

1949

Leonard Howe v. Maurice R. Michelsen and June H. Michelsen : Brief of Respondent

Utah Supreme Court

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For the Appellant; O. A. Tangren and E. D. Sorensen;

For the Respondent; Edwin D. Hatch;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

LEONARD HOWE,
Plaintiff and Appellant,

vs.

MAURICE R. MICHELSEN and
JUNE H. MICHELSEN,
Defendants,

MAURICE R. MICHELSEN,
Respondent.

Case No. 7397

BRIEF OF RESPONDENT

For the Appellant: O. A. Tangren and
E. D. Sorensen, Esqs.

For the Respondent: Edwin D. Hatch, Esq.

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In The Supreme Court of The State of Utah

LEONARD HOWE,
Plaintiff and Appellant,

vs.

MAURICE R. MICHELSEN and
JUNE H. MICHELSEN,
Defendants,

MAURICE R. MICHELSEN,
Respondent.

Case No. 7397

BRIEF OF RESPONDENT

STATEMENT

The Respondent cannot agree with the statement of the facts as set out at pages 1 through 5 of Appellant's brief, for the reasons following:

That Statement is incorrect and quite incomplete, though in some parts fair. For that reason we take the liberty to state the facts as we believe them to appear from the record, as follows:

At a time during the summer of early Fall of the year 1947, one A. E. Christensen, a realtor, took listing for to sell the ranch and cattle of appellant, the same being located in Wasatch County, Utah, near the mouth of Daniels Creek Canyon as it debouches into the Provo, or Heber, Valley.

In that listing the appellant listed, inter alia, some 150 tons of hay and some 2500 bushels of grain to be the crop to be raised on said premises for that year. (Tr. p., Exhibit))

Shortly thereafter, the said realtor interested the defendants in the purchase of said property, with the result that, on the 4th day of September, 1947, an agreement of purchase and sale was entered into by the Plaintiff and the Defendants. Said agreement appears at pages 1 and 2 of the Separate Answer of this Respondent. (Tr. pp. 5, 6, 8, 9, 12, 13.)

The list of property forming a part of this preliminary agreement, set out, as at September 4, 1947, "50% of all hay and grain produced. (Estimate total 150 tons of hay and approximately 1250 bushels of grains) total 2500 bushels." (Tr. pp. 11-14, said Answer of Respondent, p. 3.)

This preliminary agreement awaited until the 7th day of November, 1947, at which date the parties concluded their preliminary agreement and entered into the final agreement. (Pg. IV of Respondent's answer, Tr. p. 14.)

This final agreement is shown as Respondent's exhibit "A" and appears as a part of his answer at Tr. pp. 21-24. Attached to said final agreement, and forming part of it, is a Bill of Sale, of the same date. (Ex. "B," attached to said answer, Tr. pp. 10-25.) This Bill of Sale is by the Appellant and his wife, to Respondent and his wife, and recites, inter alia, "one half of all hay and grain produced on the farm described in said contract during the year 1947, estimated at 150 tons of hay and 2500 bushels of grain." (Tr. p. 25.)

At paragraph 2 of the reply of Appellant, he admits that he entered into said preliminary agreement, and then, for the first time, makes an attempt to qualify his repeated representations as to quantity of hay and grain raised on the premises during 1947. (Tr. pp. 5-6-8-9-29.) And at his paragraph 3 of his said reply, he attempts to explain away his said representations by qualifying them to import but one-half of such crops as might at some after time be present on the premises. (Tr. p. 29.) (Rep. Tr. p. 14.)

At his paragraph 3 Appellant again admits that the contract in its final form was entered into as alleged, but then attempts to alter it as to quantity of hay and grain. (Tr. p. 29.) (Rep. Tr. p. 12.)

Possession of said premises was not given to Respondent until November 10, 1947. (Tr. pp. 29-30, pgf. 5 of said Reply. Rep. Tr. pp. 11-13.)

He admits that the measurements of hay and grain occurred on November 16, 1949 (Tr. p. 7), and that, not until January 5, 1948, did the matter of whose hay was whose arise, or was discussed. (Tr. p. 30, Pgf. 6 of said Reply.)

