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Bingham and Garfield Railway v. North Utah Mining Company : Brief of Respondent

Utah Supreme Court

BRIEF

In the Supreme Court of the State of Utah.

FEBRUARY TERM, 1916.

BINGHAM & GARFIELD RAILWAY COMPANY, a Corporation, *Plaintiff and Appellant.* *vs.* NORTH UTAH MINING COMPANY a Corporation; THE RIGHT HONORABLE WILLIAM HOOD LORD WALTERAN; THE HONORABLE CYRIL A. LIDDLE, and WILLIAM ROBBINS. *Defendants and Respondents.*	No. 2877.

Appeal from Third Judicial District Court, Salt Lake County, Utah, Hon. F. C. Loofbourrow, Judge.

BRIEF OF DEFENDANT ROBBINS.

In the month of June, 1910, the deefndant, Robbins, obtained a lease on all of the North Utah Mining Company's property, commanded by the No. 2 Red Wing Tun-

nel. (Abs. p. 25.) This lease ran for two years and covered all of the ground which was embraced within the No. 1 and No. 2 tunnels, also that covered by the Robbins' tunnel, and all of the ground embraced in what was described in the evidence as the Robbins stope. (Abs. 26.)

Immediately after receiving the lease, Mr. Robbins hired an employee and also worked himself when occasion required, and cleaned out Tunnel No. 1, occupying about 35 or 40 days in this work. (Abs. 27.)

Afterwards the Robbins tunnel was started, as that was considered by the deefndant, Robbins, a more practical way of removing the ore. The Robbins' tunnel was run to strike the ore on the fissure and the bedded vein. The work on this tunnel had occupied possibly a month when the defendant was notified to quit work. An order of possession was given the plaintiff, and the defendant ceased work. This tunnel had been driven, including the open cut, about 40 or 45 feet. (Abs. p. 28.)

The plaintiff took possession on the ground and drove a large tunnel through the mountain and immediately above the Robbins' stope, and the workings connected therewith. A large abutment was constructed, and the Robbins tunnel completely filled in. Large piers were constructed down the swale, immediately below the leased premises, and also on the leased premises, and a large force of men worked for the plaintiff until May, 1911. The plaintiff occupied and used in this work all

of Tract A, and the ground embraced within plaintiff's lease, and also used and occupied the ground off the right of way for a dump for the material removed in driving the tunnel.

After the order of possession, the defendant Robbins, did no further work; he testified that after the company commenced work, he could do nothing because plaintiff had a large number of men there grading out for the big abutment which they built against his tunnel, and filled it in with concrete so he could not use it afterwards. The plaintiff's men were working from the mouth of the tunnel down to the road in the bottom of the canyon, and his tunnel was right at the point where the abutment was placed, and their work shut off the work of the Robbins' stope entirely. That before the plaintiff took possession, he had room to dump in the swale, and dumping could have been done without any expense. (Abs. pp. 20 and 30.)

That after the railroad was built, he could not dump on the right of way. That he had asked Mr. Goodrich if he could dump there, and the request had been refused. (Abs. pp. 30 and 405.) There was no dump room outside of the right of way. The hillside was much steeper on either side of the right of way than it was on the right of way, and the houses below made it practically impossible for him to dump there, and after the railroad was built, he could not take the ore from the Robbins' stope without putting in timbers to hold the track up; that it would not

be safe to mine there unless this was done, and the expense would not justify him in thus timbering the stope, and consequently he had to abandon the lease. (Abs. pp. 30 and 31.)

Counsel for plaintiff do not contend that the offer to amend or the offer to release certain of the condemned premises, and accept less than that asked for in the amended complaint, could affect the defendant Robbins. At the time of the first trial, and of course at the time of the second trial, Robbins' lease had long expired, and he had no rights whatever in the premises. Mr. Ellis on behalf of the plaintiff stated in open court that the amendments or offers would not affect the plaintiff, Robbins. (Abs. p. 330.)

