

1958

Whitney D. Hammond v. Zelf S. Calder : Brief of Appellant

Utah Supreme Court

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Zelf S. Calder;

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IN THE SUPREME COURT
of the
STATE OF UTAH

WHITNEY D. HAMMOND, Admin-
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Eskridge, Deceased,

Plaintiff and Respondent,

vs.

ZELPH S. CALDER,

Defendant and Appellant.

Case
No. 8827

APPELLANT'S BRIEF

ZELPH S. CALDER

251 So. 3rd West
Vernal, Utah

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STATEMENT OF FACTS

Jim Eskridge, plaintiff and respondent, hereinafter known as Jim Eskridge and plaintiff, in his complaint alleges the lease agreement, Record page 2 (R. p. 2) which as pertinent is a share cropping lease wherein Jim Eskridge is to have three-fourths and Zelfh S. Calder, defendant and appellant hereinafter called the defendant is to have one-fourth of the crops raised, except that defendant "shall have all the grazing rights and privileges to the lands, except that it shall be the exclusive right of the

party of the second part (Jim Eskridge) to say when livestock may be grazed on growing grain," and then plaintiff makes a contrary allegation, (paragraph 4), that he "was to have the exclusive right to say when livestock may be grazed upon said lands."

On October 18, 1955 (long after crops were harvested), (R. p. 5) Jim Eskridge brought this action for a temporary injunction. Defendant did not resist said temporary order providing Jim Eskridge would put up an indemnity bond of \$500 (R. p. 8) which he failed to do. Defendant on October 18 (R. p. 7) requested Jim Eskridge to put up a non-residence cost bond (as he was a resident of Craig Colorado), which he also failed to do.

On November 15, 1955 (R. p. 9) Whitney D. Hammond presented a motion for extension of thirty days time to file a cost bond because Jim Eskridge had been killed in an airplane accident. The court on said date granted said motion. On December 17, 1955 (R. p. 14) defendant filed a motion to dismiss the case on the ground that no cost bond had been filed. On January 24, 1956 the court denied plaintiff's motion to dismiss. No non-resident cost bond has ever been filed.

On February 29, 1956 (R. p. 19) defendant filed his answer and counter-claim and as pertinent alleges that the lease agreement terminated with the death of Jim Eskridge on the 29th day of October, 1955.

On April 3, 1956 plaintiff filed his reply.

On April 24, 1956 (R. p. 27) defendant filed a motion

for Summary Judgment on the grounds "that said lease agreement is based upon a personal contract which does not survive the death of the intestate". On April 25, 1956 pre-trial was set for May 1, 1956 (R. p. 28). Defendant's authorities on his motion for summary. Judgment filed May 1, 1956 minute entry (R. p. 31) shows said motion taken under advisement and case set for trial June 25, 1956.

June 25, 1956 a minute entry reads as follows (R. p. 34)) "This was the time set for the trial in this matter, the plaintiff being represented by Hugh Colton and Whitney Hammond, the defendant being represented by Clyde Johnson and himself. After discussion between counsel, a stipulation was entered into and made a part of the record, which stipulation, if carried out, will terminate this action."

The stipulation reads as follows: (R. p. 35)

"BE IT REMEMBERED, that this matter came on regularly for trial June 25, 1956, before the HONORABLE MAURICE HARDING, Judge, without a jury, at the City and County Building at Vernal, Uintah County, Utah, and that the following stipulation was entered into by the parties.

A P P E A R A N C E S

FOR THE PLAINTIFF: MESSRS. HUGH
COLTON and WHITNEY D. HAM-
MOND, Vernal, Utah

FOR THE DEFENDANT: MESSRS.

