on Shelby's property. (Tr. 56) At approximately 3:00 or 4:00, Shelby and his wife, on horseback, went up to round up the thirty-six head of the steers (Tr. 54). At that time they were only able to find 19 head, but they were located on Shelby's property along his west fence. (Tr. 54) Shelby and his wife proceeded to drive the cattle across his property to the north and out a gate on his northern boundary and down what had been used as a roadway when he was stopped by Marriner Brown (Tr. 19), while the seventeen head of cattle proceeded on down the road and around a bend in the hill. During the period that plaintiff and his wife conversed with Mr. Brown, Mr. Chournos appeared, riding on horseback, from a distance away, a fact which was admitted by the defendant (Tr. 82-84). Upon finishing the conversation, plaintiff Shelby and his wife proceeded down to the Monte Cristo road, which was to the north of them, and were unable to see their cattle, although they were advised by one Longhurst that he had seen Mr. Chournos, the defend-

ant, driving the seventeen head of cattle while on horse-back and with the aid of a dog. At that time, the cattle were on a run. (Tr. 21)

“Q Now you say he was driving cattle. Just what what do you mean, sir?

A Well, he was having a dog bite the cattle. They were on the run and a few of the cattle had their tongues out and seemed to be pretty well out of breath.”

Approximately one hour later, these cattle were seen returning in the general direction of the Shelby property at a distance between four and six miles away from the Shelby property. (Tr. 26-28, Tr. 68-70)

This running occurred between the hours of one-half hour before sunset (Tr. 19) and one-half hour after sunset (Tr. 27). It might be pointed out at this time that both plaintiffs’ witness and defendant’s witness stated that one-half hour after sunset, they were returning towards the Shelby property, which would indicate that they must logically have come from a point further from the point from the Shelby property than that where they were seen.

The evidence as to the nineteen head of cattle which plaintiff Shelby did not find on that afternoon of September 29th indicates that he tracked a single footed horse, which was the horse that Mr. Chournos admitted riding, for a distance of four and one-half to five miles east of the Shelby property (Tr. 80), and the evidence further indicates (Tr. 61-63) that they were likewise driven on a run.

Evidence showed that cattle should not be driven at a rate to exceed two and one-half miles per hour, and that should they be driven all day at that rate, that they might lose up to four per cent of their gross weight. (Tr. 28-44).

Defendant Chournos maintains that his only purpose in driving the cattle at all was to remove them from his premises, yet he drove the seventeen head of steers (Tr. 77- 86) a distance of some three and one-half miles away from the premises owned by the plaintiff, although he admitted that he knew that there was every likelihood that the milk cow would return or attempt to return to the Shelby property, and that steers are inclined to follow a leader and therefore some would follow the milk cow. A few did and in so doing duplicated in reverse the course they had taken over the defendants' property. This would seem to be a peculiar method of removing cattle from one's premises.

Defendant stated that his only reason for driving the other nineteen head of steers was a similar desire to rid his premises of these particular animals, although the evidence shows that he drove them between four and four and one-half miles east of the Shelby property, although his east line was approximately one-half mile east of the Shelby property, so that the facts show that the defendant drove the cattle some three and one-half or four miles east and beyond the defendant's eastern property line. As a result of defendant's driving of these cattle, they became lost to the plaintiff and were found in rocky, mountainous country without adequate forage or water as long as three weeks after defendant drove them. (Tr. 3-7, Tr. 35-50). When they were

found, they had lost an average weight of ninety pounds. (Tr. 3-7, Tr. 45-50, Tr. 60-62). The cattle were thereafter delivered to Sage, Wyoming, to market, where they sold at an average price of 16 $\frac{1}{2}$ cents per pound, and crediting this value per pound to the weight lost, it was found that the plaintiffs had been damaged in the sum of Five Hundred Thirty-Four and 60/100 (\$534.60) Dollars.

ARGUMENT

It will be observed that the only objection appellant voices is that the facts do not justify the verdict.

This case was tried to the court without a jury, and the rule in such cases is stated in 5 *C. J. S., Appeal and Error*, Sec. 1656 *acq*, at Page 687.

“When facts are involved the appellate court is extremely reluctant to disagree with the trial court and the latter’s findings are at all times given great weight and deference, particularly where the trial judge saw and heard with witnesses giving oral testimony.

Ordinarily the findings will not be disturbed if they are not clearly, plainly, palpably or manifestly wrong or erroneous. * * * * If examination discloses * * * * the findings are not wholly or totally without support in the evidence * * * * nor unreasonable, unsustainable on any reasonable theory or hypothesis * * * * the appellate court will affirm.”

With this rule in mind, let us examine defendant’s several points demonstrating that there is no reversible error in the record of this case.

