

1958

Zelph S. Calder v. Ralph Siddoway : Brief of Appellant

Utah Supreme Court

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Zelph Calder; In Person;

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

AUG 5 1958

ZELPH S. CALDER,

Plaintiff and Appellant,

—vs.—

RALPH SIDDOWAY,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No. 8833

APPELLANT'S BRIEF

ZELPH CALDER,
IN PERSON.

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IN THE SUPREME COURT
of the
STATE OF UTAH

ZELPH S. CALDER,

Plaintiff and Appellant,

—vs.—

RALPH SIDDOWAY,

Defendant and Respondent.

Case No. 8833

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This case was started with a trespass action and finished by way of counterclaim on an injury to sheep and breach of contract. Many counts and counterclaim counts were filed. Plaintiff dismissed all his counts but Count One, in which the jury gave him a verdict for \$189.00. The Defendant in his counterclaim dismissed all of his counts except Counts One, Two, and Eight. The jury gave a verdict of \$293.80 on Defendant's Count One, no cause of action on Count Two, and \$122.00 on Count Eight.

Originally Plaintiff and Appellant, hereinafter re-

ferred to as Plaintiff, on October 28, 1953, filed a trespass action against Defendant and Respondent, hereinafter referred to as Defendant, and, after stating in Paragraph One his ownership and possession of certain described lands on October 6, 1951, he alleged:

“II

“That on said ranch and at said time Plaintiff had raised certain wheat which was in the field and ready for harvest.”

“III

“That at said time and place and against the will of Plaintiff, Defendant did trespass upon the wheat fields heretofore described with certain sheep, and did cause Plaintiff to suffer damage to his wheat crop” in the amount of \$1,200.00. (R. 1 and 30).

Defendant filed an answer and counterclaim, denying Plaintiff’s Complaint and alleging in Count One that he was the owner and in possession of lands therein described. (R. p. 43).

“2. That prior to the 20th day of May, 1951, the Plaintiff leased his premises to B. H. Stringham and Kenneth Stringham for the purpose of pasturing their sheep; that said sheep were placed on the Plaintiff’s premises pursuant to the terms of said lease.”

“3. That on or about the 20th day of May, 1951, the Plaintiff unlawfully and with force, broke and entered upon Defendant’s land. That at said time he unlawfully drove the Stringham ewes and young undocked lambs onto the Defendant’s land, where they were mixed with the Defendant’s ewes and young undocked lambs.”

"4. That in consequence of said acts, it was necessary to corral the ewes and young lambs in order that they might be separated. This resulted in the loss of weight and the retardation of the growth of all of the lambs. It was impossible to return all the lambs to their respective mothers and that many of the Defendant's ewes lost their lambs. That Defendant, as a result thereof, was damaged in the sum of \$2,000.00." (J.R. 5, 6, and 43).

On March 8, 1954, Plaintiff made a motion for a summary judgment on Defendant's counterclaim, Count One. (R. p. 22).

"1. That Defendant's counterclaim was signed and filed to defeat the purpose of Rule 11 in that it is sham and false."

"2. That said motion is supported by the following affidavit, which is hereunto attached and made a part of this motion." (R. p. 23).

"1. That, as pertinent to Defendant's first count of his counterclaim, affiant has about 400 acres of the above described land adjacent to and south of Defendant's land described in his Count One, which is enclosed by a sheep tight fence and natural barriers, of which about 200 acres is cultivated and irrigated and has produced grain for the past four years. Said land is situated in Sections 11 and 12, T. 1 S., R. 24 E., S.L.M.

"2. That on May 10, 1951, affiant leased his grazing lands, which are situated about two to six miles north of affiant's said 400 acre enclosure, to Mr. B. H. Stringham; that on or about the first day of June, 1951, B. H. Stringham assigned his

lease to Mr. Joseph Price and did remove his sheep therefrom, and has never been on or near plaintiff's property with his sheep since; that about the time of said assignment Kenneth Stringham requested of affiant permission to stay with his ewes and lambs about ten days on the said 400-acre enclosure. Affiant permitted him to stay for a day or so. Defendant's ewes and lambs were then on his sagebrush and semi-arid land through the fence to the north of plaintiff's said enclosure. About the next day Mr. Rowland McNeil herder of defendant's ewes and lambs, reported to affiant that some of their sheep had become mixed with the Stringham sheep and he thought they could easily separate them by drifting them apart. The next affiant knew about the Siddoway and Stringham ewes and lambs were that they were all mixed and in on affiant's said enclosed land and there remained for a week or ten days, consuming young grain grasses, clovers and forage, which were in much greater abundance than the grazing on defendant's lands.