ZELPH CALDER AND CLYDE S.
JOHNSON, Vernal, Utah

* * * * *

MR. COLTON: May it be stipulated that this case and the counter-claim will be settled on the following basis: that the plaintiff will be permitted to fulfill the terms of the lease this year with reference to the harvesting of the grain that was planted last year and which is now growing on the South and Middle units of what has been designated as the Calder Ranch; that the grain now growing thereon be divided in accordance with the terms of the lease, 25 per cent to the defendant and 75 per cent to the plaintiff; that as soon as the grain is harvested, the plaintiff will be relieved from any further responsibility or obligation under the terms of the lease and will be permitted to take his personal property off the place; that the plaintiff will be allowed two-sevenths of the cost of clearing 658 acres of land, said cost to be determined by a board of arbitration consisting of Wayne Goodrich and Raymond Searle, or someone else to be designated by the parties, and that if the two persons cannot agree of a reasonable price for the clearing of the said land, then their written statements are to be submitted to the Court and considered as evidence from which the Court can make a finding as to what a reasonable price for the clearing of the land will be, and the cost is to be determined as of the time the land was cleared, which was in 1951; that the amount as thus determined is to be paid to the plaintiff on or before the 1st day of November, 1956; that upon payment of the said sum, such payment shall be considered in settlement of all claims which the plaintiff might have

against the defendant; that the plaintiff will release all lands in the North unit, known as the Rye Grass unit, of the Calder property as of this date and defendant shall have immediate right of full possession thereof; that the defendant releases the plaintiff from all claims and permits the plaintiff reasonable time in which to remove his property from the said Calder property; and the plaintiff shall have the right to sell his share of the wheat under the wheat allotment of the defendant.

THE COURT: Is that stipulated?

MR. JOHNSON: Yes sir."

* * * * *

Report of arbitrators was filed October 16, 1956 (R. p. 36) and reads as follows:

"Pursuant to the Stipulation entered into by the Parties hereto on the 25th day of June, 1956, We the undersigned Arbitrators met for the purpose of determining the cost of clearing six hundred fifty eight (658) acres of land. After careful deliberation and consideration we hereby fix the cost of clearing said land at \$12.00 per acre.

Dated this 15th day of October, 1956.

Wayne Goodrich
Raymond Searle"

A request for withdrawal of the award by one of the arbitrators, Wayne Goodrich, filed October 20, 1956 (R. p. 40) with supporting affidavits (R. p. 44 and 45) which were to the effect that he had not seen the stipulation but was informed by Mr. Searle, the other arbitrator, that they were to arrive at the cost for clearing, plowing

and preparing for seed bed. That his award for clearing would be \$3.00 per acre and that he could not reach an agreement with Mr. Searle.

The order of the court, filed October 23, 1956 reads as follows: (R. p. 42)

“This Matter came on reularly to be heard this 23rd day of October, 1956 on Plaintiff’s Motion for Order and Judgment founded upon the stipulation entered into by the parties before this Court on the 25th day of June, 1956 and the Report of Arbitrators dated October 15, 1956 which stipulation and report are filed herein; and the Court having heard from both parties and examined the evidence and being now fully advised in the premises finds that the Plaintiff is entitled to sell his share of the wheat to-wit 4082 bushels, harvested on the Defendant property during 1956 without penalty:

NOW THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the plaintiff Whitney D. Hammond as Administrator of the Estate of Jim Eskridge, Deceased, sell all his share of the wheat harvested on Defendant’s property during 1956, to-wit, 4082 bushels, without penalty, and the Defendant is hereby ordered to refrain from any act or action which will in any way prevent or hinder the issuance of a marketing card by the Uintah County Agricultural Stabilization and Conservation Committee authorizing and permitting Plaintiff to market said 4082 bushels of wheat without penalty, and the Defendant is further ordered to perform any act it may be reuiired by said Committee to procure the issuance of said market card.

It is further ORDERED that the hearing on

the cost of clearing Defendant's land be, and the same is hereby continued to December 18, 1956 at 10:00 a.m.

Dated this 23rd day of October, 1956.

Maurice Harding
JUDGE"

On November 23, 1956 (R. p. 62) defendant filed Notice of Appeal.