The Appellant alleges, (pgf. 6 of his said reply (Tr. p. 30) that an agreement was then reached (on January 5, 1949) as to both the prices and amounts to be paid for and received by Respondent from him as the half part of all the crops (hay and grain) raised on the premises for the year 1947. This stands denied, under our system of pleading.

This high Court, we believe, will take judicial notice that the cropping season of all years, at the vicinity of these farm lands in Wasatch County, Utah, finally closes during the early part of September of each year, and the crops then can be ascertained with certainty by the raiser of same. Hence we mention this as a fact in the case. This we say is peculiarly true as to hay and grain. (See also: Rep't'r's Tr. p. 12; p. 11, p. 22.)

This Court will also, we believe, take judicial notice that the feeding season for dairy cattle at this location starts soon following the harvest of hay and grain, and has begun long prior to November in each year.

We also feel that this Court will so take notice that all dairy herds need to be fed grain (Rep. Tr. p. 11), during the whole of the year, and hay after the cool days and colder nights begin in the Fall of the year, with grain also.

The appellant here admits that such was his custom as to feeding, and that he fed some quantity of these items over the period until November 10, 1947, when Respondent took over. (Reporter's Tr. pp. 27-31-32.)

Exhibit "A", did not become mutually binding, and so must fail as any statement of any agreement, the Appellant not signing same. (Reporter's Tr. pp. 16 through 18 and p. 25.)

The sole question needful to decision of this matter is: "the total amount of the crops produced during the year 1947." (See agreement shown at pages 19 and 20 and 21, 22, 23 and 24 of the Reporter's transcript.) Together with the further question of how much each was to have.

Mr. Howe, in stating the part of the crops to be claimed by his farmer, Mr. Houtz, gives Houtz one-half of the crops, so interpreting his view as to what that term meant in that dealing. (Rep. Tr. p. 33.) There he does not claim at any after date, after his feeding out of the crop.

The final contract above mentioned, inter alia, contains the following provision:

“The buyers and the sellers each agree that should they default in any of the covenants or agreements contained herein, that they will pay all costs and expenses that may arise from any enforcement of this contract, either by suit or otherwise, including a reasonable attorney’s fee.”

(Exhibit “A” of defendant’s answer, page 3, 6th, Tr. p. 50.)

(See Exhibit “A” of defendant’s answer, page 3, 6th, Tr. p. 50.)

This is not questionable, see Rep. Tr. pp. 8-9.

The stipulated facts are that the final agreement (Ex. “A” of this Respondent’s answer, shall be interpreted to mean, as is hereby Respondent contended, “a half of the grain produced on the above described farm during the year 1947, estimated total of hay raised 150 tons and total of grain raised 2500 bushels.” (Rep. Tr. p. 9.)

EVIDENCE OF PROOF

We agree with the statements contained in the first paragraph of this heading at page 5 of Appellant’s brief.

We take issue with the second such paragraph, last commencing on said page 5 of Appellant’s Brief, in the following particulars:

Appellant take the position, it would seem, that prior to January 1948 there was some duty on respondent’s part to purchase something (hay, grain, etc.) from appellant. Such was not the case, for: Under the

agreement of November 7, 1947, the respondent had already acquired title to a full one-half of all crops (in their totals) raised on the premises, and appellant was entitled to any overage of such. This overage and the determination of its amount, is the only part of such items as could in any wise have any price put upon it for the purpose of respondent's purchase of such remainder belonging to the appellant. (See: Exhibits attached to this respondent's separate answer, pp. 21 through 25 of the Transcript.)

The third paragraph appearing at page 6 of Appellant's brief would seem to assume a conclusive proof of an agreement by respondent to purchase the whole of the items listed at evidentiary Exhibit "A", and so to assume no possible differing about that. Such clearly does not so appear in the record. Let us see:

Howe says so. (Rep. Tr. p. 27.) BUT *Howe further says*: 'The greater portion of the feeds had been fed to the cattle prior to January of 1948.' (R. Tr. pp. 27, 31, 32); 'I presented the bill (Ev. Ex. "A") over the rail' to the father of respondent (R. Tr. p. 28); 'I didn't demand a check' (R. Tr. p. 29); When I next saw the father 'I'd already hired a lawyer' (R. Tr. p. 30); 'I never have discussed this matter with the father after the first visit' (R. Tr. p. 31); I and young Mr. Michelsen were alone at the time of the making of Evidentiary Ex. "A" (R. Tr. pp. 34, 35.)

