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Kenneth N. Silliman and Utah Alloy Ores, Inc. v. Rex T. Powell, et al : Brief of Defendants- Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH N. SILLIMAN and)	
UTAH ALLOY ORES, INC.,)	
a Utah corporation,)	
)	
Plaintiffs-Appellants,)	
)	
vs.)	APPEAL NO. 17054
)	
REX T. POWELL, et al.,)	
)	
Defendants-Respondents.))	

BRIEF OF DEFENDANTS-RESPONDENTS

* * *

APPEAL FROM THE DECREE OF THE SEVENTH JUDICIAL
DISTRICT COURT IN AND FOR GRAND COUNTY, UTAH

THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT

* * *

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH N. SILLIMAN and)	
UTAH ALLOY ORES, INC.,)	
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Plaintiffs-Appellants,)	
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vs.)	Appeal No. 17054
)	
REX T. POWELL, et al.,)	
)	
Defendants-Respondents.)	

BRIEF OF DEFENDANTS-RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

The Defendants-Respondents, Don and Mary Teare, located five (5) claims commonly known as Lone Indian Claims 1 through 5 in the unorganized mining district known as the Yellow Cat, located in Grand County, Utah, together with additional claims in a subsequent year. The Plaintiffs-Appellants commenced this suit to quiet title to what they alleged to be their unpatented lode mining claims, being the same claims the Teares had expended labor and satisfied the assessment work upon.

DISPOSITION OF THE CASE IN THE LOWER COURT

The matter came on to be heard before the Honorable
A. John Ruggeri, Judge Pro Tem of the Seventh Judicial District

in and for Grand County, sitting without a jury on March 19-23, 1979, and on April 3, 1979. During the pendency of the trial, Defendants Penromer Company, Ltd., entered into a stipulation of settlement with Plaintiffs-Appellants and with Powell Defendants (Trial Transcript, Friday, March 23, 1979 at 679-81). A stipulation of the issues between Plaintiffs-Appellants and the Rowe Defendants was stipulated to soon after the trial on May 14, 1979 and recorded June 5, 1979. The remaining parties submitted briefs to the Court, and the Court issued its Memorandum Decision on August 30, 1979 in favor of the Defendants-Respondents. The Findings of Fact and Conclusions of Law as submitted by the Defendants-Respondents stated that the Appellants failed to meet their alleged burden of showing that the assessment work done by the Appellants for the assessment years ending September 1, 1973 through September 1, 1977 was sufficient in both character and amount to meet the requirements of 30 U.S.C. § 28, and thus the Court found that the locations made by the Defendants-Respondents were valid over the Appellants' claims. The final Decree entered February 13, 1980, quieted title to all claims in conflict in favor of the Respondents and dismissed the Appellants' damage claims, dissolved a temporary restraining order and a temporary injunction previously entered prohibiting Respondents from removing or selling uranium ore and awarded Respondents their costs.

Pursuant to Rule 59 of the Utah Rules of Civil Procedure, the Plaintiffs-Appellants moved for a new trial, such motion being denied the same day. The Notice of Appeal was filed March 12, 1980.

RELIEF SOUGHT ON APPEAL

The Defendants-Respondents request this Court affirm the Judgment entered by the Seventh Judicial District Court in and for Grand County.

STATEMENT OF THE FACTS

Between July 4, 1977 and August 25, 1977, the Defendants Don and Mary Teare located five (5) claims commonly known as Lone Indian Claims 1 through 5, in the unorganized mining district known as the Yellow Cat, in Grand County, Utah. These claims were located by them at a time when two friends of theirs from Grand Junction, Colorado were also locating claims which at that time took the name of Tin Bender and Outdoorsman. The original locators of the Tin Bender and Outdoorsman Claims appeared in Court and testified for the Defendant Teares. Their testimony was to the effect that Don Teare continually admonished them to avoid locating claims in any area where there was evidence of valid claims by monuments, notices, locations, discoveries or the like. The areas where the monuments were apparent to them were conscientiously avoided, such as the

claims of the Powells lying to the West of the area in question.

Between September 4, 1977 and May 10, 1978, the Defendants Don and Mary Teare caused to be located seven (7) additional claims of interest to this case, the Lone Indian 6, the Lone Indians 8 through 12, and the Lone Indian 14. Again in the testimony of the Teares, they sought to avoid conflict with any existing claims.

It subsequently developed that the Plaintiffs asserted the existance of prior, allegedly valid, claims in the areas of the claims located by Teares and, accordingly, the Teares became parties defendant to this law suit which bore a filing date prior to the Teares locations.