The only errors assigned and discussed, so far as affecting the defendant, Robbins, is the giving of instruction No. 18, to the effect that after the order of possession, the deefndant, Robbins, had no right to dump rock or earth on the right of way unless the jury found by a preponderance of the evidence that the plaintiff, subsequent to the court's order, gave the said Robbins permission to dump rock and earth upon said area, nor did the defendant have any right to build any track across said right of way for the purpose of hauling the ore or waste, or for any other purpose, nor did he have any right after the order of possession, to work underground in the leased premises, if such work would have in any wise impaired the subjacent support of the right of way. (See plain-

tiff's brief, p. 26.) That the defendant, Robbins, was not acting in good faith in taking the lease and in driving the Robbins' stope. That the defendant, Robbins, suffered no damages.

We will discuss these assignments in the same relative order as discussed by plaintiff in its brief.

I.

As to the right of the defendant, Robbins, to dump ore or waste upon the right of way without the consent of the plaintiff, and to build a track across the same for his own convenience.

Plaintiff in its complaint asked for the tracts sought to be condemned in their entirety without any reservations or limitations whatsoever. It did not seek to qualify its demands in the original petition, or amendments thereto, nor was any such limitation or qualification ever heard of until the close of plaintiff's case in the second trial, which was practically three years after the lease to Robbins *had expired.* Counsel for plaintiff at the trial, strenuously sought to show that Robbins was granted permission by agents of the defendant company to dump on the right of way; this question was fairly submitted to the jury whether such permission had been given or not.

It must be further noted that the plaintiff occupied the entire tract from December, when it commenced work, until the following May; that is, men were working from the tunnel bore to the bottom of the canyon, were

blasting, dumping, excavating for abutments and piers, and driving immense tunnels in close proximity where the ore bodies of defendant Robbins were situated and doing all work necessary for the erection of its road and bridges. During that entire time it was absolutely impossible for Robbins to do any work in connection with his lease. His tunnel was filled in, the abutment was built at the place where it was necessary for him to work, the railroad tunnel was a few feet overhead, and the only available dump room was occupied by the company. After the construction of the track, tunnels and bridges, the plaintiff still controlled the tracts it sought to condemn and had the right of absolute control over them.

That the company has exclusive possession will be seen by the following authorities:

> "There is no question but that the company is entitled to the exclusive possession of the right of way, if such possession is necessary to the proper operation of the road. Some courts hold that the company is entitled to such exclusive possession from the nature of the case and as matter of law."
>
> 2 Lewis Em. Dom. Sec. 847.
>
> "The use by a railway company of land condemned, for its road, is practically an exclusive one, and permanent in its nature, unless the statute, or the court in its order, limits the ease-

ment to be acquired by reserving certain rights and privileges to the land owner, or unless such limitation is conceded by the company."

15 Cyc. page 1023, and cases cited.

In the case of Guthrie, etc., Co. vs. Faulkner, Okla. 73 Pac. 290, the court says:

> "Whether such an appropriation is called a fee simple title or merely an easement, it is apparent that such an appropriation is a permament taking and holding of the real estate, to the exclusion of the owner, for all practical purposes, and, while it is taken for an express purpose, the effect as to the landowner is to deprive him of the use of his land."

In St. Onge vs. Day-Col. 18 Pac. 279, it is held that:

> "The owner of land through which a railway company has the right of way, actually in use for railway purposes, cannot himself use such right of way, or recover for trespasses committed thereon by others; the railway company being entitled to the exclusive use thereof."

In Wilmot vs. Railroad Company, Miss. 24 S. 701, the court says:

> "The duties imposed by law upon a railroad company of safely carrying persons and property, and of protecting employees and other persons lawfully upon the right of way from damages arising from any obstruction or hindrance

> of the servants of the company in the performance of their duties, and the responsibility laid upon the company for the performance of such duties, require the right and power in the officers of the company of excluding at their pleasure all persons from the right of way. The occupancy of the right of way by the railroad company is practically exclusive, and the owner of the servient estate, could cultivate it only by the consent of the railroad company."

See also:

> Railroad Company vs. Comstock, 22 Atl. 511;
> Hazen vs. Railway Company, 2 Gray 580;
> Brainerd vs. Clapp, 10 Cush. 12;
> Railway Company vs. Potter, 42 Vt. 275;
> Rand Em. Dom. Sec. 215.

