

1954

Walter F. Morgan et al v. Bert Sorenson et al : Appellants' Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WALTER F. MORGAN, HAROLD T.
MORGAN, GEORGE CROMAR, LESLIE
CROMAR, WILLIAM CROMAR,
EUGENE CROMAR, and ARLENE
CROMAR GEAR,

Plaintiffs and Respondents,

— vs. —

BERT SORENSON, DICK WIND, MRS.
BERT SORENSON, and MRS. DICK
WIND,

Defendants and Appellants,

— AND —

VERRUE THEOBALD, Administrator of
the Estate of James T. Morgan, Deceased;
VERRUE THEOBALD, Administrator of
the estate of Frank A. Cromar, Deceased;
Mrs. Frank Cromar, whose true and correct
name is otherwise unknown; JOHN BAR-
NARD, and HAROLD EVANS,

Cross-Defendants and Respondents.

Case No.
8153

APPELLANTS' REPLY BRIEF

Appealed from the Fifth Judicial Court in and for
Juab County, Utah, Hon. Will L. Hoyt, Judge

ELDON A. ELIASON,
Delta, Utah
Attorney for Appellants.

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STATEMENT OF FACTS

It is felt that after reading the brief of respondents that it is necessary to reply to the statement of the case and the statement of facts as set out in respondents' brief not only for the reason of correcting some of the statements therein, but the respondents in their brief have

attempted for the first time in the entire proceedings through their brief to completely reverse the position of their case, and are attempting through their brief to claim the property as heirs of James T. Morgan and not as grantees and vigilant operators as they pretended to claim through their testimony at the trial hearing.

POINT I.

NO CONTINUING INTEREST IN GRANTOR OF CLAIMS.

For the first time in the case the respondents on page 3 of their brief refer to a continuing right or interest of the grantor James Morgan and again on pages 5 and 17 of said brief the respondents over exerted in alleging and referring to a co-ownership and co-tenant in the said mining property, which relationship they now seek to establish between the grantor and the grantees. It provides a good arrangement for the respondents if they "Can have their cake and eat it too", or better still if they "Can ride two horses each a different direction."

Referring again to the findings of the Court it should be emphasized that the court found that between July 1, 1948 and July 1, 1949, more than \$500 worth of labor was performed upon the mining claims in question. The Court was careful after hearing the testimony and seeing the demeanor of the witnesses to refrain from making any finding of any work done from July 1, 1949 to July 1, 1950, which is the period in question and for which period the appellants contend a forfeiture was committed.

The Court further found that James Morgan was

the owner of three-fourths interest in the Black Jack claims on April 10, 1949, and that the remaining interest was held by the heirs and/or legal representatives of Frank Cromar, who died prior to April 10, 1949. The Court further found that on April 10, 1949, James Morgan executed a Quit Claim Deed to his sons, Walter F. Morgan and Harold T. Morgan and then the trial Court added, "And it appears probable that said deed was intended as a deed of gift to take effect upon death of the said grantor." It is to the last inference or appearance of the Court that the appellants object most strenuously and contend that there is neither evidence nor legal authority to justify any such appearance.

In order for the respondents to have any claim in the mining property it must be acquired by reason of the provision of House Resolution No. 1764 of Public Law 107 of the 81st Congress wherein assessment work for the year ending July 1, 1951 was waived under the provisions of a moratorium of public Law 107, condition one of which required the *Claimants* to file notice of intention to hold. Whether a notice satisfying the requirements of the statute was filed appears to be the crux of this case.

Obviously the owners and claimants in this case did not file any such notice nor did they intend or calculate that any notice had been filed for or on behalf of them as required under the provisions of Public Law 107. Referring to the testimony of Walter Morgan at the hearing, (Tr. 15, 16) Mr. Morgan was asked referring to the

Quit Claim Deed from his father to himself and brother Harold.

Q. Mr. Morgan you stated that you recorded the conveyance you received from your father in 1951, is that right?

MR. ANDERSON: Objection on the grounds of repetition.

COURT: Overruled.

Q. Did you file any instrument prior to that time showing a record of any interest or claim you had in the property, did you file any instrument before you recorded that, showing any interest or claim that you had in the property?

A. No.

Again on cross examination of Walter Morgan (Tr. 301) he was asked:

Q. Mr. Morgan, what if anything, have you filed of record or done about connecting any work done in 1948 with the 1949 and 1950 assessment work?