"3. That affiant has read paragraph three of defendant's first count of his counterclaim and knows that the allegations therein contained are false."

In Defendant's Eighth Count of his counterclaim he alleges that he entered into an agreement to repair a certain fence between their lands. Defendant was to furnish four spools of barbed wire, and Plaintiff was to do the work. Plaintiff failed to do the work to Defendant's damage of the spools of wire, \$42.00, and an additional \$100.00. (R. p. 48).

Plaintiff made a motion to strike Counts One and

Eight of Defendant's counterclaim on the grounds that they do not arise out of the same subject matter and are contrary to law, as announced in *Park Bridge Corp. v. Elias*, 7 Fed. Rules Ser. 13 p. 1 (R. 49).

The Court denied Plaintiff's motion. (R. p. 50, 51).

On March 31, 1954, the Court denied Plaintiff's motion for a summary judgment on Defendant's counterclaim, Count One. (R. p. 28).

In Plaintiff's reply to Defendant's answer and counterclaim, filed September 20, 1954, he alleges substantially the same as in his affidavit above. The Defendant (R. p. 58) made a motion to strike Plaintiff's reply, which was granted by the Court. (R. p. 60).

Defendant made a demand for a jury on August 10, 1957, and the case was tried August 26, 27, and 28, 1957.

Plaintiff dismissed all of his counts, except Count One concerning the Defendant's sheep trespassing on Plaintiff's ripened grain. The Defendant dismissed all his counts except Count One, the mixing up of the Stringham and Siddoway sheep; Count Two, concerning Plaintiff's pigs eating Defendant's sheep; and Count Eight, an agreement between Plaintiff and Defendant to repair a partition fence.

Plaintiff did not order the testimony transcribed on his Count One or Defendant's Count Two because he raises no issue on them.

Concerning Defendant's counterclaim Count One, Rowland McNeil, witness for the Defendant, testified that on or about May 20th, he was caring for 350 to

400 sheep on the Cook property, (Defendant's property described in his Count One), which was to the north of the Mentzer property (Plaintiff's property), (S. Tr. p. 4); that Briant Stringham's ewes and young lambs were brought in by a circuitous way not along the traveled road, and placed in the meadows (Plaintiff's property). That night and the next morning they were mixed in with the Siddoway ewes and lambs. That afternoon "they had permission to put them back into Mr. Calder's field."

Mr. B. H. Stringham, witness for the Defendant, testified that he leased the north property from Plaintiff in the Mail Draw for \$1,000.00; that he became dissatisfied with the lease and sold it to Joseph Price for \$750.00. That "Dutch" Stewart moved the "droppers" (sheep which had not lambed) farther on Diamond Mountain and left some ewes and lambs on the property he had leased from Mr. Calder. (This property just north of the Siddoway or Cook property, and two or three miles north of the Mentzer property)

Mr. Stringham further testified as follows: (Tr. p. 11)

Q. (by Mr. Colton) "Do you know what happened to them while they were in that pasture?"

A. "I know they were moved or went into the other field and mixed with Ralph Siddoway's."

Q. "Do you know how they mixed or how they got in there?"

A. "I was told by Mr. Calder he put them in there by mistake."

Mr. Kenneth Stringham testified that he had heard

the testimony about the mixup of the sheep that he and his father were operating in 1951; that when he arrived they were in Siddoways and that they were moved into Calder's field with his permission. (Tr. p. 11).

On cross-examination Mr. Kenneth Stringham testified that he had permission prior to the mixup to move their sheep (ewes and lambs) onto the Mentzer property. (Tr. p. 13).

Mr. Siddoway, as pertinent, testified that he believed the mixup occurred around eight o'clock in the morning on the 19th or 20th of May, 1951; that he had heard Mr. McNeil testify and his testimony would be the same with reference to going down to his camp and back up. Then went up Pot Creek three or four miles to Mr. Calder's upper place.

Mr. Siddoway testified as follows: (Tr. p. 15)

Q. (by Mr. Colton) "Will you state to the Court and jury, in words and substance what you and Mr. Calder said that day, the conversation?"