Inasmuch as the evidence indicates the Teares mined a portion of these claims and otherwise expended labor on the claims here made to satisfy the assessment work upon which the continued validity of their claims was dependent, the principal issues in the conflict between the Plaintiffs and the Teares is whether or not the area of location by the Teares was in fact open to location at the time of the Teares activity in the Yellow Cat area.

ISSUES

1. Was the area of the location of the claims of the Teares open for location in view of the activities undertaken by the alleged senior locator for the assessment

years ending September 1, 1976 and September 1, 1977. To facilitate the discussion, the facts as pertinent to each assessment year will be taken separately.

(a) Assessment year ending September 1, 1976.

The evidence before the Court is that the Plaintiffs caused ninety-five (95) hours of dozer work to be done in August, 1976, or a total of two hundred seventeen (217) hours of labor valued by the Plaintiffs at Fifty and No/100 (\$50.00) Dollars per hour, but by other independent and responsible evidence, at Sixteen and No/100 (\$16.00) Dollars an hour or a total of Three Thousand Four Hundred Seventy-two and No/100 (\$3,472.00) Dollars of labor done in assessment work done by the Plaintiffs independent of drilling operations. This road work was done in many areas throughout the group of eighty-four (84) or so claims asserted by the Plaintiffs in this litigation. It is to be noted, however, that those claims of the Plaintiffs in conflict with the Teare claims located in the period following the assessment year ending on September 1, 1976 number only eight (8), (Little Pittsburgh 1, Little Pittsburgh 2, Mineral Alloy 3, Telluride 4, Mineral Alloy 2, Allor 2, and Telluride 25) and are all in close proximity to a county road. It is further to be noted, that in the testimony of Mr. Silliman pertaining to the assessment work for the year ending September 1, 1976, he said with respect to the Teare group in conflict with his own, that there was ten (10) hours

of dozer work on "a road running down here" which stops between Little Pittsburgh 1 and 2 and partially on Telluride 4. Thus, the road work of direct application to the benefit of the claims in conflict with the Teare group totals only ten (10) hours at Sixteen and No/100 (\$16.00) Dollars an hour, or a value of One Hundred Sixty and No/100 (\$160.00) Dollars, not the Eight Hundred and No/100 (\$800.00) Dollars which would generally be thought to be the value in connection with such claims, especially when such claims appeared to be noncontiguous to the greater majority of the Plaintiffs claims on certain maps placed in evidence by the Plaintiff himself.

The Plaintiff expects much in the way of preserving the validity of his claims by the drilling activity conducted by Schumacher Drilling Company in August, 1976 and completed in September, 1976. The total value of the drilling, Nine Thousand One Hundred Ninety-five and No/100 (\$9,195.00) Dollars, is urged by the Plaintiff to be considered assessment work for the year 1976 when in fact the overwhelming bulk of it occurred in the assessment year commencing September 2, 1976, only seven (7) days of the drilling occurring prior thereto (transcript of March 21, 1975, pages 363-69), however, from the testimony of Mr. Silliman at the trial, twenty-one (21) drill holes drilled by Schumacher were drilled in the "gate" area, a line of drill holes running generally northwesterly to southeasterly for the purpose of intersecting an ore trend

on a body of claims which lie in such a manner as to give pertinent evidence that that ore trend was a separate and distinct ore entity from any ore that might be found on the eight (8) claims of the Plaintiffs lying a mile or more to the South and East of the "gate" as extended, and parallel to rather than in the line of the ore trend. That drilling cannot be construed to have any economic or other benefit to the eight (8) claims of the Plaintiffs in conflict with the Teares and therefore, cannot stand as a part of its assessment work.

(b) Teare claims located between September 4, 1977, and May 10, 1978 conflict principally with the Parco No. 1 claim of the Plaintiffs, but also with the Telluride 4 and Mineral Alloy 2 and 3 claims of the Plaintiffs, other than the Parco No. 1, which lie in the vicinity of those claims located a previous assessment year. In the assessment year ending September 1, 1977, Mr. Silliman, according to his testimony, did some road work totalling five (5) hours, in the vicinity of Mineral Alloy 2 and 3, Telluride 4, and the Little Pittsburgh 2. These activities embraced five (5) hours, or Eighty and No/100 (\$80.00) Dollars of assessment work for the benefit of the eight (8) claims in conflict with Teare by reason of locations in the immediately preceeding year. The Plaintiff went on to say that he had done general road work in the vicinity of all the claims in August, 1977 consisting of Two Hundred Ten (210) hours and had drilling done by a contractor