In Paxton vs. Railroad Company, Miss. 24 S., 536, it is held the owner of land through which a railroad passes has no right to cultivate the latter without its consent.

See also:

> Railway Company vs. Cocks, et al., 22 N. Y. Sup. 1017;
> R. R. Co. vs. Olive, et al. N. C. 55, S. E. 263.

In Boston etc. Railroad Company vs. Hunt, Mass. 96 N. E. 140, the court holds:

> "The right of way, even if defined as a public easement obtained by condemnation of the land, is substantially absolute so long as used for

the purposes of a railroad by the corporation, or those succeeding by legislative sanction to its rights. It is because of these characteristics of complete possession and control that damages for the taking are assessed upon the theory that the occupation will be permanent and practically exclusive."

See:

Presbrey vs. Railway Co. 103 Mass. 1.

Barnes vs. Railroad Co. 130 Mass. 388.

Steel Company vs. Railway, 187 Mass. 500; 73 N. E. 646.

In Hopkins et al. vs. Railway Company, Minn., 78 N. W. 969, the court held (page 970):

"The railroad company is entitled to the exclusive possession of the land, unless otherwise expressly provided in the order of the court, so long as it sees fit to use it for the purpose for which it was acquired; that it is for the railroad company and it alone to determine, when it deems it necessary or proper to use the land for such purposes, and when it takes possession, the burden is not on it to show that the manner of the use is necessary. * * * There are manifest reasons, founded on public policy and necessity, why the possession of land acquired for railroad purposes should ordinarily be exclusively in the company, and not concurrently in it and the former owner. If the contention of the plaintiffs should prevail, it would produce interminable

> vexatious litigation. The result would be that, every time a railway company attempted to take possession of property which it had acquired for a railroad purpose, it would be liable to be involved in a contest with the former landowner over the question whether such possession was presently needed for the pupose for which the property was acquired, or whether the continued possession and use of the land, or some part of it, by the landowner, was compatible with its use by the company for the purpose for which it was condemned."

In Railroad Company vs. Comstock, Conn., 22 Atl. 511, the court says:

> "A land owner, through whose premises a railroad right of way has been condemned, cannot require that a crossing be kept open over the track in order that he may have more convenient access to portions of his land lying beyond it, though such crossing may not interfere with the use of the right of way for railroad purposes."

Counsel virtually rest their entire case, so far as the question under discussion is concerned, on the authority of Kansas City Railway Company vs. Allen, 22 Kan. 285.

In that case the company contended that the owner of the premises would have a right of way to pass under the railroad track with his teams and stock. It presents a much different question from the one at bar. Certainly opposing counsel would not contend that the dumping of

ore and waste on the right of way, against steel stringers and braces and concrete pillars, is analogous to the driving of stock underneath the bridge, or that the building of a track for dump purposes is similar to walking across a right of way.

Counsel in their brief say:

> "But where, as here, the line of railway track is constructed across a bridge some 200 feet in height above the surface of the ground and cars are run across this track, there would seem to be no reason for the rule giving exclusive possession to the surface of the soil far below the railway track across which cars are operated. And this, too, where the railroad operators themselves, in the condemnation proceeding, are willing that the owner of the fee shall use the surface beneath the location of the track and state, under oath, that such use will not and cannot interfere with or injure in any way the support, maintenance or operation of the line of railway across the right of way.
>
> The plaintiff in this action does not contend that the defendants or any of them would have the right to make any use whatever of that portion of the right of way consisting of the tunnel bore, subject to the right of the railway to operate its trains, because it is self-evident that the use by the owner of such tunnel would be a constant menace not only to a proper operation of the railway company, but to the lives of the employees of the owner, as well as the lives of passengers which the railway com-

pany might carry in its cars through the tunnel."

Counsel concede that defendants could not use any portion of the right of way, consisting of the tunnel bore, and yet claim that they could use the right of way upon which the bridge is built. Is one more important than the other? Isn't the safety of the bridge equally as important as the tunnel bore? Let us assume the defendant has dumped earth and waste around the steel work of the bridge, and had endangered the safety of the bridge. Could not the railroad company compel him to desist? (and we may remark in passing that the pictures of the bridge show that plaintiff itself has built woodwork around the steel for the very purpose of preventing the dirt from the natural surface getting thereon.)