Respondent testifies:

'On January 5, 1948, we came to the unit price on

the items shown at Ev. Ex. "A"; they are the same prices submitted here; 'I didn't say to Howe that if he would take Ev. Ex. "A" down to father he will give you a check for \$2129.32, I did say: Take this down and my father will go over it and if it is OK and according to the contract he will pay you as per unit price; that was the end of the conversation' (Rep. Tr. pp. 37, 38); 'I never agreed with Howe on the total amount, I just agreed with the amounts shown as being then on the place' (Rep. Tr. p. 39); I assumed that I would get half of 150 tons of hay and 2500 bushels of grain (Rep. Tr. p. 40); 'There was only 85 tons of hay there when we first measured it in November, 1947 and the other pounds we have stipulated upon' (Rep. Tr. pp. 41, 42) 'I never agreed as to the total price shown on Ex. "A." That was to be submitted to father before any conclusion was made upon it' (Rep. Tr. p. 43).

The Father testified:

Howe represented to me that he expected to have, 150 tons of hay and 2500 bushels of grain raised on the place in 1947. That was prior to September 4, 1947, and in the presence of Mr. A. E. Christensen and my son' (Rep. Tr. pp. 45,46); 'I am familiar with and sat in on the negotiations that led up to the purchase agreement of November 7, 1947. (Rep. Tr. p. 47); Howe came to me about the memorandum Ex. "A", in the spring of 1948 (Rep. Tr. p. 48); Howe said that he and my son had agreed on it and asked me for \$2100.00, on receipt of which he would make his bill of sale; I will have a bill of sale drawn and I will check the quantities

and if they are correct I will give you a check for it, I told him I would check it against the contract. He came back a few days later and asked if I had the bill of sale drawn, and I said: "No, because there is an error." He said my boy had so agreed with him. I said it is not according to the contract, I will get the contract. I went for it, and when I returned Howe had gone. I never saw him after that regarding this matter. Only Howe and I were present. I never did meet Howe as he related. I was closely associated in and advisor to my son about this matter. Howe never did state to me that there was less hay or grain in totals of 1947 crops raised than set out in the contract. He never told me of having fed any part of said crops. (Rep. Tr. pp. 49-50.) The contract called for 150 tons of hay and 2500 bushels of grain, and we were to get half of it; half of what was produced on the farm for 1947; Mr. Howe was to get the other half. (Rep. Tr. p. 52); I accepted Mr. Howe's representations, as to the hay and grain, we were to have half of it. It was Mr. Howe's estimate, we didn't examine it. We took Howe at his word. (Rep. Tr. pp. 53, 54.)

Howe did not take the stand to rebutt any one of the statements by Respondent or his father.

What we have set out with respect to paragraph 3, page 6 of Appellant's Brief, we also say as to paragraphs 2 and 4 appearing at said page 6.

Hence, we say that the foregoing sets out the record as it is and that said paragraphs of Appellant's brief

are inconclusive, not any full statement, and are not in any wise supported by the greater weight of the evidence. We have been, perhaps a bit prolix, but only so in order to aid the Court.

At page 7 of his brief Appellant quotes from the contract, and says its provisions so shown are conclusive. We agree: BUT we do not make the same interpretation of the quoted parts set out there.

We say:

The words "One-half of all hay and grain produced on the above described premises" during the year 1947, cannot be held to be other than a full one-half of such:

The words "—the hay and grain aforesaid" appearing in the next quoted paragraph mean, without possibility of other meaning, that the full one-half of each should be divided "immediately after the execution of the contract."

The contract is dated the 7th day of November, and the quantities of these articles then on the premises arrived at within ten days thereafter. BUT the quantities so then found are not in either case, anywhere near the represented amounts raised and to be raised. Howe admits that he fed out of the crop but did not tell us how much he fed. Of course his feeding was on his own account and for his sole benefit, pending the closing of the agreement in final form.