named Bogner, for which he paid Two Thousand One Hundred Twenty Dollars (\$2,120.00). Taking the sum of Two Thousand One Hundred Twenty Dollars (\$2,120.00), an additional Six Hundred Dollars (\$600.00), as shown on Exhibit 47, and the Two Hundred Ten (210) hours at Sixteen Dollars (\$16.00) per hour, the total falls far short of the Eight Thousand Four Hundred Dollars (\$8,400.00) or Eight Thousand Five Hundred Dollars (\$8,500.00) needed to justify assessment work validating all the claims of the Plaintiff which in that year may have been otherwise subject to attack. Since by the preponderance of the evidence that Plaintiff clearly failed to perform sufficient assessment work to validate all his claims, the Court must look first at the work done to determine where the work would most likely be of economic benefit to a claim. Exhibits 46 and 47 pertain to drilling work done in an area substantially removed from the contest area of the Teares. No drilling or road work can be considered of economic benefit to the Parco 1, that remote and isolated claim in conflict with other claims of the Teares located subsequently to the year in question. Bogner's drilling program was basically done on the Little Pittsburghs 3 and 4, Allor 12, Telluride 8 and 9, as shown on Exhibit 20 with blue ink, and represents such a random collection of drilling on claims so sufficiently remote from those in conflict with the Teares to have no meaning at all in determining even a probability of ore on the claims in conflict with the Teares. It is to be noted

that none of the drilling work done by Bogner was done in connection with road work done on the claims in connection with the Teares and where road work is done for no further purpose such as drilling, exploration or development of mines or mining itself, especially where road work is a necessity seasonally required because of washes, the idleness of such road work cannot count toward assessment.

Clearly then, the testimony of Silliman and his evidence pertaining to the assessment year ending September 1, 1977 is inadequate to show to the Court that requisite assessment labor had been done on those claims in conflict with the Teares to preserve them from lapsing and they had in fact lapsed that year, or, having lapsed the year prior thereto, were not in any manner revitalized by the assessment work so done.

In the law, road work as an effort satisfying the annual obligation of labor and assessment work, has "always been considered to be labor or improvement for annual assessment work, provided it is directly related to the development of the claims or facilitation of extraction of minerals from them. However, like any other form of labor or improvement, it actually must be performed and bear a close relationship to mine development." (The Rocky Mountain Mineral Law Foundation, Annual Assessment Work, pages 2-35 through 2-36 and numerous cases cited in footnotes thereto). In the case at present, the the road work set forth by the Plaintiff to preserve his claims

from lapse, as shown throughout his testimony pertaining to road work in numerous assessment years, indicated the road work was rarely if ever done to any plan of development, exploration or extraction of ore, but rather was done solely to satisfy a perfunctory requirement in the law by the Plaintiff through a tool of convenience available to him, namely a bulldozer owned by him. Repetitive road work has been noted, in and of itself, to be an insufficient foundation for assessment work. The publication of the Rocky Mountain Mineral Law Institute, in their study of American Mining Law, in Volume II in the article pertaining to assessment work, Chapter III, "Performance of Work Outside Claim Boundaries," discusses the requirement of contiguity on page 122, though the modern rule tends to follow an allowance of work done outside a claim area and on noncontiguous claims, there is in such case, a strict requirement of benefit for the claim for which said work is alleged to have been performed. The case before us is devoid of any claim of benefit for those claims in conflict with the Teares, where drilling in the years in question is counted toward the annual assessment work. The drilling pertaining to the "gate" has been previously discussed and the random, isolated and remote drilling done in the subsequent assessment year does in no wise pertain to the claims in conflict with the Teares, nor is it done on claims contiguous thereto. Indeed, most of the exceptions to the requirement of contiguity, discussed on page 123 of Volume II

aforesaid, pertain to such work outside of contiguous claims as roads of access, ditches for water, drifts, and not speculative exploration operations.