1. Did the trial court err in its Finding No. 1?

The evidence clearly shows on September 29th plaintiffs were the owner of thirty-six head of steers (see Exhibit C), and the evidence shows that they were on property enclosed by the plaintiff LeRoy Shelby. (Tr. 52).

2. Did the trial court err in its Finding No. 2?

The evidence as stated before (Tr. 52) indicates that on or about 10:00 o'clock in the morning on September 29th, all of the steers belonging to the plaintiffs were on the plaintiff Shelby's property.

3. Did the trial court err in its Finding No. 4?

Counsel professes ignorance of the word "maliciously". The word is defined by Webster as, "Characterized by or involving malice; having or done with or mischievous intentions or motives".

The facts at bar indicate that defendant drove seventeen head of cattle a space of four to six miles in an hour in a direction directly away from the owner's premises. Defendant expressed his intent only to rid his premises of the animals, but the facts show he could have called or returned the cattle to the owners in a matter of minutes, and could have driven them off his premises in a short distance, but instead, he drove them over his land and in a direction opposite to the land of the plaintiff (Tr. 77 and 86) for an admitted three and one-half miles, well knowing that some would return to the Shelby property because a milk cow was among them. (Tr. 86-88).

The facts as to the rest of the cattle indicate that defendant's horse was with them at a distance of five miles to the east of the Shelby property. (Tr. 47).

Defendant maintains he only wanted to drive them off his property, but the evidence shows that his east line is about one-half mile east of the Shelby property line, as is admitted by counsel at (Tr. 80). This would indicate he drove the cattle some four and one-half miles past his east line.

There is ample evidence that they were driven at a rapid pace. (Tr. 61-63).

The evidence further shows all the cattle were left in a rocky area where there was insufficient feed and /or water. (Tr. 47, Tr. 57-63).

4. Did the trial court err in its Finding No. 5?

The defendant objects to that portion of the Finding as follows:

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

and also:

“* * and then and there wilfully and maliciously drove said seventeen 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.”

The facts as to the Finding of fact indicate that the first contention is erroneous in that the court found:

“Defendant came upon the remaining seventeen head of steers at or near a water hole known as Millie Spring.”

With reference to defendant's other objection to Finding No. 5, it is believed that this is fully discussed in the facts set out relative to Finding No. 4.

5. Did the trial court err in its Finding No. 6?

Defendant's acts relative to the nineteen head have already been discussed in Paragraph 3 above.

However, as to the condition of all of the cattle, see Tr. 10.

“They looked pretty hard. They had a lot of rough treatment. They didn't look like the same cattle at all.”

Further the record is filled with evidence that the cattle suffered an average loss of ninety pounds. (Tr. 3-11, Tr. 64-6, Tr. 45-63).

6. Did the trial court err in its Finding No. 7?

The evidence is that there was no reason for the cattle to trespass on or stray from the Shelby property, for the reason that Shelby had (Tr. 50) gone to great lengths to improve the grass and forage on his property by planting brome grass and crested wheat grass. Further, there was water for said cattle on leased ground of plaintiff immediately south of his main property. (See Exhibit “B”, Plaintiff's land marked in red).

7. Did the trial court err in its Finding No. 8?

The evidence shows without question that the cattle were sold on October 29th for 16½ cents per pound,

and that but for the acts of the defendant, the cattle would have been ninety pounds heavier on that date. No other evidence was needed.

8. Did the trial court err in its Finding No. 9 and No. 10?

As appellant admits, there is ample evidence to find that the steers shrunk about ninety pounds apiece between September 29th and October 29th, when they were sold. Appellant raises a question as to how much of the damage was caused by the running and how much by the lack of food and water. As will be seen by the law hereinafter cited, these questions raise problems that are immaterial and irrelevant. The fact is that due to the defendant's wrongful acts, these cattle lost weight. How much of this loss is attributable to one wrongful act and how much to another is not a question of any merit. The only question is whether defendant's acts resulted in the loss, and the answer to that is an unqualified "yes".

9. Defendant makes a contention of error in entering Conclusion of Law No. 1 and in entering Judgment in favor of the plaintiffs and against the defendant and in assessing the damages in the sum of Five Hundred Thirty-Four and 60/100 (\$534.60) Dollars.

Therefore let us examine the law relative to the points now raised.

LAW

1. There seems to be a great deal of contention made by the defendant as to that part of Findings No. 1 and No. 2 that indicate that the cattle had been en-

closed for a substantial period of time and were released in an unfenced enclosure only the day that they were driven.

There is a great deal of conflict in the evidence relative to this, and some evidence to the effect that they had been out for a considerable period.

It is submitted, however, that these findings are immaterial and irrelevant to the cause of action before the Court, and were put in the complaint and the findings probably by reason of counsel for plaintiffs inexperience.

The sole question in this matter is whether or not the defendant came upon steers owned by the plaintiffs on September 29, 1946, and wilfully and maliciously and to become lost.