On November 23, 1956 (R. p. 61) defendant filed a Motion to Supplement the Record, supported by his affidavit, which in substance states that he has 500 acres of irrigated wheat land and his lessee (plaintiff) has 1000 acres of dry land wheat ground qualified as wheat ground by U.S.D.A. Stabilization Service; that the wheat allotment is in the name of the defendant (R. p. 61); that said Stabilization service on June 20 (Ex. B., R. p. 47) notified defendant there were 953 acres of wheat on his farm, 448.4 acres volunteer and 504.6 acres other than volunteer, all of which was the plaintiff's except 211 acres of irrigated wheat belonging to defendant; that the acreage allotment for the whole ranch was 436 acres; that in order to qualify for support price (non-recourse loan) the excess wheat had to be pastured or plowed up before July 5, 1956. "That on June 26, 1956 defendant turned his cattle in on the volunteer wheat released to him by above stipulation made June 25 and on or about June 27 ("July" is in error) defendant went to the office of Mr. Colton, attorney for the plaintiff, and offered to plow up a sufficient amount of his irrigated wheat if plaintiff would plow up his prorata share of

fall wheat (which was mostly winter-killed) so that the wheat acreage would be reduced to conform to the wheat allotment and qualify them both for a non-recourse federal loan for the full support price of the wheat. Plaintiff refused to plow up or aid in any way to reduce the acreage to meet the allotment.

Defendant knew of no penalty that could be imposed by the U.S.D.A. other than to be deprived of the right to a non-recourse loan (R. p. 61, 62).

On July 30 defendant was notified by the U.S.D.A. Stabilization Committee for Uintah County that his normal yield was set at 7581 bushels; that if his ranch produced wheat in excess of the above amount a penalty of \$1.07 a bushel would be imposed upon it and that whether or not a penalty would be imposed could not be determined until after the wheat was harvested and measured. (An extreme drought existed during the summer of 1956. Uintah County was classified as a disaster area.) Regardless of the excess acreage, no penalty would be imposed unless defendant's farm produced more than 7581 bushels except the penalty of being deprived of a federal non-recourse loan.

On August 29, 1956 defendant was notified that his normal yield of 7581 bushels was revised down to 6976 bushels.

On September 10, 1956 defendant advised the A.S.C. County Committee that all the wheat, including the Eskridge wheat, was harvested, stored and ready for inspection and measurement.

On October 31, 1956 defendant (R. p. 61, ex. E.) received Exhibit E, (R. p. 50) from the said county committee, which they established as 2778 bushels of excess wheat with a penalty of \$2972.46 which had to be paid before any wheat could be sold. The above represented the penalty on the Eskridge wheat of 4082 bushels and 5671.79 bushels belonging to the defendant.

Exhibit F is the bond of \$2972.46 which defendant was forced to put up by the above recited court order.

On November 26, 1956 defendant (R. p. 63) filed appeal cost bond of \$300.00.

On December 18, 1956 the District Court made a minute entry holding the appeal in abeyance.

With respect to the cost of clearing the land, Mr. Searle, a witness for the plaintiff (R. p. 9) summed his testimony by saying that it would cost not less than \$4.00 per acre to clear the brush off the land. That it would cost \$12.00 per acre to clear and plow the land like Mr. Eskridge did in 1951.

The Court (at R. p. 20) states: "We agreed on the persons that would make this appraisal and they have done so. Now, unless that appraisal is impeached in some manner, I think it should stand." (R. p. 20).

Mr. Leo Calder testified that he had farmed on Diamond Mountain (Tr. p. 21) for 20 to 30 years; that he had considerable experience with clearing sagebrush from the land; that the best way was to pull two railroad rails behind his tractor, then go the opposite way, which

pretty well bunched the sagebrush. Then he would take a weed burner with oil pressure and squirt oil into the bunches of sagebrush and fire it with a torch; that it cost, including tractor hire, wear and tear on machinery, about \$2.00 to \$2.50 per acre to clear sagebrush preparatory to plowing (Tr. p. 22); that where he cleared the land by burning only, it cost but 50 cents an acre. (Tr. p. 24); That Mr. Eskridge could have done it more cheaply because his ground was not so sodded and as heavy brush; that Mr. Eskridge plowed his ground and raked and burned it because he thought it was cheaper than to rail and burn it first. He also cleared part of it by burning. (Tr. p. 27). He further testified that his D. 8 caterpillar tractor pulling his 20 foot plow would plow at the rate of 3 miles per hour. The reasonable value of such equipment was \$15 per hour. (Each mile the tractor would plow 2 and $\frac{2}{5}$ acres, or $2\frac{1}{5}$ acres per hour at a cost of \$15, or slightly over \$2.00 per acre. (Tr. p. 31).