MR. ANDERSON: Just a moment, we object to that as irrelevant and immaterial.

MR. ELIASON: You asked the question on direct.

THE COURT: He may answer.

A. I believe I filed proof of labor.

Q. What year did you file proof of labor? In what year did you do that? What have you filed of record or what have you done to connect any work done in 1948 and 1949 to the assessment work required for 1949, ending July 1, 1950?

A. None.

Q. You haven't filed anything—done anything?

A. Not for 1949.

It is difficult to see how the respondent himself could have been more definite and more thorough in testifying that he did not do anything to obtain the benefits of the provisions of a moratorium under Public Law 107 than is expressed in the testimony herein quoted.

If the respondents, the witness being the principle one of them, claim any interest or right by reason of a notice of an intention to hold filed by James Morgan on this and other property more than three months after he had divested himself of any interest in the property by quit claim deed, then it would appear that the witness was obligated to so testify and advise the Court of any claim which he made to the benefits accruing from the actions of this stranger, James Morgan.

The complete about face of the respondents as to the effect of the Quit Claim Deed from James Morgan to the claimants, Walter Morgan and Harold T. Morgan is most pronounced. No inference or reference whatsoever to co-ownership or a co-tenancy between the grantor, James Morgan, and the grantees, Walter Morgan and Harold Morgan is shown in the testimony, but the exact reverse is strongly testified to (Tr. 8) as shown by the following testimony:

Q. Well, what comment was made by your father at the time he gave this (deed) to you?

- A. His exact words I don't remember, but he just wanted us to have all of his personal holdings because he was getting old.
- Q. Where were you at the time he handed you this instrument?
- A. In my shop in Santaquin.
- Q. In your shop at Santaquin. Who else was present, if anyone?
- A. My son.
- Q. Your son. Anyone else?
- A. No.
- Q. What did you give your father, if anything, in return for this instrument?
- A. One dollar.
- Q. Did you give him a dollar there at the time in the shop at Santaquin?
- A. That is right.
- Q. Did you ever give him anything else at the time for this instrument?
- A. No.
- Q. At the time that this purported deed was given to you by your father, made out in the name of Harold T. Morgan and/or Walter F. Morgan, did he mention or make any statement as to why it was made in these two names with the conjunction and or between them?
- A. No.
- Q. Never made any statement about it?

A. No.

Q. Did he state what interest was Harold's and what interest would be yours?

A. It was mutually understood, all of our rights, what our interests would be.

The answer to the principal question involved in this law suit was answered by the respondent Walter Morgan in the following direct and unequivocal testimony relating to the interest of the respective parties in and to the property after the Quit Claim Deed was executed (Tr. 12, 13).

Q. After you received that coveyance from your father shown as Exhibit 7, did you enter into possession of the claims referred to as Black Jack 1 to 5 here—

A. What?

Q. Did you take possession of those claims, enter upon the property?

A. *That was my father's intention.* (emphasis ours.)

Q. Did you actually go upon the property after?

A. I have been on the property several times after, and before.

Any attempt on the part of the respondents herein now to show or establish a continuing claim of co-owner or co-tenant after the deed was executed in order to try to take advantage of the benefits of Public Law 107 is a deliberate attempt to reverse the position taken by the claimants themselves on the witness stand and supported

throughout their entire case by their continuing testimony. The respondents Walter Morgan and Harold Morgan make proof to their claim of ownership in the mining property by forcefully testifying of the definiteness with which the conveyance of the property was made from James Morgan to Walter F. Morgan and Harold T. Morgan, describing the time of delivery (Tr. 8), consideration (Tr. 8), immediate claiming of possession and fathers intention that the grantees take possession (Tr. 13). A rank injustice upon litigants herein and an abuse of all the laws relating to the subject would be affected if the respondents were now permitted, as they attempted to do in their brief, to say "We did not mean what we said under oath on the witness stand." "We were not aware how seriously our claim to the property would affect our rights under the moratorium of Public Law 107. We now mean to say our father, James Morgan, remained the owner of the property, or a co-owner, or a co-tenant or an agent or something that would enable us to get the benefits of him who was in fact a total stranger to the property after April 10, 1949." The numerous cases referred to in the principal brief of the appellants will suffice to establish the necessary legal authority for the proposition that the deed was complete in every phase transferring all interest to the grantees and divesting all rights and interest in the grantor.

POINT II.

EVIDENCE SHOWS NO ASSESSMENT WORK FOR YEAR ENDING JULY, 1950.

