

1959

Whitney D. Hammond v. Zelf S. Calder : Petition for Rehearing

Utah Supreme Court

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Zelf S. Calder;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

24 1959

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

Plaintiff and Respondent,

vs.

ZELPH S. CALDER,

Defendant and Appellant.

Supreme Court, Utah

Case No. 8827

PETITION FOR REHEARING

ZELPH S. CALDER

251 South 3rd West St.

Vernal, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

WHITNEY D. HAMMOND,
Administrator of the Estate of
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Plaintiff and Respondent,

vs.

ZELPH S. CALDER,

Defendant and Appellant.

} Case No. 8827

PETITION FOR REHEARING

Appellant Zelfh S. Calder hereby petitions and alleges that this court erred in affirming the trial court:

1. In holding that Rule 12 (j) and 12 (k) “may have disappeared”, which is purely an attempt to make a retroactive ruling which is unconstitutional, contrary to said rules and contrary to the reasoning and decisions of this court in Bunting and Kemper cases.

2. In affirming the trial court’s order that defendant shall pay Eskridge’s wheat penalty. Said order deprived petitioner of his constitutional right to “due process of law” and impairs the obligations of a contract.

BRIEF OF AUTHORITIES AND ARGUMENT

The most important authority in support of this petition is Rule 12 (j) and (k), which read:

(j) When the plaintiff in any action resides out of this state, or is a foreign corporation, the defendant may serve a notice upon such plaintiff to furnish security for the costs and charges which may be awarded against such plaintiff. Thereafter all proceedings in the action *shall be stayed* until the plaintiff shall have served and filed an undertaking * * *.

(k) If the plaintiff fails to file such undertaking within *one month after the service of notice*, or fails to file any additional undertaking which may be required by the court within the time specified, *the court shall*, upon motion of the defendant, enter an order dismissing said action. (The above is italicized by petitioner.)

The clear and unambiguous language stays this action from October 18, 1955 until November 2, 1956, thus making a nullity of the trial court's order and judgment entered October 23, 1956. "Shall be stayed" was not brought forcefully before the trial court. The death of Eskridge and the subrogation of his rights to Colton and Hammond change the complexion of this case. Petitioner was anxious to get in possession of his leased premises for early spring work. This was thwarted by plaintiff until after a year's production was lost.

The Bunting and Kemper cases, cited in the court's opinion, extend themselves to help a non-resident litigant from being defaulted. Rule 12 (k) gives a non-resident forewarning that he has "one month" to post a bond of \$300. The Bunting case extended the rule beyond 30 days. The Kemper case extended the rule a little further and said even though defendant has made his motion to dismiss and the 30 day statute of limitation has transpired (42 days), this court still will give relief to this non-resident by way of dismissal without prejudice.

Mr. Justice Henroid, concurred in by Mr. Justice Worthen, dissented to the reasoning of the other three justices by saying, "Since we require the plaintiff to give no explanation for the default or his delay, it would appear that the rule disappeared except as an instrument of harrassment and expense to one of our own resident defendants at the hands of another non-resident plaintiff." Mr. Justice Henroid could have gone further and said that our Utah constitution, Article 12, Sec. 6, says that no foreign corporation shall be allowed to do business in this state on more favorable terms than a corporation of this state.

In the instant case Mr. Justice Henroid says "Rule 17 (j) (apparently meaning Rule 12 (k)) may have disappeared, but they (Bunting and Kemper cases) are the law of state and controlling."

The instant case promulgates a rule of law which extends to this non-resident plaintiff more than one year from the time request was made to post a surety bond, more than ten months after plaintiff's "one month" statute of limitation had run which was after default; also, defendant had lost a year's crop through failure of plaintiff to give up the lease, and had suffered mandamus order compelling him to pay Eskridge's wheat penalty without bond, all before plaintiff's bond was posted.

Such a rule of law completely causes Rule 12 (k) to disappear and in so doing strips this defendant of his constitutional rights so zealously guarded by both the State and U. S. Constitution.

4 Words and Phrases, 2nd series, 376, says, "A retroactive decision is one which makes and applies a new rule of law and attaches another and unforeseen liability to a contract after its execution and is as vicious as an *ex post facto* statute". *Chancery v. Baker*, 131 Fed. 161, 69 L.R.A. 653.

With respect to the wheat penalty, defendant received no notice or opportunity to be heard on it. Defendant went into the court chambers anxious and willing to pay what he agreed to, to wit: 2/7 of the cost of clearing 658 acres. When he got in there he found a judgment of \$2,256.00 had been filed against him by the board of arbitrators (R.

36-7) which he knew nothing about. Also he came out of said hearing with a court mandate compelling him to pay Eskridges wheat penalty, which he knew nothing about before he went into the court chambers. (Defendant is now being sued in U. S. District Court of Utah Case No. C-10-50 on this wheat penalty.)

Webster in the famous Dartmouth College case says by due process of law is meant, "a law which hears before it condemns."

CONCLUSION

This defendant entered into this contract dictated by Mr. Colton in good faith knowing the sanctity of a contract. He wants to be bound by it. Likewise he wants the plaintiff to be bound by it with equal sanctity.

The unprecedented Eskridge wheat penalty inflicted on him is more than offset by the cost of clearing.

We submit that this case should be dismissed without prejudice.

Respectfully submitted,
ZELPH S. CALDER
251 South 3rd West St.
Vernal, Utah

P. S. If this court pleases not to grant this petition would it stay sending down the remitter so as to give petitioner an opportunity to bring this case to the attention of the U. S. Supreme Court.

I hereby acknowledge receipt of copy this
..... day of February, 1959.

Attorneys for the Plaintiff

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 Feb 2 1959
1959.

Wm. J. L. Kristensen