Mr. Zelf Calder testified that it cost him about \$2.00 per acre to clear his sagebrush land.

After both sides rested and arguments made (Tr. p. 37) the Record reads:

“The Court: I am going to rule that the clearing included the plowing, that that was included within the contemplation of the parties at the time the stipulation was made, as far as I know. Is there any misunderstanding now?

“Mr. Colton: I don't think so, Your Honor. That is exactly as we understand it.

“Mr. Nash: Mr. Calder indicates that that wasn't his understanding at all and as I have indicated to the Court, I don't know whether the stipulation was presented to the Court in writing.

“The Court: It was orally stated and then reduced to writing later.

“From the preponderance of the evidence, the Court finds that the cost of clearing the land, as contemplated by the stipulation, was \$12.00 per acre for 658 acres. That would be \$7,886.00; one-seventh would be \$1,126.59 and twice that would be \$2,253.18, for which judgment is given for the plaintiff and against the defendant, with interest on that amount from the first day of November, 1956, at the rate of six percent per annum until paid.

“If there is nothing further, Court will be adjourned.” (Tr. p. 37 and 38).

That on June 10, 1958 (R. p. 72) plaintiff filed Findings of Fact and Conclusions of Law, which in substance reviews the filing of complaint death of Jim Eskridge stipulation entered into involving the 2/7 of the cost of clearing 658 acres and the award of arbitrators. The facts as stated by plaintiff complaint; the substance of this order compelling defendant to pay plaintiffs penalty on his share of the wheat, 4082 bushels, so that it could be sold without penalty. And the conclusions of law in substance as above recited by the court. The Judgment as above recited together with awarding plaintiff his costs.

On January 21, 1958 (R. p. 76) defendant filed a Motion to replace a lost pleading, claim against plaintiff,

which after describing his property reads as follows:
(R. p. 77)

“... 2. That on the above mentioned date defendant had a large steel granery, approximately 40' x 50', attached to and a part of the above described real property.

3. That defendant is informed and believed and, therefore, alleges that on said date plaintiff by and through his representative or agent did unlawfully, wrongfully and against the will of the defendant enter upon said described property and did remove said granery from defendant's premises in violation of a stipulation between plaintiff and defendant entered into and filed with this Court on June 25, 1956.

4. That the reasonable value of said granery is \$2500.00.

WHEREFOR, defendant prays that his claim of \$2500.00 be allowed as a judgment against the plaintiff, and for his costs and just equitable relief.

Zelph S. Calder

Verification”

The court records show that on December 5, 1957 plaintiff filed a motion to strike defendant's said claim, but the court files do not now contain said claim.

A minute entry (R. p. 78) dated January 21, 1958 denied defendant's motion for hearing said claim.

Notice of Appeal was filed January 23, 1958 (R. p. 79).

The District Court (R. p. 82) gave permission for defendant to file additional record on appeal in the

probate file No. 1367, in the Matter of the Estate of Jim Eskridge, Deceased. The petition (R. p. 84) for the appointment of Whitney D. Hammond was for the purpose only to prosecute the case Jim Eskridge had filed against defendant before his death. A \$100.00 bond was filed February 7, 1956. The \$2,000 surety bond was later (R. p. 85½) incorporated into this record. The inventory, filed March 12, 1957 (R. p. 87) as pertinent lists personal property Leasehold in Zeph S. Calder property \$2,256, (the exact amount of the judgment) wheat 27,980 lbs. at \$3.15 per 100#, \$839.42. (about 1/10 of the 4,082 bushels of Eskridge wheat).

STATEMENT OF POINTS

1. The Court erred in denying defendant's motion to dismiss with prejudice because defendant's failure to file a non-residence cost bond.
2. The court exceeded its authority and jurisdiction by ordering appellant to pay the excess wheat penalty on the Jim Eskridge wheat.
3. The Court erred in its judgment of \$2,356.00, in that there is no evidence of cost of clearing to support an award higher than \$4.00 per acre.
4. The Court erred in awarding costs to the plaintiff, because the stipulation settles all claims.
5. The Court erred in refusing to hear defendant's claim against the plaintiff for removal of defendant's granery.