Let us assume that the defendant, Robbins, had constructed a track across the right of way for the purpose of dumping his waste or ore on the ground adjoining the right of way. Where would he have built this track? Suppose that the very next day after he had built it, the railroad company desired to use the ground for any purpose, would it have said that Robbins had a right to maintain the track there regardless of the use or necessity of the railroad? The construction of a track for dumping purposes by Robbins would be no slight or trivial matter; and suppose that it was necessary in the construction of this dump track to weaken any of the supports of the bridge, would counsel contend that the defendant Robbins had this right? Or assume further, that after having

built the track across the right of way, and had gone to the expense of erecting cribs for the purpose of protecting his dump, and had gone to great expense and labor to timber the stope to make it safe, and had made the dump and track permanent, and his dump permanent, that immediately the railroad company had said, you will have to remove your track; would counsel contend that it did not have this right? If the railroad company had desired to limit the tract sought to be condemned or limit the use of the property sought to be condemned, it should have in the first instance made the limitation or reservation in its original petition or by some appropriate means given the limitation or reservation before the lease to Robbins expired.

A careful reading of the Kansas case, upon which counsel rely, will see that it is not in conflict with the law as announced by the courts of practically all the states, and even Kansas follows the same rule as herein contended for, as will be seen by an examination of the Kansas cases, thus: in Dillon vs. Kansas City, etc., Co., Kan. 74, Pac. 251, error was alleged because the court had held that plaintiff was not entitled to the concurrent occupancy of a portion of the land flooded with water for the purpose of fishing and hunting, nor to the use of water stored thereon, or ice formed on Lake Chanute. And upon this question of concurrent occupancy, the Supreme Court of Kansas says: Page 253.

"Upon all these questions we think the ruling of the court correct. As the land in question was condemned and the easement paid for by the defendant company, it is entitled to the exclusive control of every part thereof actually used by it for the purpose of catching and storing water, and also all other portions not flooded with water, but the occupancy of which is necessary for the protection of the pond and the conservation of the water. Railroad companies are public carriers, and are properly held to the highest accountability in the performance of their duties. It is highly important to the general traveling public, as well as to business interests, that such corporations have exclusive possession and uninterrupted control of all property, the use of which is necessary in the discharge of this service. If the principle of concurrent occupation of property used by such corporations in carrying on their regular traffic should obtain, the expeditious and safe performance of their duties would be difficult, if not impossible. Kans. Cent. Ry. Co. vs. Allen, 22 Kan. 286, 31 Am. Rep. 190; Mo. Pac. Ry. Co. vs. Manson, 31 Kan. 337, 2 Pac. 800; K. C. R. Co. vs. Com'rs. Jackson Co., 45 Kan. 716, 26 Pac. 394. There can be no concurrent occupancy of railroad property in actual use by it in the operation of its business without its consent."

In S. Pac. Co. vs. San Francisco Sav. Union, et al., Cal., 70 Pac. 961-962, the court held:

"Whatever minerals lie beneath the surface

> of the right of way are reserved to the owner, and wherever such minerals are in situ underlying this right of way, while he may not enter upon it to take them (because the nature of the easement requires exclusive possession of the surface by the company), he can drift from tunnels sunk upon his adjoining land and do so, leaving, however, sufficient support of the easement imposed. Subject to this support, the right of the owner of the land to take out all minerals beneath the right of way is absolute. Under the condemnation, the railroad company acquired the permanent and exclusive control of the surface of the land, but it acquires nothing more."

This case seems to be decisive of the very question in issue, the court expressly holding that the land owner could not enter upon the right of way because exclusive possession was in the company, but he would have to remove the minerals by drifts or tunnels from adjoining land.