The claim owner often attempts to apportion the work done to certain claims when the total of his work falls short of that required to validate all of his claims. The American Law of Mining, Volume II, Section 7.21 (pages 127-29) discusses the issue of apportionment and notes that the Courts have followed three (3) different rules, "(1) The assessment work is apportioned equally to all of the claims in the group, the result being that sufficient work is not established for any of the claims; (2) The claim owner is permitted to apply the work to the claim or claims where the work was performed; (3) The claim owner is permitted to select the claims for which he wishes to work to apply." The editorial of the test aforesaid observes that rule 1 places too great a penalty on the claim owner while rule 3 is too liberal in allowing the claim owner to indefinitely select the claims for which he wishes the work to apply, and thereby selectively defeats junior locators on a year by year basis while avoiding the legal requirement to do the assessment work necessary to keep all of his claims valid. Rule 2 is generally recommended as the sound rule for it allows the claim of the validity of the assessment work to be done only for those claims where the work was performed or for those claims specifically for which the work benefited. It is urged that in the case before

the Bar, the Court adopt such a rule; otherwise, it would allow Sillimans inadequate work, done generally with a dozer at his inflated evaluation, to be selected by him in succeeding years to be applied to this or that claim in toto to defeat a junior locator there and allow his remaining claims upon which other locations have not occurred to remain open to revitalization by simply asserting some other year's labor work to that claim when a junior locator appears on the scene. Such work could not be considered to be done in good faith, where it is done pursuant to the application of the rule allowing the claim holder to select the claims upon which he wishes his work to apply and, absence of good faith, assessment work has been regarded as ineffectual. Indeed "in no field of law it seems to me the element of good faith more important.....," Turner, Problem Incident to Unpatented Mining Claims Assessment Work Requirements 3 Rocky Mountain Mineral Institute 455 (1957) quoted in the Rocky Mountain Mineral Law Foundation, Annual Assessment Work, pages 2-17. Indeed, the whole presumption of mining law favoring a senior locator is predicated upon the good faith acts of the senior locator and one such element of good faith in assessment work is that the assessment work be done for the purpose of holding a claim by improving and benefiting the claim or the actual extraction of ore. Where the work done is manifestly inadequate to the requirements of the law, and that as done is no benefit to the claims in question as is the case with repetitive and useless road work, the work cannot be held to

fill the assessment requirement.

There is under the law, a developing body of conditions which are in addition to assessment work as pre-requisites to maintain a claim. This requirement of posting notices and maintaining claim boundary markers is discussed in Chapter VII of the American Law of Mining, Volume II, page 181, et sec. The Colorado Supremem Court in the case of Pollard vs. Shively has pointed out the imprortance of maintenance of monuments in cases where a considerable variation occurs between the location certificate and the monuments on the ground. The Court observes that the recording act is to provide constructive notice, it is, in the language of the Court, "Just to insist that the statuatory monuments shall be found performing their statuatory and essential duty of actual notice, and where a variation exists between the monuments, and..... the location certificate, it is necessary.....for the locator, as against subsequent locators, to keep up his monuments to an extent that gives fair and reasonable notice. In other words, a claimant who has not kept up his boundary posts, will not be permitted to show the courses and distances of his recorded location to be erroneous, when the right of an intervening locator without notice, will be prejudiced," Pollard vs. Shively. The commentator in the text aforesaid has further stated "It is submitted that this rule should apply with equal force when the description of the claims contained in the recorded location notice or certificate is so indefinite that it does not give

prospectors upon the public domain constructive notice of the location of the claim's boundaries. In such instances, the innocent prospector, who, without knowledge of the rights of the first locator, expends his time and efforts locating a claim, should receive the same protection afforded other bona fide purchasers for value. "The American Law of Mining, pages 183-84. The foregoing law is cited in particular with respect to the location notice for Parco 1, which simply says that the claim by certain width and depth descriptions is located approximately one-half (1/2) mile east of Agate Wash, a wash which runs north-south several miles distant. Such a description can hardly be expected to fit a location in any given point, and indeed, on the maps of the Plaintiff, by scale and ruler, it can be seen that at no place does the Parco 1 claim appear to be in the identical position with that as shown on another map, or ever to overlap itself but often varies as much as six or seven hundred feet from center line of claim to center line of claim if such transposition is attempted. I would further point out that the Federal government now requires that claims be accurately and continuously marked on the ground and that failure to do so will invalidate or void the claims as against the Federal government (American Law of Mining, Volume II, page 184) California has even enacted a statute to the effect that the annual assessment work shall include an affidavit in addition to the labor itself, which shall contain a statement under oath to the effect that all monuments "required by law to have

been erected upon the claim and all notices required by law to have been posted upon the claim or copies thereof were in place at the date within the assessment year for which the affidavit is made, and a statement of the date" and further, "a statement that at such date each corner monument bore or contained markers sufficient to appropriately designate the corner of the mining claim to which it pertains and the name of the claim."