Howe admits his feeding as aforesaid. (Rep. Tr. p. 27)

Howe says he was under no duty to account to respondent for so doing or for the rents, issues and profits so had exclusively by him. (Rep. Tr. pp. 13)

From the foregoing we say: No one can ascertain how much hay or what quantity of grain was produced in 1947 on this farm; Howe is an experienced farmer, long farming these lands, and wholly familiar with them and their producing capacities. Howe made his estimates for the Respondent to rely on, which Respondent did. Howe's representations were just that. They cannot be said to have been "puffing." Howe is so the only one who has said how much he raised. He had harvested his crops in toto and knew his productions when he signed the contract and bill of sale of November 7, 1947. (Rep. Tr. p. 12)

The delay in concluding the preliminary agreement of September until November 7th, following was occasioned by plaintiff alone. (Rep. Tr. pp. 4, 5.)

A R G U M E N T

Upon Appellant's First Assignment of Error:

The amended complaint provisions and averments there alleged are, of course, controverted, and so issues made, and by the Court determined upon. Those averments are so not, in any sense, controlling or conclusive.

By the preponderance of the evidence, above pointed out herein, it was the price for the several items, that was agreed on, the quantities *then on the premises* were also agreed on. (Rep. Tr. pp. 22-23.)

There is no semblance of, or anything to lead to any conclusion that by the memorandum, Exhibit "A" in evidence, there arose any meeting of minds as to the share of the property (the hay and grain) mentioned in said memorandum of each the Appellant and the Respondent or was in any sense agreed on. To the contrary: The Appellant does say so, but he is unsupported by the whole record when all is considered: He says so, then says to the father of Respondent that Respondent had said to get his check from the father. But the father's testimony and that of the Respondent as to this matter is to the effect that Howe's part of said property would be purchased and paid for, after a check against the contract.

Of course, the preponderance of the testimony is to this latter effect.

There never was any meeting of mind between these parties as to what part of either the 85 tons of hay or the grain on the premises in November or January was the property of Howe. (See Rep. Tr. pp. 23, 24.)

Until that had been finally agreed there could be no meeting of minds as to that.

That was a primary question before the Court below.

Exhibit "A," standing alone, is meaningless. Explanation and interpretation is needful to give it any potency.

When the interpretation of Howe is looked at, (that it constituted a promise to pay for all listed property)

is set opposite that of the Respondent (that his father would check it against the contract, and then determine what should be paid, and when bill of sale was delivered would make the then arrived-at proper payment) : Where lies the reasonable explanation?

Howe said nothing to Respondent at the time he obtained his signature as to divisions of hay and grain as per the contract, or about any amount which was his. The record is destitute of any such matter.

That there was no meeting of minds, and that the matter was left to the examination and approval or disapproval of the father of Respondent. (Rep. Tr. pp. 38 and 39.) Mr. Howe himself says, viz: "I agreed to put my anme there, after the bill of sale was put on it." (Tr. 18.) Of course, with that statement by Appellant it cannot be said that any completed agreement was made or any meeting of minds arrived at so as to make any enforcable contract. The whole matter was, at its very best, but a tentative, reviewable matter, to be later concluded upon.

Further, the entire Exhibit "A," except for the signature of Respondent, was made up by Mr. Howe. (Rep. Tr. pp. 42, 43.)

Without citing any authority for it, the same being beyond question, we say: Under those circumstances this memorandum and its explanation and interpretation must, as a matter of law, be construed most strongly against its writer, the Appellant.

Again: It is stipulated that: MR. HATCH: "On the 16th of November, these various items were measured up, and at that time, Mr. Howe so pleads in his original complaint, these people said we will buy whatever is yours; and then they negotiated as to price over some period; and in January they took the figures they arrived at in November being the true set price.

MR. TRANGREN: "That is right." (Rep. Tr. p. 20.)

Again:-

"THE COURT: (addressing Mr. Tangren) Well then, what is your question.

MR. TANGREN: We contend we are entitled to have the property that was there, when it was measured and divided.

THE COURT: According to your papers, each is entitled to half of the crops produced in the year 1947.

MR. TANGREN: If they will admit that there is no question.

* * *

THE COURT: Yes. That the hay and grain *afore-said* shall be equally divided between the seller and the buyer immediately upon and following the execution of this agreement, and delivery of the same shall be mutually made. Now, do you both stand on that?