ARGUMENT

1. The Court erred in denying defendant's Motion to dismiss (R. p. 11 and 13) with prejudice on the grounds that plaintiff has not filed with the Court a non-residence cost bond.

This assignment of error was not listed in defendant's partial designation of the record (R. p. 81), but by stipulation all the record was designated on appeal, hence Point 1, in conformity with Rule 75d is properly before this Court.

The facts clearly show that plaintiff did not file a non-residence cost bond in conformity with law or at all (9 Ut. C. A., 1953, Rule 12 J and K).

For authority on this point, see *Bunting Tractor Co. v. Emmett D. Ford Contractors* (Ut. 1954) 272 p 2nd 191. The court held that plaintiffs delinquency (in not filing a non-resident cost bond within 30 days) was merely technical, and where bond was furnished before filing of motion to dismiss and defendant was not prejudiced by delay, dismissal with prejudice was an abuse of discretion, and judgment would be reformed by substituting word "without prejudice" for words "with prejudice."

In the instant case a non-residence bond was not filed before a motion to dismiss was made. It has never been filed.

The defendant was also substantially prejudiced by delay in that the defendant was not given back posses-

sion of his leased property until after June 25, 1956 so that he could not till his ground in the early spring to lock in the winter and spring moisture necessary to the fall planting of wheat thus depriving him of one years wheat crop (The Eskridge lease in 1956 produced 5,443 bushels at a value of \$10,886)

This brief should end here. But out of an abundance of caution defendant will pursue further his points of error.

2. The court erred in its order compelling defendant to pay plaintiffs excess wheat penalty.

Defendant has no objection to paying the excess penalty on his own wheat. Plaintiff had a bigger acreage in wheat and raised more wheat on the Calder Ranch than did the defendant. If Jim Eskridge were alive today this defendant believes he would pay his own excess wheat penalty. The most favorable prorating for the plaintiff would be to take his $\frac{3}{4}$ share of grain produced on his lease, 4082 bushels, as against defendant's $\frac{1}{4}$ share plus wheat raised on his own irrigated ground which equals 5671 bushels. Defendant bonded for the total excess wheat of 2778 bushels or \$2972.46. Thus on this basis of prorating, plaintiffs penalty would be \$1129.00 which is satisfactory to this defendant.

There is nothing in this stipulation that would cast even an inference that it was the intention of the parties that defendant should pay plaintiff's wheat penalty. Defendant's wheat allotment which was signed up with

the Uintah County Wheat Stabilization Service, in the name of the defendant, to cover the entire ranch.

The wheat committee issues wheat marketing cards to the farmers to authorize them to sell their wheat. Before 1956 said committee had issued a wheat marketing card to Mr. Eskridge without defendants knowledge, consent or objection. See 7 U.S.C.A. Sec. 1365 or 1956 Wheat Marketing regulation. See U.S.D.A. S.L. office. The above regulations also makes provision for said committee to settle disputes between lessor and lessee over excess wheat penalty with a right of equitable review into Federal or State Courts.

This stipulation was made long before anyone knew of any excess wheat penalty although the court order in its preamble states the court having heard from both parties and examined the evidence and being fully advised finds that plaintiff is entitled to sell his 4082 bushels of wheat without penalty, defendant does not know of any evidence being taken or noticing of a motion for any order or affidavits or pleading of any kind indicating a basis for the courts order.

So that to look at the stipulation the conclusion is forced that the honorable district court is in error in forcing defendant to pay or arrange for the payment of plaintiff's wheat penalty.

As for authorities in this proposition defendant is at a loss to find any issue. Perhaps Plaintiff in his brief can substantiate the court order. Defendant will reserve further comment in his reply brief.

3. The court erred in its judgment of \$2356.00. This is the exact amount that plaintiff entered in his inventory (R. p. 87) dated March 11, 1957, which was 9 months prior to the trial and judgment.