A. Mr. Calder was over in the field and I went over and said to him, 'Zelph, you made a hell of a mess down there for me', and he said, 'Why, what have I done?', and I said, 'Those sheep you drove from your place into my place were Stringham's sheep, they weren't my sheep at all.' And he said, 'Oh, I thought those sheep were your sheep', and I said, 'Why didn't you look at them; I don't know how we are going to get them separated; neither bunch is docked and they are mixed through and through. I don't know what we can do about it.' And he said, 'I am sure

sorry; I thought they were your sheep and I was doing you a favor', and he said, 'I haven't even got feed enough to keep that big bunch, there is 750 head in that bunch, let alone the 300 head of Mr. Stringham's', and he said 'Since I mixed them up you can put them over in the Manser place until you can do something with them.' I said, 'The lambs, we can't put them in the corral yet', and I said, 'We will have to put them some place until they are big enough to move them', and he said, 'You will just have to leave them until you can.' "

Mr. Siddoway said that he went up Pot Creek and told Kenneth Stringham, "We had a mixup and we all came down to the place. Bawley McNeil and Kenneth Stringham and 'Dutch' Stewart and me. We tried to work our own ewes and lambs out from the main bunch. We had such a mess we just decided we couldn't do it, so then we just opened the gate and drove them over into Mr. Calder's place" (Tr. p. 16).

Mr. Siddoway's testimony further reads at Tr. p. 16:

"Q. (by Mr. Colton) How long did you leave them there?

"A. (by Mr. Siddoway) I don't remember for sure; it was a week or ten days.

"Q. And during that time did Mr. Calder make any objection?

"A. Not to me.

"Q. Did he keep his agreement of letting you leave them all there until you had separated them?

"A. Yes."

On cross examination Mr. Siddoway testified of Mr. Calder's property "Down through the middle of it was a nice grass meadow. Out on the sides there was some grain planted. (Tr. p. 20). That the feed on the Manser property was much better than his sagebrush and natural grasses." (Tr. p. 21).

Mr. Calder testified that he did not drive the Stringham sheep or any sheep from his (Mentzer) property into the Siddoway sheep; that he had no conversation with Mr. Briant Stringham as to mixing Mr. Stringham's sheep with Mr. Siddoway's sheep; that he told Mr. Siddoway after Mr. Siddoway reported the sheep were mixed that he could stay on the grain a little while until the lambs got a little older. "They stayed there much longer than I expected they would." (Tr. p. 32).

With respect to Mr. Siddoway's testimony on his Count Eight, the record reads:

"Q. (by Mr. Stewart) Coming down to the same fence line that you testified to, wasn't there a fence already existing there?

"A. Yes.

"Q. How many strands of barbed wire were there on it?

"A. Some places there were three, some four and some five and some six.

"Q. And wasn't it the agreement between you and Mr. Calder that Mr. Calder would take this barbed wire that you furnished and repair this fence which existed?

"A. That is right.

"Q. Was there any agreement between you and

Mr. Calder that there would be combination wire used to repair that?

“A. No.

“Q. Would it be, if you used a six-wire barbed wire fence, would it be cattle-tight?

“A. If it is in good condition it is cattle tight.”
(Tr. p. 29)

Mr. Calder, on direct examination with respect to the fence, testified (Tr. p. 35):

“Q. (by Mr. Stewart) What was the agreement?

“A. The agreement was that he'd furnished the wire and I would do the work.” (Tr. p. 35).

On September 9, 1957 (R. p. 80) Plaintiff made a motion to amend judgment by vacating the judgment on Plaintiffs' First Count because the jury should have been instructed to find for Plaintiff on the grounds that Defendant had received full consideration even though the jury believed he was blameworthy, and further alleged facts of being taken by surprise, said facts were verified.

Comes now Plaintiff and makes motion to the above entitled court for a new trial on the grounds of newly discovered evidence, represented by the following Affidavit which was secured after the record on appeal had been transmitted to the above entitled Court. Plaintiff respectfully requests to supplement the record with the following:

“AFFIDAVIT

“STATE OF UTAH }
COUNTY OF UINTAH } ss.