As regards to this question, whether they had been enclosed or in an enclosure for a period prior to the time of the acts complained of is irrelevant and not material to this case and further can have no injurious effect on the defendant's rights.

The law on this subject is found at 5 *C. J. S.*, *Section 1787, page 1192.*

“The mere taking of unnecessary and superfluous findings or the presence of error in findings on immaterial, irrelevant, or purely collateral issues is harmless and non-reversible error, if the judgement is otherwise sufficiently supported.”

“A judgement supported by proper findings is not vitiated by findings on immaterial points or issue, for example, on issues outside the plead-

ings or unsupported by evidence, or where whatever the findings on the issue it affords appellant no cause of action or grounds of defense, but is without legal consequence; such findings may be treated as surplusage and discredited not only in that action, but also in subsequent litigation.”

Further from 5 *C. J. S.*, *Section 1677, Page 810 and 811,*

“The rule as to those errors which are in principle collateral and without influence on the final result is that the record must not only establish the error but the party complaining with prejudice thereby; there must be an affirmative showing that it was not unlikely that the error effected the result.”

“The doctrine of harmless error is favored and will be applied whenever it is reasonable and safe to do so.”

As has already been submitted, the errors, that defendant now complains of, are collateral and do not influence the final result, or verdict, and further, it is to be noted that at no place in the brief of the defendant is there any affirmative showing that these errors, if errors they be, adversely affected his rights.

It is further submitted that this case was tried before a judge who had been trained in the profession of law, and as a consequence, would give little or no heed to any irrelevant matter that might enter into the record, and that the defendant is not and was not prejudiced by these findings.

The above law and argument might also be applied to defendant's seventh contention of error, namely, his objections to Findings No. 8.

2. The law relative to the principal issue presented by this case seems to be uniform, although all the cases which counsel has been able to find are relatively old cases. At 3 *C. J. S., Animals, Section 189*, it is found:

“A landowner has a right to drive trespassing animals from his land whether it is or is not enclosed, without being liable for any injuries to such animals, *if he uses only such means and force as are commensurate with and strictly limited by the existing necessity.* Further, *the right to drive off exists only to the extent necessary to prevent further injury to the landowner, and must be exercised with reasonable care to prevent unnecessary injuries to the trespassing animals.*”
(Italics added)

Again, at 2 *American Jurisprudence, Animals, Section 126*, it is found:

“A landowner has a right to exclude animals from his premises but in doing so, *he must exercises that degree of care to prevent injury that would ordinarily be observed by a prudent person, and if harm results to them from failure to exercise such caution, he is liable for damages to the owner.* He is likewise liable if he employs towards them any unnecessary violence. Moreover, *as this right of the landowner to drive off the animals is based purely on the principle of prevention, it ceases as soon as they have crossed the line marking the limits of his territory.* Thus, if a man drives cattle of another upon a highway in a direction to him known to be opposite to the owner's residence, and they are lost in consequence, he is liable for conversion, although he did not intend it.”
(Italics added)

In *Scott vs. Cates*, (North Carolina) 95 S. E. 551, the defendant shot certain bird dogs belonging to plaintiff, claiming that they were chasing a flock of turkeys and it was necessary to shoot in order to prevent the turkeys from destruction. The Court holding for the plaintiff, state the presence of the dogs on the premises of defendant gave him the right to drive them away but not to injure them unnecessarily, although they were trespassing. The Court further stated that it was erroneous to charge a jury that the burden was on the plaintiff to satisfy the jury that the shooting was unlawful and wrongful, and held at the same time, that the burden should be on the defendant to prove a legal excuse for his acts to the satisfaction of the jury. In other words it is interpreted by the Supreme Court of North Carolina that the acts are in the nature of an affirmative defense which defendant must prove and justify, rather than an action for the plaintiff to prove.

The reason is obvious that this must be so because such facts are peculiarly within the knowledge of only the defendant. Yet in the case at bar, defendant's only evidence is that he drove the cattle in the "ordinary manner" and he refused to explain what "ordinary manner" meant.

In the case of *Richards vs. Sanderson*, (Colorado), 89 Pac. 759, the defendant drove plaintiff's cattle, and the Court held to the effect that defendant would not be liable for damages in driving plaintiff's cattle off defendant's land if he did so without any unnecessary injury to the cattle, and held that in an action to recover actual damages for wrongful driving of plain-

tiff's cattle, it is immaterial whether or not before driving the cattle, the defendant in good faith took legal advice and was governed thereby in what he did.

In *Thompson vs. State*, 16 *Alabama* 106, 42 *American Reports* 101, the defendant was charged with killing hogs of the plaintiff while the hogs were in the act of eating, or destroying a growing crop of corn on the premises of the defendant. The Court held,

“Every person has a lawful right to defend his personal property, not for the purpose of redressing an injury already perpetrated, but purely upon the principle of prevention in the present and for the future. Yet this right, valuable and important as it is, must be commensurate with and strictly limited to the existing necessity.”