The respondents in their brief again depart from the

findings of the Court in attempting to show some assessment work performed upon this property by the claimants for the year ending July 1, 1950. It is obvious that the trial Court found no evidence of assessment work from July 1, 1949 to July 1, 1950. The finding of the Court that assessment work performed from 1948 to 1949, could be claimed to benefit the respondents and apply under the moratorium for the assessment work required for the years 1949 to July 1, 1950 was equivalent to stating that the Court found no evidence of assessment work for the year ending July 1950, otherwise the legal problems relating to the moratorium and the benefits therefrom and the effect of the Quit Claim Deed from James Morgan to Walter F. Morgan and Harold T. Morgan would not have needed to have been discussed.

It is felt that some reference should be made here, however, to some claims of the respondents in their brief to assessment work allegedly done for the year ending July 1, 1950. First of all the defendants (appellants) testified that the following named persons were upon the claims and that they did examine them and each of them for the purpose of determining whether any assessment work was being done, with the time and circumstances as follows: On July 3, 1949, Bert Sorenson and Ray Spor were upon the property (Tr. 18, 20, 116, 317). Again on July 20, 1949, Ray Spor and Bert Sorenson were upon each of the claims of the said mining property to inspect them, (Tr. 28). The third trip to the property testified to by the appellants was about the 18th of October, 1949,

when Bert Sorenson, Wesley Sampson and John Sorenson testified to having gone to the property and inspected each of the claims (Tr. 34). The fourth visit to the property by appellants after July 1, 1949, was April 1, 1950 (Tr. 39) when Wesley Sampson and Bert Sorenson visited and inspected the property. The fifth trip to the property testified to by the appellants was June 25, 1950, when Ray Spor and Bert Sorenson visited and inspected the property, (Tr. 46). The sixth trip to the property was September or October 1950, when Bert Sorenson and Wesley Sampson again visited and inspected the property, (Tr. 50).

The seventh trip to the property was in April 1951, when Bert Soresnon, Wesley Sampson and John Sorenson visited the property. The eighth trip to the property by appellants and the one just prior to the locating by the appellants was June 1, 1951, when Ray Spor, Bert Sorenson and John Sorenson again visited the property (Tr. 61). The final date of staking and locating the property by the appellants was June 15, 1951, at which time Dick Wind, Bert Sorenson and John Sorenson located the claims Black Queen Nos. 1 to 5 over the abandoned forfeited Black Jack claims. Without going into the details of each visit to the property on the dates herein set out, it is sufficient to state that the transcript as referred to reveals a detailed examination of every part or parcel of the claims on each of the visits of inspection to the property. Witnesses were asked if they saw all of the property; if they went into the tunnel; if

they used a light; what type of light was used; if they examined the end of the tunnel; if they examined the walls of the tunnel; if they went to each and every part of the respective claims; if they covered areas sufficient to see all of the property within the claims; if they saw evidence of persons having been there; car or truck tracks, equipment having been moved, water having been pumped, monuments or boundaries having been set up.

In each specific instance all four of the appellants' witnesses testified that there had at no time been any evidence of any activity whatsoever. That the property remained throughout the entire period abandoned without any showing in the slightest degree of any mining activity or work. This testimony remained entirely uncontradicted and undenied.

The only slight bit of evidence referring to any work by the respondents from July 1, 1949 to June 15, 1951, was the claim that one, Harold Evans had pumped out a wintz at the end of a tunnel some time between July 7th and 16th. The statement made by said Harold Evans quoted on page 6 of the respondents' brief that three men helped pump out the wintz and install stalls and stills was so contradicted by himself and others that it could not be believed. In direct testimony as to who helped pump the wintz he stated Hal Crumbal, Ernest Lancaster, Jack Swift, Richard Stevens and Louis Stevens, who is now deceased, (Tr. 225). On cross examination it became apparent to the witness that the appellants had testimony that the men so named did not help in the purported op-

eration and on cross examination, (Tr. 238-b) when asked who went with him to pump the wintz he stated his son-in-law, Hal Crumbo, was the only person accompanying him. The appellants' witnesses, Ray Spor and Bert Sorenson, saw no evidence whatsoever of any pumping operations having been performed or any water having been run from the mine, or any evidence of equipment having been used there and they testified having spent several hours in investigating the property on July 20, 1949.