“I, MATTHEWS (DUTCH) STEWART, after being first duly sworn, depose and say that in the spring of 1952, I herded sheep for Briant and Kenneth Stringham;

“That on or about the 10th of May, I took Stringham’s sheep onto the Zelfh Calder property, in what is known as the Rye Grass country;

“That Mr. Eskridge of Craig, Colorado, was on said property farming a portion of it when we moved in;

“That I was with said sheep about a week when Bill Stringham, a brother of Briant Stringham, took the main herd up on Simon’s Creek, about ten miles to the west, and left me there to gather what ewes had lambed, which was not over 200 head;

“That I gathered the ewes and lambs and brought them out to the Zelfh Calder field where there is a corral, a windmill, and a woven wire fence, known as the Mentzer property; that Verlie Stringham, wife of Kenneth Stringham, helped me trail about 82 ewes with their lambs, and put them through the fence. The gate was up and we put it up again. This was done about 7:00 o’clock in the morning;

“That I then went back to the Zelfh Calder north field in Rye Grass to gather some more ewes and lambs. About 2:00 o’clock someone came (I don’t remember who) and told me that the Siddoway sheep were mixed in with

the Stringham sheep in the Zelfh Calder field where I had placed them early that morning. I then rode over to the Mentzer field to see what I could do. I found the Siddoway sheep in with the Stringham sheep. Ralph Siddoway and his herder, Bally McNeil, came in about ten minutes, and we decided to corral the Stringham ewes. We put the Stringham ewes in the corral and all the lambs and the Siddoway ewes were left out of the corral. We left a hole big enough for the lambs to crawl through to their mothers. The next morning we went over and put the Siddoway sheep outside the fence, and I know that there were not over five lambs that had not got to their mothers that night. It was easy to tell the Siddoway lambs from the Stringham lambs, as the Siddoway lambs were all white faces and the Stringham lambs were all black faces.

“I finished gathering the rest of the ewes and lambs in the Rye Grass place, and brought them to the Mentzer field. I am sure there were not more than 200 of the Stringham sheep there and about the same amount of the Siddoway sheep.

“I then went up to Stringham’s main camp and finished lambing. I do not know what happened after I went up there.

/s/ Matthews Stewart

“Dated this 27th day of April, 1958.

“Subscribed and sworn to before me this 27th day of April, 1958.

/s/ Tessie P. Calder,
Notary Public”

"AFFIDAVIT

"STATE OF UTAH
"COUNTY OF UINTAH } ss.

"ZELPH S. CALDER, after first being duly sworn, deposes and says that upon finding that "Dutch" Stewart worked for B. H. Stringham at the time of the alleged mixup of the Stringham and Siddoway sheep (Tr. p. 6 and p. 16) that he diligently sought to locate "Dutch" Stewart both at Moab, Utah, and at Salt Lake City, Utah, and that affiant finally found him herding sheep in Colorado, where affiant went and secured the above affidavit.

/s/ Zelfh S. Calder

"Dated this 28th day of June, 1958.

"Subscribed and sworn to before me this 28th day of June, 1958.

/s/ Tessie P. Calder,
Notary Public"

APPELLANT'S CLAIMED POINTS OF ERROR

1. The trial court erred in refusing to grant Plaintiff's Motion to Dismiss Defendant's counterclaims One and Eight, because they are different actions that do not arise out of the same circumstances, occurrences or transactions.

2. The trial court committed error in denying Plaintiff's Motion for a Summary Judgment on Defendant's counterclaim Count One because the evidence submitted by Plaintiff's affidavit was conclusive that Defendant's counterclaim Count One was false and sham. There was no evidence to the contrary.

3. The court erred in striking from Plaintiff's reply and counterclaim the false allegations of Defendant's counterclaim Count One.

4. The court erred in giving instruction No. 7 because the parties did not agree to build a new partition fence.

5. The court erred in overruling Plaintiff's Motion to Amend Judgment because, even though the jury believed Defendant's false testimony that Plaintiff told the Defendant that he drove the Stringham sheep into the Siddoway sheep, the evidence shows that Defendant fully paid for such false blameworthy act, and the jury should have been so instructed.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS ONE AND EIGHT, BECAUSE THEY ARE DIFFERENT ACTIONS THAT DO NOT ARISE OUT OF THE SAME CIRCUMSTANCES, OCCURRENCES OR TRANSACTIONS.

The issue is pointed in Plaintiff's error No. 1 whether or not the new rules of procedure Rule 13 permits a counterclaim to set up a new cause of action entirely different from the Plaintiff's cause of action of trespass, to wit: Count One, injury to Defendant's sheep, and Count Eight, breach of contract, when there is no circumstance, occurrence or transaction arising out of the Plaintiff's claim.