The Court found for the plaintiff and ordered that it did not make any difference how the hogs got on the defendant's land, whether by breaking through the fence, or by a gate that had been left open.

In the case at bar, it would seem that there is ample proof that defendant's handling of the cattle was not as an ordinary and prudent man would have done, but rather, that they were handled by a man who was very irate, angry, and determined to inflict some injury upon the plaintiff.

Counsel apparently gets a great deal of comfort out of a statement in *Corpus Juris Secundum* as follows:

“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, expecially where the injury is the result of the owner's negligence in failing to care for them after notice of their situation."

An examination of the above statement indicates that the only authority for such statement is the case of *Humphrey vs. Douglass*, 11 *Vt.* 22, 34 *American Decisions* 668. For a proper examination of the facts in this case, it must be understood that this case was a rehearing of the case of *Humphrey vs. Douglass*, 10 *Vt.* 71, 33 *American Decisions* 177. The facts in this case indicate that two horses broke through an adjoining fence onto the property of the defendant, and that upon discovering them, he took them out to the road and turned them loose. There is nothing in the evidence to indicate that he turned them in an opposite direction to plaintiff's land. It would seem, therefore, that the decision quoted does not sustain the contention of the author of the *Corpus Juris Secundum* article.

It is further interesting to note that the case used as authority for the above decisions is that of *Richardson vs. Carr*, 25 *American Decisions* 56, 1 *Harrington* 142 (*Delaware*) wherein the Court says:

"If a cow be found trespassing on another's property, the owner of the property may impound her or sue for damages or drive her out; but in driving her out, he must use only necessary violence or he becomes himself a trespasser and liable in damages to the owner of the cow. If the defendant in this case beat the plaintiff's cow and mangled her with dogs, as he is charged, he

is a trespasser, though the cow was in his corn-field; and the plaintiff ought to have damages to the value of the cow if her death was occasioned by his act.”

It would seem that the only actual case that goes to the direction in which cattle or stock may be driven when being removed from one's premises is the case of *Tobin vs. Deal*, (*Wisconsin*) 18 N. W. 634, wherein it was held that if a man drives the cattle of another upon a highway in a direction known to him to be opposite to the owner's residence, and they are lost in consequence, he is liable for conversion, although he did not intend it.

It would seem, therefore, that there is no case authority for counsel's contention that the defendant had the right to drive the cattle in any way or in any direction that he chose.

It would seem, therefore, that upon examination of all the law available, the acts of driving animals off one's property must be done under the guidance of two requisites imposed by law, (1) the driver must only use such means and force as are necessary to drive the animals off his property, and that he is liable in damages for any unnecessary violence occasioned by such act, and (2) that the act of driving must be based purely upon the principle of prevention of present injury to his property.

CONCLUSION

The plaintiffs do not admit that there is any trespass in this case, but submit the evidence as to the seventeen head of cattle indicates that they were driven down

what had been designated as a road and used for the purpose of going to and from water, and that it was recognized as a road.

It is further submitted that the remaining nineteen head were taken by the defendant from the land of the plaintiff, and that his acts relative to both bands of cattle were entirely reprehensible and without right.

It is submitted, however, that even if it be found that the cattle were trespassing upon land of the defendant, his acts did not adhere to the law hereinbefore set forth.

Defendant endeavors to break his wrongful acts into two parts as regards damages and he seems to hold that even if he be found guilty of wrongfully driving plaintiffs' cattle, he is only liable for the loss engendered as a result of the running and is not liable for the immediate consequences of this act.

This would seem to be directly contrary to the law of the Tobin case *supra* and the other authorities cited. It is also inconceivable as a matter of sheer logic that it can be maintained that a man may be held responsible for the actual doing of a deed but not responsible for the direct result of the deed. Surely the appellant would not contend that had he run the cattle over a cliff, he would be responsible only for the damages sustained to the animals while they were running to the brink of the cliff, and the appellant would be free of the damages sustained to the cattle as a result of their fall. It would seem, therefore, relatively obvious that the appellant did not drive the cattle (1) off his premises

in the manner that a reasonable and prudent man would do, (2) with an effort to minimize his damages, but that in fact the appellant was motivated solely with a desire to inflict damages and harm upon the plaintiffs, and as a direct and proximate result of his wrongful acts, these cattle were damaged, as the Court found, in an average loss of weight of ninety pounds per animal.

It is submitted that the judgement of the District Court is supported not only by ample competent evidence, but by the law, and it is requested that this appeal be dismissed.

Respectfully submitted,

Clyde Patterson

*Attorney for Respondents
and Plaintiffs*