In Chicago, etc. Railway Company vs. McGrew, Mo. 15, S. W. 931, the court gave the following instruction, page 934:

> "That, except at public or private crossings, a railroad company is entitled to the exclusive possession of its right of way, and no person has the right to come upon such railroad track, nor use the surface of such right of way, for any purpose, nor can any railroad company grant or consent to any such use; this rule being not alone for the

benefit of the railroad, but also of the public. If the jury believe from the evidence that none of the devices or means introduced in evidence could be erected or made, or, if erected or made, could be successfully operated or used, without the agents or employees of the defendant *getting on the right of way of plaintiff*, then the jury are instructed defendant would not be permitted to erect or maintain the same; or if, on the other hand, the jury should believe from the evidence that the erection, making, or maintenance of any such device under or over the track, would in any degree endanger the operation of such railroad, or the safety of the traveling public, no matter how slight the danger or how improbable the occurrence may be, the defendant would have no right to erect, make, or maintain the same, or the railroad company any authority to consent to any such erection."

And of this instruction the court says:

"Though the interest acquired by a railroad company to its right of way through condemnation proceedings, is regarded as a mere easement, yet the law contemplates the right to an absolute and exclusive possession and control thereof, as against the private rights of the owner of the fee, the proprietors of adjacent land, and all others. In view of the nature of the business of the railroad company, and its obligations to the public, such exclusive possession is necessary and proper, in or-

der that it may perform fully the purpose for which it is authorized and used. Judge Redfield, in Jackson vs. Railroad Co., 25 Vt. 159, says:

"The railroad company must have the right at all times to the exclusive occupancy of the land taken and to exclude all concurrent occupancy by the former owner in any mode and for any purpose."

So in this State, one in no manner connected with the railroad company, who goes upon its track at a place other than a public or private crossing, is a trespasser. No sufficient reason can be seen why, by agreement between the parties interested, certain rights not inconsistent with the public interest, might not have been reserved by the land owner, so as to secure to himself a limited right of way under such circumstances as existed in this case. *Yet such a reservation must have been by consent of both parties; neither could have been required to grant or accept them.* Defendant was entitled to compensation in money, and could not, without his consent, have been required to accept in lieu thereof licenses or privileges, however beneficial to him they may seem to be. After a failure to agree on the compensation or other arrangements mutually satisfactory, the parties go into court, not as contracting parties, but as antagonists, and each has the right, if he sees fit to do so, to stand on his legal rights, and insist on his legal remedies, and yield nothing of either."

In Railroad Company vs. Stock Yard Co., Mo. 25 S. W. 399, the condemning company sought to show a mitigation of damages by the fact that a driveway or chute for stock had been made underneath its track, thus permitting the defendant to drive stock from one yard to the other underneath the railroad track; the lower court instructed the jury that this could be shown in the mitigation of damages, but the Supreme Court of Missouri held:

> "Where a railroad company condemning its right of way through stockyards does not offer, either in its petition or on trial, to reserve to the owner a crossing or private way, not required by statute, the fact that it permits the use of such a way under its track cannot mitigate the damages, since it is entitled to the use of its whole right of way for railroad purposes, and revoke such permission at any time."

See also Railway Co. vs. Clark, 25 S. W. 192, in which last case the authorities on this question are reviewed at great length. The cases last quoted from above are directly in point with the case at bar. As a legal proposition could anything be more manifest, that if Robbins had constructed a track at any point underneath the bridge, or had attempted to dump waste or ore upon the right of way, that he could have been stopped at once.

In Fayetteville, etc., Co. vs. Combs, Ark., 11 S. W. 419, the court says:

> "The company has the right to the exclusive occupancy of the land condemned when it is necessary to the proper operation of the road, and the presumption is that it needs and intends to use all it takes, leaving nothing of appreciable value to the owner. Clayton vs. Ry. Co., Iowa, 25 N. W. 150. Hollingsworth vs. Iowa, 19 N. W. 325. The company's remedy in such case is to condemn less."

And in Railroad Co. vs. Raymond, Minn., 33 N. W. 704, it is held that:

> "It is for the railroad company, seeking the appropriation of land to its use, to indicate in its petition, the nature and extent of the easement proposed to be taken."

And the court held that the land owner has not reserved a right of private crossing unless it is so defined.