Further Victor Bray, an elderly man, testified for respondents to having been upon the mining property with James Morgan for three days, from July 19th to 22nd (Tr. 258). He stated that they cleared out around the tracks and stuff and was back and forth out of the tunnel but he didn't see any evidence of any pumping operations or any water that had been pumped out of the wintz. It is extremely unusual that he would have known nothing of the alleged pumping operations or have seen no evidence of any water having been pumped only three or four days after the pumping had been completed on July 16th, two days before witness Bray arrived.

It is interesting to note that the respondents in their brief on page 13 report that Ray Spor testified that when he was upon the property on July 3, 1949, there was evidence that water had been previously pumped out because he could see where water had been running down hill on the outside of the tunnel, which indicated some activity in the way of pumping. The respondents even

quoted with favor the testimony of Spor "that it had probably been pumped within a month previous to July 1, 1949."

Yet when Ray Spor was on the same property on the 20th day of July, 1949, he observed nothing that was different than when he visited the property on July 3rd. Especially was he questioned relative to the matter of any water having been pumped from the shaft. The following questions and answers on this subject appear on page 317-318 of the transcript.

Q. Did you hear the testimony of Mr. Evans relative to the pumping of water from the winze in the tunnel on the Black Jack Claim No. 1?

A. Yes, Sir.

Q. When you were there in July, the 20th, 1949, was the water in the winze any different than it was when you were there in July first?

A. No, sir.

Q. Was there any dampness or mud anywhere in the area of the tunnel different than it was when you were there in July first?

A. No, sir.

MR. ANDERSON: We object to this as irrelevant and incompetent, has no bearing upon the issues, and not proper rebuttal, surrebuttal.

THE COURT: He may answer.

A. No sir.

Q. Did you hear Mr. Evans state that in pump-

ing the water, a three inch pipe was used for five days for twenty-four hours a day?

A. That is correct.

Q. Did you further hear him make the statement that the water in the winze raised approximately a foot every two—or about two feet a minute?

A. Yes, sir.

Q. At that rate, have you made any mathematical computation as to the amount of water that would be pumped from that wintze at the time Mr. Evans said it was pumped?

MR. ANDERSON: I object to that as irrelevant and immaterial, and not proper rebuttal.

THE COURT: He may answer yes or no.

Q. Have you made any mathematical computation?

A. Yes, sir.

Q. Would you tell me what you have computed as to the amount of water that would be pumped from that winze if it was pumped dry, or approximately dry, with the amount of water raising as Mr. Evans stated it did and the size of the winze being a six by six shaft at a depth of approximately seventy feet?

MR. ANDERSON: May our objection go to this as not proper rebuttal or surrebuttal, immaterial and irrelevant?

THE COURT: He may answer.

A. Well, at the rate of flow of per minute, as

raising two feet, six by six by two, times 7.48 gallons per cubic foot, the water raised according to that at the rate of 538.632 gallons per minute, and that there, in a period of five days would be 3,878,150.4 gallons in a period of five days, the shaft was supposed to be filled at the time they commenced pumping which was 18,852.12 gallons of water in the shaft.

MR. ANDERSON: I move to strike as irrelevant and immaterial, not proper surrebuttal.

THE COURT: It may stand.

Q. Did you hear the pump described by—

A. Yes.

Q. Mr. Evans?

A. Yes, sir.

Q. As to its make and size?

A. Yes, sir.

Q. Can a pump of that size and make pump that much water in that period of time?

A. Absolutely not.

Q. Did you observe if water had been pumped there, and that quantity of water or if any appreciable quantity of water had been pumped, where it would have run from the mouth of the tunnel?

MR. ANDERSON: Just a moment, we object to that as not proper surrebuttal. He went into that on their case in chief. It is repetitious, went into it and spent a half an hour interrogating about the quantity of water, how far down it ran, and where it ran to.

THE COURT: He may answer.

A. Showed no evidence of—

Q. Now, wait a minute, did you see where the water would have run from the tunnel had it been pumped out?

A. Yes, it would have run right down the ravine, run past the lower shaft in the Black Jack No. 4 and went right on down the ravine, if it had been pumped out.

Q. Did you see any evidence on July 20th, when you were there of any water having run down the area you have just described?

A. No, sir.

Q. Did you see any tracks up around the tunnel where any person had been or equipment located?

A. No, sir.

Q. Would the water have run across the road had that amount been pumped out?

A. Yes.

MR. ANDERSON: Just a moment, we object to that as calling for a conclusion, it doesn't say where the road is from the mouth of the tunnel, it is immaterial, repetition, and not proper surrebuttal.