It was the understanding of the court that clearing included plowing within the contemplation of the parties at the time the stipulation was made. This invites the question — Why then wasn't plowing mentioned at the time the stipulation was made? It was a much more expensive and important operation than clearing. It is an operation essential each year to the growing of wheat. This again invites the question — is plowing essential every year in the ordinary course of husbandry? There is only one clearing. There is more than one plowing.

It is hard to disagree with the trial court on the question of fact or to whether or not it was the understanding of the parties that clearing was to include plowing and preparing for seed bed. Perhaps this understanding was reached in the court chambers immediately before the stipulation was made when defendants counsel, who unfortunately is not with us, was present and not the defendant. Or remotely possible defendant could have had his attention momentarily attracted away when plowing was purported to have been mentioned during the short time this stipulation was being drafted.

Regardless, Mr. Colton dictated the stipulation. It mentions cost of clearing the land 4 times. Defendant listened close to the dictation. After it was transcribed re-read it carefully.

With respect to arbitration four months after stipulation was made defendant had the judgment of "award of arbitrators" served on him in the amount of \$2356.00.

No notice was given to the defendant of the meeting of the board of arbitrators (Sec. 78-31-5 Ut. C. A. 1953); no time or place of hearing set (Sec. 78-31-6 U.C.A. 1953); No award was made in conformity with section (78-33-14 U.C.A. 1953) after the purported award was made defendant consulted with Mr. Goodrich who said he had never seen the stipulation and requested his name be withdrawn. And submitted to the court in writing his cost of clearing as \$3.00 per acre together with supporting affidavits. Mr. Searle did not submit to the court his cost of clearing or counter Mr. Goodrich's varified appraisal. So that all that was before the court on the appraisal was \$3.00 per acre. The trial court (Tr. p. 20) said: "Now, unless that appraisal is impeached in some manner, I think it should stand." To have this appraisal of \$12.00 per acre or \$2356 stand would invite judgment to be entered without notice, time or place of hearing and would take ones property without due process of law.

To sum up, there is no evidence of an appraisal to exceed \$3.00 per acre. At the hearing there was no evidence presented to exceed \$4.00 per cre for clearing land. This was testified to by plaintiff's witness Mr. Searle. He was an interested party as he had a contract to combine the grain, only 10% of which was accounted for in the inventory. A fair figure is around \$2.00 per

acre. This is approximately what Mr. Eskridge plowed the ground for with his big power equipment and about what it would cost defendant to rail and burn it with his Case tractor. The lowest figure was 50 cents per acre for burning.

This stipulation calls for payment of the clearing of 2/7 of 658 acres. Defendant believes in the sanctity of a contract and wants to pay in conformity herewith notwithstanding when this stipulation was made there was only one cropping year left in the lease.

Defendant does not believe there is any division of authorities on the above proposition. It is fundamental that a contract is construed against the maker especially is that true where the maker is a lawyer. 12 Am. Juris. Sec. 2523 Corbin on Contracts, Section 559.

4. The Court erred in awarding costs to the plaintiff, because the stipulation settles all claims.

Defendant believes it was the intention of the parties who made the stipulation that each should bear his costs. It would seem because of the court order imposing plaintiff's excess wheat penalty on defendant of \$1129 and the excess clearing cost of 2356.00 that the more equitable thing would be to impose costs upon plaintiff.

The above judgments are not the consumation of an injunctive action brought to test whether or not defendant had the grazing rights to his leased ground, and, if not, whether or not plaintiff suffered any damage.

5. The court erred in refusing to hear defendant's claim against the plaintiff for removal of his granery.

Had it not been that this claim was lost during the early part of this lawsuit it perhaps would have been disposed of earlier. This is a verified claim and uncontroverted. Defendant thinks that the court committed prejudicial error in dismissing it. Defendant would be satisfied if this granery, now situated on the Roy Searle property, about 10 miles south of his property, was returned to him.

In conclusion defendant respectfully submits that defendant should have judgment of \$1129.00 against plaintiff less the reasonable and fair costs of clearing 2/7 of 658 acres of land plus a fair and equitable disposition of his claim to the steel granery.

Respectfully Submitted,

ZELPH S. CALDER

251 So. 3rd West
Vernal, Utah