From the foregoing authorities it must be clear that if the plaintiff company had desired that Robbins construct tracks underneath its bridge and across its right of way and should dump ore or waste upon the condemned premises, that it should have taken the property with those limitations and reservations to Robbins in view. While we concede its generosity at this time, still it comes at such a late day, more than three years after the lease has expired, that we are unable to accept it. Necessity is often a virtue, and no doubt the necessities of the case caused this sudden and generous outburst of virtue on the part of the plaintiff.

That removing of this ore was rendered impossible by the work of the plaintiff, an examination of the following testimony will show:

Dr. Talmage testified that inasmuch as the working of the stope was rendered practically impossible without dump room, the lease was rendered practically valueless, and that the removing of the ore so close to the tunnel would be extremely hazardous.

Mr. Zalinski testified that the building of the bridge and the construction of the tunnel practically wiped out the Robbins lease. (Abs. 177.)

Mr. Orem, a practical mining man, testified that the work of the railroad practically wiped out Mr. Robbins' lease. (Abs. 273.) And also did Mr. Jones, (Abs. 274), who testified that it would be practically suicide to do any work in the Robbins stope after the construction of the tunnel. Also Mr. Salt, who testified to the same thing (Abs. 279), and likewise Mr. Jennings.

As far as Mr. Robbins was concerned, the taking of the property by the plaintiff was to eliminate him entirely and to render his lease absolutely valueless.

To show the conditions under which Mr. Robbins would have to work to remove the ore during the progress of the work of the plaintiff, we wish to quote the following testimony of Mr. Goodrich, the chief engineer of the plaintiff, which testimony is found on pages 1141 and 1142 of the transcript:

"Q. What did your men do when they blasted? Leave the hill?

"A. Yes, sir.

"Q. While they blasted?

"A. Yes, sir.

"Q. And he (Robbins) would have to do the same?

"A. Yes, sir.

"Q. You mean that he could carry it on provided he would subject himself to whatever might happen to him; in other words, you folks had the right of way, and could do as you pleased, couldn't you?

"A. Yes, sir.

"Q. And build it as you pleased?

"A. Yes, sir.

"Q. Well, if you folks wanted to use powder you would use powder, wouldn't you?

"A. Yes, sir.

"Q. Regardless of what Mr. Robbins wanted?

"A. Yes, sir.

"Q. In other words, you would do as you pleased, wouldn't you; build it as you pleased, regardless of what Mr. Robbins wanted?

"A. Yes, sir.

"Q. And he would have nothing to say about your work or your men?

"A. No, sir.

"Q. That was true, wasn't it?

"A. Yes, sir.

"Q. And it was under those conditions you wanted him to remove the ore within this stope, a part of which you caved while you were excavating on the outside? Is that true?

"A. Yes, I should think he would have to do that.

II.

As to whether Robbins was acting in good faith in taking the lease, and as to the amount of damages:

It is true that the plaintiff had caused surveys to be made before the lease was taken by the defendant Robbins, but these surveys were for a different route than that actually constructed. Mr. Robbins and Mr. Bohm both testified that they were furnished with a may showing a proposed right of way, (this map has been introduced in evidence and is now an exhibit in the case), and it shows the projected line of the railroad at a considerable distance below where the road was finally located. The construction of the road as thus proposed would not have interfered in the least with the mining work or lease of Robbins. Further, he was told that it would be necessary to move certain buildings because the road was to be constructed on this proposed route farther down the canyon, and he had no information whatever that the road would be constructed where it was; in fact, all of his information was to the contrary, and it was not until that he believed that the road would not interfere with the leased premises that the lease was given. An examination of the testimony of Mr. Robbins and Mr. Bohm,

and of others who were present at the time of the conversation referred to in plaintiff's brief, will show that the road to be constructed was to be at a different point from where it was finally located. The question of good faith was presented to the jury upon the conflicting statements and evidence and the jury no doubt concluded that Mr. Robbins did act in good faith.