A. Yes sir,—

THE COURT: He may answer.

A. I would noticed it.

Q. Beg your pardon?

A. I say I would noticed it.

Q. Would it had to have run across the road?

A. Yes, sir.

Q. Was there any evidence of dampness or mud on the road?

A. No, sir.

Q. Mr. Bray has described having dug a tunnel in the mouth, or trench at the mouth of this tunnel, approximately 360 feet and eight inches deep and about eight inches wide. Did you observe that on or about the 20th of July?

A. No, sir.

Q. You were there right at the tunnel, weren't you?

A. Yes, sir.

Q. Did you see any evidence of anyone having camped there the previous day or so?

A. No, sir.

Q. Any car or tracks?

A. Never seen any.

The respondents in their brief attempt to claim 36 shifts which is denied by their own witness Evans, who finally stated that he and Crumbo were the only persons that could have been there.

Some reference is made to timbers which were used when the winze was pumped, which the appellants contend was in April of 1949 and which fact was stated to Bert Sorenson and others by Lancaster, respondents' witnesses, (Tr. 286) but in referring to the stulls or sills respondents' witness, Lancaster, testified as follows (Tr. 287):

Q. How many timbers did you saw in 1949, for Mr. Evans to take over to the Black Jack?

A. It was either four or five stulls.

Q. Describe those stulls, will you?

A. They are approximately around five foot to five foot eight.

Q. When you sawed them, you just sawed the timber in two, is that right?

A. Sawed the timber in two, we measured them and sawed them according to the length they wanted.

Q. About four or five foot?

A. Yes.

Q. What kind of timber, purchased in the lumber yard, or native timber?

A. No, regular ties, all railroad ties.

Q. Old railroad ties?

A. Yes.

Q. Had been used before?

A. Yes.

Q. That was the only timber that was sent over to the Black Jack at that time?

A. Except a few pieces of lagging.

When questioned further about the lagging the witness testified they were four or five pieces of used board that could have been picked up, might have come from Kearns or any where. Those four or five pieces were according to the witness four or five feet long (Tr. 287-

288). Even if such property were used after July 1, 1949, which is expressly denied, the maximum value that could be placed upon such equipment would be less than \$5.00 and not \$300 or thereabouts as the respondents would claim in their brief. The respondents also refer to a check for the purchase of gasoline to one Galloway, (Tr. 227). The witness didn't know how much gas he had used or how much he had left over but it is contended that if he ever paid \$98.00 to one Galloway for gasoline that it was for fuel delivered to the Ida Mining Camp where he testified to have been working at the time of this alleged pumping operation and there is no evidence whatsoever that any amount of money was spent for gasoline on the Black Jack mining claim after July 1, 1949.

POINT III.

GOOD FAITH

The appellants specifically avoided reference to the issue of lack of good faith referred to in the respondents' brief for the reason that the evidence speaks far more emphatically than argument. The appellants waited for approximately two years to see if there was any mining activity being conducted upon the property or any improvements being made. For two years they saw nothing but a forfeited area where no one came to make improvements or inspect the property or even to replace monuments or boundary markers; where there was no effort made to file notice of assessment work. Feeling

as they did that the property could be improved under the mining laws of the United States and the State of Utah, they staked their mining claims, and immediately did over one thousand dollars worth of labor on the property.

It would seem all evidence of lack of good faith would be on the part of the respondents. There was definitely no effort to improve the property as required by the mining laws of the United States and the State of Utah. Harold Evans, the only person purporting to have done any work on the property, stated in his deposition that he surrendered his lease on April 19, 1949 and told Morgan he was through, and moved all his equipment. This dog in the manger attitude of not wanting to work the property or not wanting anyone else to, is contrary to the policy of mining claims in the United States.

CONCLUSION

The entire case of the respondents switched as they have from one position to another has shown nothing but a confused effort to make a claim to the property which under all the cases and practices of mining law was forfeited and abandoned. For the court to permit a notice filed by a stranger to become effective to preserve the forfeited and abandoned rights of those who had completely failed to abide by the United States mining laws and regulations would be to throw the entire field of mining law into chaos by allowing a former owner to come in after two years of abandoned and forfeited in-

terests and activity. Under such doctrine the mining areas of the United States could go undeveloped and monopolized by the shiftless and non-active prospector.

Respectfully submitted,

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