MR. TANGREN: Yes.

MR. HATCH: Yes." (Emphasis ours.) (Rep. Tr. p. 21.)

There can be no possibility of error in saying that the hay and grain "aforesaid" was the full crop raised for 1947, the word "aforesaid" having no other possible antecedent.

We believe that the Trial Court could not have possibly determined this cause other than he did, and that Appellant's first Assignment of Error is clearly fallacious.

On Appellant's Second Assignment of Error:

Here is a repetition of his First Assignment, couched in different language.

If the Court did not err (and we say such is true) there can be no merit to this assignment, for:

There is nothing before the Court which gives any light upon the exact amount of either hay or grain harvested in 1947 on these lands except the repeated estimations of Respondent, the last of such appearing over his signature in his bill of sale of November 7, 1947, at a time when Respondent knew, or is charged with the full knowledge of those facts. Hence, we say, the Trial Court could do nothing other than the Respondent did, viz: Accept the representations of the Appellant to arrive at the answer to that element of the case. The Court did not err in so doing.

The prices for the hay and grain had been agreed on in November. (Rep. Tr. p. 20, above cited.)

There remained only the question of the interpretation of the contract of November 7, to arrive at the respective shares of these items belonging to each.

Under the above set of facts, and the Court having taken the Appellant at his word, and found that there was approximately 150 tons of hay and 2500 bushels of grain so produced on the farm, the computations set out at pages 5, 6 and 7, Paragraph VIII of Respondent's Answer cannot be said to be either devious or escapable.

As to Appellant's Third Assignment of Error:

We have set out, we believe, a sufficient answer to the Brief of Respondent as to this assignment, in what we have herein before argued. We so refer to our arguments under Assignments 1 and 3, and apply them here in so far as such may be said to have application as if set out here fully.

This assignment, we say, is falacious and not well taken.

We might further note hereunder that we concur in their statement of no ambiguity appearing in the Purchase and Sales agreement of November 7, BUT we cannot find it in our thinking to believe that the Appellant, during the period September 4 to November 10, could deplete the hay and grain on the premises raised that year by his feeding it, and in such manner change the clear import of that agreement so as to still have a one-half interest in the then remainders of such. That to our way of thinking is quite untenable.

As to Appellant's Fourth Assignment of Error:

As to this assignment, the Appellant seems to feel that the sole matters which may be considered are contained in his amended complaint. Of course, we take violent issue with any such attitude.

What we have said herein before which has application to this assignment, we here repeat. This assignment, like the others, is falacious.

As to Appellant's Fifth Assignment of Error:

Here we have a statement that it "was not necessary for defendant to bring in and set up —the Purchase and Sale Agreement" of November 7, 1949. In the same breath and assignment argument (page 18 of his brief) he says, "both showed that plaintiff was entitled to one half of the crops raised in 1947." Of course, that is just what the Respondent has claimed from the beginning. Here it is conceded.

It would be interesting to know just how the Respondent might have set up his co-relative right, and so asserted it, unless he did bring in that agreement, and have ascertained here just what that other one-half of the full crops for that year might amount to, and so to enforce the terms of the agreement of November 7, and obtain his full half of the hay and grain to him rightfully belonging, and so not be placed in position to have to pay for more hay and grain than the Appellant had any title to. So much for that argument of appellant.

Now, as to attorneys fees:

The contract of November 7 clearly provides for such in this set of circumstances.

The Trial Court was fully cognizant of the time required to defend the defendants; the preparation of their defense, the times of appearances in Court by Respondent's attorney. The Trial Court is not a new-comer to the bar. He had the statement of counsel for defendants that the fee allowed was reasonable. He could further, and without that, have determined the matter on his own motion, under the doctrine of judicial notice.

We don't contend that such was not an issue. Rather we say that issue was properly determined favorably to the defendant.

This assignment is frivolous and not well taken.

As to Assignment of Error No. 6:

There was, and now is, no issue on either rolled barley; lay mash; bone meal or cottonseed meal, the quantities or prices for such.

The only matter for determination here was the amount of the hay and grain raised on the farm in 1947, together with the determination of the respective parts of these litigants.

Hence, we say this assignment is frivolous, and submit it to be just that.