That defendant Robbins believed the road would be constructed along a different route from where it was finally located, and that it would not interfere with his workings, will be clearly shown by the following testimony (Abs. 57):

> "At the time I took this lease I got the understanding from Mr. Bohm that the railroad was coming at a different point from where it did come below the point where the bridge is now. It would be some 250 feet from where the bridge now is. If it had come through at that point, it would not have interfered with my working. Mr. Bohm was furnished with a blueprint showing the right of way at this other place."

As heretofore stated, this is the second trial of the cause. The jury in the first case returned a verdict in favor of Robbins in the sum of $4,500.00, as will be seen by an examination of the record, page 84. Upon the second trial, the jury returned a verdict for the defendant Robbins in the sum of $4,000.00. According to the testimony of Mr. Robbins, he spent on the lease $500 or $600

before the railroad company took possession (Abs. 33). And had been damaged in the taking of the property between $12,000.00 and $15,000.00.

Mr. McCree, a mining expert and practical miner, testified (Abs. 63) to the nature of ore that was found in the Robbins stope, and of the nature of the ore therein, as shown by the samples. These assays were introduced in evidence. His estimate of the ore was between 300 and 400 tons. (Abs. 66.) The values of the samples are given (Abs. 79-80), and that the value of the ore net to defendant Robbins was shown to be $24.91 a ton. (Abs. 88.) Mr. Sterling B. Talmage testified to the taking of samples and photographs (Abs. 90-91), and also to the extent of the ore which he found within the different workings of the so-called Robbins stope, and his estimate from careful figuring and after making all allowances for deductions, was 200 tons of ore that Mr. Robbins could take out. This was ore that was actually in sight and could be removed without any difficulty. (Abs. 317.)

Dr. James E. Talmage, a leading mining expert and world-famed geologist, described fully how the ore made, the samples that he took, and produced photographs showing the ore deposits. He stated (Abs. 109) that the ore continued in the left-hand finger of the stope 65 feet by actual measurement; that it did not then die out, but it passed beneath the waste on the floor. That the vein appeared strong in the face, approximately three feet in

width. That there were 225 tons of ore exposed, and that a very conservative estimate would be 202 tons in the stope. (Abs. 110.)

Mr. Zalinski, another mining expert, testified to practically the same amount of ore (Abs. 150, 151), and of taking of samples and of the value of these samples. (Abs. 153, 154.)

Mr. Jennings, another mining expert, testified (Abs. 303) that there were at least 225 tons of ore, and that its net value was $29.15 per ton. (Abs. 306.)

Mr. Harry S. Knight, an ore buyer, figured the value of the samples and assays, and, according to his values, the ore would net more than $20.00 per ton. All this was ore that was actually in sight, and did not take into account the ore that might or might not be uncovered in the progress of the working and development of the mine. The rule is well settled in this state, as well as in all other states, that where there is substantial evidence to support the verdict, that the court will not interfere. This rule is almost universal, and as announced in Ry. Co. vs. George, Mo., 47 S. W. P. 11:

> "The estimate of the damages was the province of the jury, and their verdict being supported by substantial evidence, having met with the approval of the court, we are not disposed to interfere."

See also Seattle and etc., Co. vs. Roader, 94 Am. St. Rep. 64, where the court says:

> "We do not feel disposed to substitute our own judgment for that of the jury, whose duty it is to assess the damages, merely because the amount may seem to us large, especially where there is abundant competent evidence upon which to base the verdict."

That this same rule has been adopted in this state, the following cases will show:

Live Stock Co. vs. Live Stock Co., 43 Utah 554,
Jensen vs. Denver & Rio Grande, 138 Pac. 1185;
Gisborn vs. Milner, 28 Utah 438;
Thomas vs. Ogden Rapid Transit Co., 155 Pac. 436.

For counsel to contend there was no ore is the utmost folly. The examination of their own evidence discloses that they removed some of this ore from this stope and had the same smelted or milled. This ore was mined and milled by the plaintiff company for the purpose of making evidence in its favor, and it did it for the purpose of proving there was no ore of commercial value in this block of ground; yet the ore so taken out, as shown by the plaintiff's own evidence, was commercially profitable. See the exhibit containing the sampling by plaintiff.

We respectfully submit there is no error in the record and that the case should be affirmed.

WILLARD HANSON,
Attorney for Defendant, Robbins.