This developing body of law, both case law and statutory law, is in every sense a sound and implied requirement of the 1872 mining law that insists that areas of the public domain reduced to private claim be marked, and that the monuments be maintained. Indeed, in the case of Don Teare who sought to avoid all areas where monuments were marked and maintained, the simple act of the Plaintiffs in restoring, repairing and maintaining monuments would have avoided all together this law suit as it pertains to the Teares since the Teares were earnestly seeking to locate and avoid existing claims. Where the Teares, as good faith locators, did, at the negligence of the Plaintiff, locate their claims in conflict with the Plaintiffs, the Plaintiffs should otherwise then be held to strict and narrow proof of the performance of the required assessment work for each and every claim of theirs in conflict with the innocent junior locator.

For the foregoing reasons, to-wit: Failure of the Plaintiffs to do assessment work as required by law, failure

of the Plaintiffs to do any assessment work for particular benefit to the claims of the Plaintiffs in conflict with the Defendants, the failure of the Plaintiffs to maintain their boundary markers and monuments, the deficiencies in the original location notices of the Plaintiffs to constitute constructive notice, coupled with the failure of the Plaintiffs in the performance of the assessment work, as testified by the Plaintiffs in Court pertaining to road work, the good faith efforts of the Teares to avoid any conflict claims in the location of their claims, the good faith efforts of the Defendants to develop their claims, it is respectfully submitted to the Court that the Plaintiffs Silliman failed to carry the burden of proof as against the Teares and the Teares indeed preponderated the evidence against the Sillimans and are entitled to judgment that their claims are valid, free of the claims of Silliman in the matter.

One further minor point should be addressed. Silliman makes a claim for treble damages for the value of certain ore removed by the Defendants. It appears without a doubt that the Defendants Teares, upon obtaining numerous maps from Silliman's surveyor, Keogh, clearly ascertained that the area of ore discovered by them on their recently staked claims lay outside the bounds of those claims of Silliman with which the surveyor had knowledge and which Silliman saw appropriate to advise his surveyor. That then upon exhaustive search of the records, the Teares let a contract to Harper to

remove such ore which upon removal was sold to Energy Fuels, who, at the time was aware of Silliman's claims which, ironically, become a subject of ore purchase arrangements as well. It is to be noted that the evidence indicates that Harper who received all proceeds from the sale of that ore, remitted none to the Teares and so the Teares, who in spite of every effort of good faith and good intention on their part, were cheated of the benefit of their labors. The Plaintiffs now seek treble damages against them for three times the value of the ore they removed. It is submitted that Harper, who removed the ore, did not do so within the terms of his agreement with the Teares, but rather converted the same and therefore breached his agency relationship with the Teares and cannot be considered as having acted on their behalf. For such reason, the Teares' innocence from any wrongful removal of the ore would render them immune not only from treble damages, but also immune from any liability whatsoever since Harper, the aprty who actually removed the ore, is the only party against whom the Sillimans could have recourse, if it should be found that the ore so removed came from any valid claim of Silliman.

ARGUMENT

I.

THE LOWER COURT DID NOT MISAPPLY THE STANDARDS OF LAW APPLICABLE TO THE COMMON DEVELOPMENT OF ASSOCIATED MINING CLAIMS

II.

THE TRIAL COURT DID NOT ERR IN ITS
ALLOCATION OF THE BURDEN OF PROOF ON
THE PERFORMANCE OF THE ASSESSMENT WORK

III.

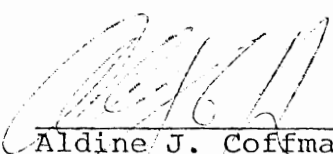
THE TRIAL COURT DID NOT ERR
WITH RESPECT TO THE DOCTRINE OF APPORTIONMENT

Inasmuch as this Brief is prepared for an indigent client and by letter of the Court of September 5, 1980, the suggestion was made to retype the Brief in a lower Court, the three (3) Arguments have been combined and the thrust of the Defendants-Respondents argument is as stated in the foregoing Issues.

CONCLUSION

In view of the foregoing, the Defendants-Respondents urge this Court to affirm the judgment of the District Court in and for Grand County, State of Utah.

Respectfully submitted this 17th day of
September, A.D. 1980.


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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Defendants-Respondents were served upon counsel for each of the Appellants by mailing the same, postage prepaid, to Duane A. Frandsen, Frandsen, Keller & Jensen, Attorneys for Respondents Powells, Professional Building, Price, Utah 84501, and to Brent D. Ward, Senior & Senior, Attorneys for Plaintiffs-Appellants, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, this 18th day of September, A.D. 1980.