As to Assignment No. 7:

This assignment, though listed by Appellant, appears to not be argued by him. He bases his comment on other fallacious contentions.

Hence, we submit this assignment is without merit.

As to Assignment No. 8:

At Appellants outset hereunder he admits that this Respondent was to receive "one-half of the hay and grain raised on the premises."

Then he admits that this Finding is "borne out by the evidence, plaintiff's exhibit "A," and by the contract of November 7.

We appreciate that admission. Have we need to go further?

What we have hereinbefore related as to the necessity of finding but \$556.00 to be the whole price of the "overage" of one-half of those crops then the property of Plaintiff we here re-affirm, and say: The Court could not have found otherwise under the issues and the proof, stipulations and the whole of the record.

Pages 23-24 of the Reporter's transcript of evidence, as we read it, do not bear out the contention of the plaintiff and Appellant on this assignment. In fact, when page 25 of the said transcript is noted, we find that even the plaintiff says; They took the October prices, so that bears out the defendant as to that. Then appears the

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relation of the conclusions and interpretations of the conversation of January 5, 1948, as the plaintiff would have them. Of course the conclusions so there appearing have been treated hereinbefore. We refer to such. Those conclusions do not make the greater weight of the testimony, and they are in clear opposition to common sense and the usual dealing under the circumstances here.

We submit this assignment to meritless and not well taken.

As to Assignment No. 9:

Counsel appreciates that this is but a repetition of their assignment No. 5. Said No. 5 we have treated, and concluded it to be without merit.

We submit that this assignment is but such, and frivolous.

As to Assignment No. 10:

Here they but restate what they have otherwise and in other words mentioned in their preceding assignments.

We here reassert what we have heretofore said as to this, and submit this assignment to wholly without merit.

As to Assignment No. 11:

Here Appellant has not argued his stated assignment or set out anything in support of it.

We, therefore, do not feel called on to treat this assignment seriously, but content ourselves in saying "There is no variance here between the pleadings of defendants and their proof.

This assignment we say ought to be ignored as bad.

As to Assignment No. 12:

No argument as to, nor any pointing out of any lack of proof is here made by Appellant.

What we have said as to No. 11 we here repeat as to this assignment. It is without merit, and has been abandoned by Appellant.

As to Assignment No. 13:

This assignment makes but a statement of a conclusion of law, and no pointing out of its supposed merit is made.

Nothing theretofore appearing in Appellant's brief seems to us to have any application here.

If we should not be correct in this last statement, then we refer to and incorporate here all that we may have said which has any application, as our argument here. Said assignment, we submit, is bad.

In Conclusion:

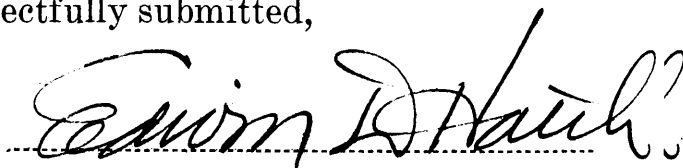
We take full and detailed issue with the "conclusion" of the appellant's brief. On the contrary, we submit:

All common sense; all rules of the English language; all possible interpretation of the agreement of November 7, 1947 and its antecedent documents, representations and inducements to the entering into that contract, lead to the inescapable conclusion that there is no merit to the contention of appellant that he was entitled to a half part of the "remainder" of the hay and grain on the premises when measured in November, or in January following, after he had fed out a considerable part of the whole crops to his own sole advantage and profit.

The writer is quite incapable of understanding how the positions of plaintiff and appellant can be supported from either the record; the representations and inducements aforesaid, or upon any ground of reason or equity.

We submit that, in addition to the above, the parties here ought to have the rule in this Court to be: The judgment affirmed, and the Appellant to pay all costs of this appeal, including a reasonable attorney's fee for the respondent, in a sum of not less than \$150.00.

Respectfully submitted,

A handwritten signature in cursive script, reading "Edwin D. Hatch", written over a horizontal dotted line.

Edwin D. Hatch

Attorney for Respondent.

Received two (2) copies of the foregoing Brief of
Respondent this10..... day of November, 1949.

O. A. Tangren and E. D. Sorensen, Attorneys for
Appellant.

By 12/ Ed Sorensen