

1949

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

Utah Supreme Court

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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

REPLY BRIEF

FILED

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ARGUMENT

Inasmuch as the respondent, in his brief, cites no authorities and raises no argument on the issues really involved in the case we would not reply except to point out that counsel spends almost the entire brief on a proposition or theory not raised at all by his pleadings or adhered to in the trial. That proposition is that plaintiff

had actually used up and fed the greater portion of his share of the crop to defendant's livestock prior to the measurement. This proposition is not only, not raised in the pleadings but is preposterous. There is not the slightest mention of such a theory raised by the pleadings nor was the trial devoted to such a theory. True, counsel asked Mr. Howe if he didn't feed the cattle some between November 7, when the agreement was finally entered into and the 10th of November when defendant took possession. That would be a matter of three days. The crop was measured on the 16th day of November, 1947, or 6 days after defendant took possession, and it can be presumed that defendant fed some during those 6 days, but this is all immaterial because it wasn't involved in the pleadings. Had defendant raised the question in his pleadings we could easily have shown that defendant got the better of the crop settlement by a late measurement and whose live-stock benefitted by whatever was fed. But these matters were lumped off by the practical settlement of the matter when the crop was measured on November 16, 1947. The agreement provided each party should have one-half. The prices were finally agreed upon on Jan. 5, 1948 and the total due Howe decided at \$2,129.32 by Plaintiff's Exhibit "A".

The whole theory relied upon by defendant during the trial was that he was entitled to one-half of the estimated amount. The actual production fell short of the estimate. That's all there was to it. However, each party was to have one-half of what there was.

There is no involved issue in this case notwithstanding-

ing the presumptions of "overages", "full one-half" and "shortages" spoken of by counsel in his pleadings.

The only question is "How much crop?" Plaintiff and defendant determined that on November 16th when they measured it. They fixed the prices and the amount Howe was entitled to on Jan. 5, 1948, and that showed the sum of \$2,129.32 for plaintiff's portion of the crop plus some minor items sold to defendant at the same time. To take any other view of the matter is only to muddle and confuse a proposition which is plain and simple and not complicated.

We respectfully insist that the judgment of the District Court should be reversed and plaintiff given judgment for the sum of \$2,129.32 plus interest and costs.

Respectfully,

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