We think that the new rules do not permit Defendant's counterclaim Counts One and Eight.

It will be noted that Defendant's counterclaim Count

One occurred about 2½ years (May 20, 1951) before Plaintiff's trespass action was filed (October 28, 1953) and about six months before the admitted trespass of Defendant's sheep (October 6, 1951). How could it arise out of the same circumstance or occurrence or transaction? If the Court intended that it was permissible by way of counterclaim to set up new causes of action entirely different and apart from the original claim, it would have so said. It would have been simple for the Court to have said when one brings an action against another person that other person has a right to bring any action he wants to, regardless of the nature, circumstance, occurrence or transaction against him, and call it a counterclaim, even though it be not a counterclaim.

To give such a strained interpretation of said Rule would be repugnant to the laws of Utah at the time the Rule of Procedure was enacted in 1951, in that you cannot even counterclaim a tort against a tort. It would be repugnant to the common law, repugnant to the English language of a counterclaim, something that counters the original claim, and repugnant to sound public policy in that such a counterclaim would encourage litigation and through a natural spirit of animosity caused by the filing of a cause of action encourage false and sham claims as in the instant cause.

For authority on Point No. 1 see *Bridge Corp. v. Elias*, 7 Fed. Rules Service 13 b 1, Case 1 at page 230, U.S. Dist. Ct., S.D. N.Y., Apr. 14, 1943.

II. THE TRIAL COURT COMMITTED ERROR IN DENYING PLAINTIFF'S MOTION FOR A SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM COUNT ONE BECAUSE THE EVIDENCE SUBMITTED BY PLAINTIFF'S AFFIDAVIT WAS CONCLUSIVE THAT DEFENDANT'S COUNTERCLAIM COUNT ONE WAS FALSE AND SHAM. THERE WAS NO EVIDENCE TO THE CONTRARY.

Plaintiff's Second Point that the trial court committed error affecting his substantial rights by denying his motion for summary judgment.

Defendant did not even file an affidavit controverting Plaintiff's affidavit (R. p. 23) to the effect that Plaintiff permitted Kenneth Stringham to stay with his ewes and lambs for a day or so on his grain field. Defendant's sheep were on his sagebrush land through the fence to the north and that they mixed with Stringham's sheep on affiant's grain field. (R. p. 24).

Defendant's counterclaim was filed to defeat the purpose of Rule 11 and Plaintiff had a right to have the issue tried as to whether or not his counterclaim was a false and sham allegation and Defendant's refusal to meet the issue is grounds for a summary judgment in conformity with Rule 56. For authority see 6 Moore's Fed. Practice, Rule 56, at p. 2068.

There are some holdings, but mostly Judicial statements to the effect that an averment of fact in a pleading cannot be overcome by an affidavit and hence in such a case a motion for summary judgment must be denied. This doctrine overlooks the fact that one of the prime purposes of summary judgments procedure is to pierce the pleadings; and the doctrine, if applied would largely

nullify the summary judgment procedure. The true rule is opposed to the foregoing doctrine, at page 2071. Moore says:

“But if the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at the trial, then he is entitled to a summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials by affidavit or otherwise that shows there is a triable issue of fact.”

III. THE COURT ERRED IN STRIKING FROM PLAINTIFF'S REPLY AND COUNTERCLAIM THE FALSE ALLEGATIONS OF DEFENDANT'S COUNTERCLAIM COUNT ONE.

With respect to Plaintiff's point of error No. 3, Plaintiff in his responding reply to Defendant's counterclaim Count One in substance alleges that Defendant's said counterclaim is false. The Court granted Defendant's Motion to Strike (R. 60) the false allegations (J.R. p. 52) without giving him the right to respond to Defendant's counterclaim. This is tantamount to depriving Plaintiff of his right to answer Defendant's complaint of Plaintiff wilfully and knowingly driving the Stringham sheep into the Siddoway sheep, other than by answering by way of a general denial.

The Rules of Procedure limits the response to a counterclaim more than the response by way of answer to the original claim, thus showing an additional ground in support of Plaintiff's point One that a counterclaim must at least arise out of the same subject matter.

