

1958

Whitney D. Hammond v. Zelf S. Calder : Appellant's Reply Brief

Utah Supreme Court

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Zelf S. Calder; In Person;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
DEC 5 - 1958

WHITNEY D. HAMMOND,
Administrator of the Estate of
Jim Eskridge, Deceased,

Plaintiff and Respondent,

vs.

ZELPH S. CALDER,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8827

APPELLANT'S REPLY BRIEF

ZELPH. S. CALDER

In Person

251 South 3rd West
Vernal, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

WHITNEY D. HAMMOND,
Administrator of the Estate of
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APPELLANT'S REPLY BRIEF

For brevity, defendant and appellant will hereinafter be referred to as Calder and plaintiff and respondent will be called Hammond or Eskridge.

Hammond's brief recites many facts that cannot be substantiated by the record. To recite each and every instance would make this reply brief too long. However, at the bottom of Hammond's brief page 2 he says that "on numerous occasions appellant (Calder) permitted his livestock to go upon

the land farmed by the plaintiff without permission, causing considerable damage to the crops growing thereon." This is erroneous, and apparently designed for the purpose to bolster up Eskridge's unfounded suit.

Calder's livestock was never upon the leased ground of Eskridge while grain was growing thereon.

Eskridge's foreman insisted that Calder keep his cattle off the leased ground entirely even though the grain was harvested. This was in direct contravention of the terms of the lease granting Calder all the grazing.

Hammond attempts to show at the bottom of page 3 of his brief that he was appointed as an ancillary administrator of the estate of Jim Eskridge, a non-resident and hence was not required to file a non-residence cost bond. This is erroneous. It will be noted that the widow of Jim Eskridge filed a petition requesting that Whitney D. Hammond be appointed as administrator for the purpose only to further prosecute the case already filed by her late husband, specifically alleging that the estate had no other property in Utah. (R. 84) Thus Whitney D. Hammond had authority only to act as agent, trustee, or special administrator to further the case already instituted.

With respect to Calder's Point 1, plaintiff's

failure to file a non-residence bond, the essential facts are undisputed, that is: The trial court gave Hammond an extension of time on November 15 to file a non-residence cost bond. No such bond was filed within the thirty days prescribed by the statutes. On December 17, Calder filed a Motion to Dismiss. This case, as a matter of law, should have ended here. No cost bond was ever filed.

Hammond seeks to excuse out of filing a cost bond because he was a residence of Utah, growing out of the fact that he was an ancillary administrator. This is not a case where the state becomes interested in unclaimed property of a non-resident requiring the appointment of an ancillary administrator. (See 2 Words and Phrases Permanent Edition 702).

If this court feels not to hold Calder on his Point 1, then the stipulation entered into on June 26, 1956, set out in full, becomes an important instrument for this court to examine.

The first question to be asked with respect to Calder's Point 2 is whether or not that stipulation makes provision for Calder to pay Eskridge's excess wheat penalty which was imposed by the United States Department of Agriculture about five months later.

Hammond again goes outside the record at page 11 and 12 of his brief and attempts to show

through lengthy conferences, (which did not occur), that Calder was blameworthy for the penalty being imposed on the Eskridge wheat, because he harvested some of Eskridge's volunteer wheat that was turned to him on June 25.

Apparently Hammond is not familiar with the U. S. D. A. 1956 Wheat Marketing Regulations (a copy is herewith left with the record for the convenience of the court and counsel.)

Without considering the volunteer wheat acreage, there was planted about 100 acres in excess of the wheat allotment of 436 acres, which was mostly Eskridge's.

Hammond refused to cooperate with Calder and plow up his pro rata share of planted wheat to meet the acreage allotment. Hence he was the blameworthy one.

Where the acreage is in excess, the production of the wheat must also be in excess of the normal yield as fixed by the U. S. D. A. for the Calder farm before a penalty can be imposed. This could not be determined until after the wheat was harvested. (See Sec. 72 P. 659, 1956 Wheat Marketing Quota Regulations.)

At the time the stipulation was entered into an extreme drouth exhisted. All indications pointed to a wheat crop far less than the normal yield. How

could this penalty be discussed when it was not known until after harvest?

With respect to Calder's third point, does this stipulation provide that Calder shall pay the cost of plowing and preparing the ground for planting? To follow the court's holding would unjustly enrich Hammond. According to the U. S. D. A. measurement of the wheat after it was harvested, Eskridge received 4,082 bushels from 350 acres of land. This wheat was worth at that time in excess of \$8,000.00. On this basis, Eskridge would receive about \$16,000.00 for 658 acres. All he would have had to do would be to plant the grain and harvest it, the cost of which would not exceed \$1.00 per acre for planting and \$3.50 per acre for harvesting. Calder would furnish the ground, pay the taxes, the interest on the mortgage indebtedness, plow and prepare the ground for seed; then, on top of that, pay Eskridge's penalty on his own excess wheat of \$1,129.00. Then still further, give up his right to pasture the Eskridge stubble ground after harvest, for only $\frac{1}{4}$ of the wheat grown. Common share cropping leases in the vicinity of Vernal are $\frac{1}{2}$ to the land owner and $\frac{1}{2}$ to the sharecropper.

CONCLUSION

We submit as a matter of law this case should have been dismissed because of Hammond's failure to file a non-residence cost bond. That if this point is not affirmed then we submit that it was error for the trial court to hold that the stipulation imposed Eskridge's excess wheat penalty of \$1,129.00 upon Calder; that it was error for the trial court to construe "clearing" in the stipulation as meaning plowing and preparing for seed bed; that it was error for the court to dismiss Calder's claim for removal of his granery and that it was error for the trial court to impose costs against Calder.

Respectfully submitted,

ZELPH. S. CALDER

In Person

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I certify that I mailed 2 copies of the foregoing
reply brief to Attorney Sterling D. Colton at 65
South Main, Salt Lake City, Utah, on -----
19-----.
