1952

Edward Stevens v. Fearn Gray : Supplemental Brief of Defendant and Respondent

Utah Supreme Court

George W. Worthen; Attorney for Defendant and Respondent;
Elias Hansen; Attorney for Plaintiff and Appellant;

7781

In the Supreme Court of the State of Utah

EDWARD R. STEVENS,
Plaintiff and Appellant,

vs..

FEARN GRAY,
Defendant and Respondent.

CASE NO. 7781

Appealed from Fourth District Court of Utah County,
Hon. Joseph E. Nelson, Judge

Supplemental Brief of Defendant and Respondent

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STATEMENT OF FACTS

We would not attempt to make any reply to appellant's Reply Brief were it not for the fact that matters were presented therein which go further than answering new matter presented in respondent's brief.

Rule 75 (P) (2) U. R. C P. provides that a reply brief shall be limited to answering new matter set forth in respondent's brief.

POINTS TO BE COVERED IN DEFENDANT'S ARGUMENT

Respondent in his argument will discuss the case under the following points:

POINT ONE

ANSWER TO PLAINTIFF'S REPLY TO POINT ONE—The Trial Court committed no error in receiving testimony of the defendant as to the reasonable value of feeding cattle.

POINT TWO

ANSWER TO PLAINTIFF'S REPLY TO POINT FOUR—The Trial Court committed no error in making its finding No. 5 and in allowing defendant credit for the items mentioned in Point Three of plaintiff's assignment of errors.

POINT THREE

ANSWER TO PLAINTIFF'S REPLY TO POINT EIGHT — The Trial Court's failure to allow defendant $1,000.00 for the use of his personal automobile in transacting partnership business.

POINT ONE

ANSWER TO PLAINTIFF'S REPLY TO POINT ONE

THE TRIAL COURT COMMITTED NO ERROR IN RECEIVING TESTIMONY OF THE DEFENDANT AS TO THE REASONABLE VALUE OF FEEDING CATTLE.

On page 5 of appellant's reply brief under his reply to Point One it is stated that, "The evidence shows, without conflict, that Stevens has, ever since the partnership ended,

attempted, without success, to secure from the defendant an accounting (Tr. 32)." We submit that the evidence fails to support said statement.

The plaintiff testified that he first made demand for an accounting along about 1942 (Tr. 87). He testified that he and defendant tried to get together about three times; that they hired James Earlandson to take down the items of expense and the general set-up in about 1942-43 Tr. 88).

If the plaintiff and defendant, in their meetings with James Earlandson, gave to him the items of expense and general set-up of the partnership, certainly there was no refusal on the part of the defendant to work out an accounting with plaintiff.

On page 5 of appellant's reply brief counsel observes that Mr. Gray had a pair of scales on his ranch.

Mr Gray testified that the only pair of scales in Payson was on his ranch (Tr. 293).

On page 7 of his reply brief counsel observes that Mr. Cowan kept records of the amount he fed (Tr. 480). Mr. Cowan did not testify that he weighed all the feed that he fed; he testified that he had one stack of hay right by the yards, two stacks of hay approximately ½ to ¼ mile away and two stacks of hay six miles away (Tr. 485).

We are sure the Court will not be misled by indulging in the presumption that Mr. Cowan hauled all of the hay in his stacks to Mr. Gray's scales and back to his feed yard, and weighed the same in order that he might have accurate records thereof. The only testimony of Mr. Cowan indicating that he weighed any of his feed is his statement as follows: "The silage has been more or less of an estimate by weighing one load of it" (Tr. 480).

On page 7 of appellant's reply brief counsel states that so far as the evidence shows, Stevens probably did as much actual work as did Gray.

The above observation is not entirely consistent with the observation made by appellant at page 19 of his original brief, to-wit: "It is further made to appear that the defendant, for the most part, had the exclusive possession of the partnership cattle especially while they were in the feed lots being fattened for the market."

We are unable to recall any testimony of either plaintiff or defendant showing that plaintiff ever used his automobile in making purchases of cattle or in looking after the cattle; in fact Mr. Dixon, who wintered partnership cattle in 1936-37, testified that he did not remember Ray (Stevens) ever being out there to see the cattle. He did know that Fearn (Gray) was over there (Tr. 168).

POINT TWO

ANSWER TO PLAINTIFF'S REPLY TO POINT FOUR

THE TRIAL COURT COMMITTED NO ERROR IN MAKING ITS FINDING NO. 5 AND IN ALLOWING DEFENDANT CREDIT FOR THE ITEMS MENTIONED IN POINT THREE OF PLAINTIFF'S ASSIGNMENT OF ERRORS.

At page 16 of appellant's reply brief it is observed that respondent claimed that the checks given to Hyrum and Albert McClellan were for hay fed to the partnership cattle brought in from Mosida and Sage Valley, and that the cattle from Mosida and Sage Valley were not brought to the ranch until a month after the purchase of hay.

An examination of plaintiff's amended counterclaim (R. 40) discloses (and it isn't disputed by any pleading of appellant) that defendant purchased the Barton cattle March 27, 1937, and the Lusty cattle April 5, 1937.

Defendant testified that the Lusty cattle were put in his feed yard about April 5, 1937 (Tr. 283). He further testified that he made no charge on a daily basis for feeding the cattle, but only for the hay. That he bought hay to feed the Barton and Lusty cattle and fed them up until the first of May until he could turn them out (Tr. 356-357).

Selby Dixon testified that the thin cattle were taken from Mosida to Payson (Tr. 168).

The Court's attention is directed to Par. 11 of defendant's amended counterclaim (R. 46) no claim is made by defendant for feeding cattle in his feed lot in the spring of 1937. The only charge claimed in respect to feeding cattle on his ranch during the spring of 1937 is for hay.

POINT THREE

ANSWER TO PLAINTIFF'S REPLY TO POINT EIGHT

THE TRIAL COURT'S FAILURE TO ALLOW DEFENDANT $1,000.00 FOR THE USE OF HIS PERSONAL AUTOMOBILE IN TRANSACTING PARTNERSHIP BUSINESS.

At page 21 of appellant's reply brief replying to Point Eight of respondent's brief as to defendant's claim for the use of his personal automobile, counsel observes, "It is obvious that the Court among its numerous other errors and oversights failed to dispose of the issue as to the use of the automobile."

It is our contention, however, that the Trial Court's failure to dispose of this issue by awarding defendant the $1,000.00 claimed, in view of plaintiff's implied admission on page 22 of his original brief, that the automobile was used by the defendant in traveling 15,000 miles and his further admission that the evidence justified an allowance of 7c per mile, does not affect defendant's right to the same, nor does it preclude this Court from making said allowance to defendant.

Respectfully submitted,

GEO. W. WORTHEN,
Attorney for Respondent.