Plaintiff believes the conclusion is forced that the

trial court committed error in striking Plaintiff's responding pleading, and further error was committed by the trial court to otherwise amend or plead to Defendant's counterclaim Count One.

IV. THE COURT ERRED IN GIVING INSTRUCTION NO. 7 BECAUSE THE PARTIES DID NOT AGREE TO BUILD A NEW PARTITION FENCE.

With respect to Plaintiff's fourth claim of error, that the court erred in its instruction to the jury No. 7, which reads as follows: (J.R. p. 66)

"You are instructed that when parties agree to build a partition fence between their lands, if there is no agreement as to how the costs shall be apportioned between them, then the total cost shall be divided between them in proportion to the linear length of the lands they own respectively, served by the fence."

This instruction is misleading and prejudicial to the substantial rights of the Plaintiff in that the plain and undisputed agreement was that Plaintiff was to repair a partition barbed wire fence and Defendant was to furnish four spools of barbed wire. The furnishing of the combination wire was no part of the agreement, (Tr. p. 28) neither was it a contract to construct a partition fence. The jury followed the court's instructions, to the effect that they included the combination fence and gave the Defendant half the costs of what he had put in on the fence, even though it was not within the agreement of the parties.

V. THE COURT ERRED IN OVERRULING PLAINTIFF'S MOTION TO AMEND JUDGMENT BECAUSE, EVEN THOUGH THE JURY BELIEVED DEFENDANT'S FALSE TESTIMONY THAT PLAINTIFF TOLD THE DEFENDANT THAT HE DROVE THE STRINGHAM SHEEP INTO THE SIDDOWAY SHEEP, THE EVIDENCE SHOWS THAT DEFENDANT FULLY PAID FOR SUCH FALSE BLAME-WORTHY ACT, AND THE JURY SHOULD HAVE BEEN SO INSTRUCTED.

Coming to Plaintiff's fifth point that the court erred in denying Plaintiff's Motion to Amend Judgment. The motion (J.R. p. 79) was made to set aside the verdict of the jury on Defendant's first count because, even though the jury believed the false testimony of the Defendant that Plaintiff drove the Stringham sheep into the Siddoway sheep, the purported blameworthy act was fully paid for by Plaintiff offering to permit Defendant to pasture his grain field and Defendant accepting the offer and placing his sheep thereon for about two weeks.

It was the duty of the court to instruct the jury on the law of contracts and direct them that Plaintiff giving up his grain field to Defendant was full consideration of whatever damage was suffered by the Defendant.

That the court erred in placing the Defendant's costs upon the Plaintiff, because Plaintiff was the prevailing party in his claim and Defendant was the prevailing party in his claim. The court should have made an order that each party should stand his own costs.

VI. As a sixth point, Plaintiff desires with permission of this court, to present a motion for a new trial on Defendant's Count One on the grounds of newly dis-

covered evidence. This motion was not presented to the trial court because the new evidence was not discovered until after the record went up to the above court.

Plaintiff desires this motion to be considered if this court affirms the court below on Plaintiff's Count One.

Plaintiff believed Defendant when he came to him on May 20, 1951, and said in substance that something awful had happened that Stringham's and his young ewes and lambs had been mixed by the Eskridge boys and that they would 'bum' their lambs (make orphans out of them) if they attempted to separate them, whereby in a spirit of good neighborliness Plaintiff consented that both the Stringham and Siddoway sheep could remain on Plaintiff's grain field until the lambs got a little older. Plaintiff knew that the Stringham sheep were in his Manser field because he told Stringham he could put them there.

Having faith in the integrity of a neighbor brought about this promise. It wasn't long until Plaintiff found to his satisfaction that Defendant's story was not as represented and Plaintiff believes it was planned and executed for the purpose of getting Plaintiff's grain field to graze their sheep, as they were both out of feed, hence, it is not unreasonable for the jury to believe Defendant's story that I told him (Defendant) that I drove the Stringham sheep into the Siddoway sheep. This is a bold falsehood and should not escape the arm of justice. Plaintiff is certain that a new trial would reveal the true facts.

In conclusion because of the small judgment, this case should not justify the time and expense of its con-

sideration before this Court. It perhaps would not have been here were it not for the fact that the jury arrived at its verdict on Defendant's Count One upon false testimony. This Defendant feels should be corrected.

Respectfully submitted,

Zelph S. Calder
251 South 3rd West
Vernal, Utah