

1981

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

Utah Supreme Court

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KENNETH N. SILLIMAN and
UTAH ALLORY ORES, INC.,
a Utah corporation,

Plaintiffs-Apellants,

vs.

REX T. POWELL, et al.,

Defendants-Respondents.

* * *

* * *

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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-Apellants,)	Appeal No. 17054
)	
vs.)	
)	
REX T. POWELL, et al.,)	
)	
Defendants-Respondents.)	

REPLY-BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This suit was commenced by appellants to quiet title to their unpatented lode mining claims in the Yellow Cat mining district of Grand County, Utah, after respondents attempted to locate claims overlying those of appellants.

DISPOSITION OF THE CASE IN THE LOWER COURT

Appellants rely on their earlier statment as to the disposition of the case in the lower court, including the paragraph which the Powell respondents objected to at Page 2 of their Brief. The failure of the trial court to make any of the findings necessitated by the doctrine of apportionment in the

face of substantial undisputed evidence that assessment work had been performed leads inexorably to the conclusion that, as stated earlier, "the court in effect ruled that since it found the work insufficient to satisfy the assessment requirement as to all claims, the work was insufficient to meet the requirement as to any claims." Brief of Appellants at 3.

RELIEF SOUGHT ON APPEAL

Appellants request that this Court reverse and vacate the judgment and findings of the Seventh Judicial District Court for Grand County, and remand this case for a new trial on the issue of the adequacy and sufficiency of the assessment work performed by appellants on their claims during the period September 1, 1971, through September 1, 1978.

STATEMENT OF THE FACTS

Appellants continue to rely on their Statement of Facts contained in their earlier Brief to this court at pages 4-23 thereof. Supplementing that statement, appellants controvert the Statement of Material Facts of the Powell Respondents in the following particulars.

Appellants take exception to the statement of the Powell respondents at Page 3 of their Brief that seventy-six of appellants eighty-four mining claims are not "contiguous" as that term is normally used with reference to mining claims. Each of the seventy-six mining claims in the main group of

appellants either overlaps one or more other claims, adjoins one or more claims along a substantial portion of a side or end boundary, or has at least one point in common with another claim. At most eight of the seventy-six mining claims in the main group could be said to be connected with the main group at only a single point of reference (See Plaintiffs' Exhibit 11). Moreover, the approximately three and one-half mile distance over which this main group of claims extends cannot be considered at all extraordinary considering the extensive reach of the underlying uranium deposits that had been previously located, and in many cases already partially mined, especially when the later-located claims of the Powells covered the same or greater surface area. (See Exhibits 11 and 59.)

Furthermore, it is not true, as Powells assert at Page 4 of their Brief, that when they located their claims they "found no indication of prior claims," "found no location monuments. . . no corner monuments, and no evidence that recent assessment work had been done in the area." Powells did admit to seeing some monuments and other workings that indicated the presence of previous claims. (Tr. at 565, and 632-38). Additionally, the check that Dan Powell made of the records at the Grand County Recorder's Office, by his own testimony, only covered claims whoses names and ownership had been identified in the field, and thus no attempt was made to use a tract index to identify the ownership of claims indicated by the presence of monuments and markers which respondents did see in the field (Tr. at 566).

The same applies to Teare respondents. Despite the assertions made in their Brief at Page 3, regarding the alleged conscientiousness of the Teares to avoid locating claims in conflict with pre-existing claims, the record is devoid of any indication that Teares ever searched the tract index at the County Recorder's Office to determine whether any mining claims previously located conflicted with their own. Teares also admitted to having seen some monuments and mine workings, the status of which they claimed they could not identify and which they conveniently assumed to have been abandoned (e.g., Tr. at 842, and 891).

Appellants further note that the statement at the top of Page 8 of the Brief for the Powell respondents about previous lawsuits is improper and should be stricken, for it involves a part of the transcript of the Silliman deposition never read into evidence at the trial.

Although it is true that the composite map known as Exhibit 11 showing all of appellants' mining claims does show minor (not major) differences in the way no more than fifteen of plaintiffs eighty-four claims were plotted by the different surveys, in even the most extreme case the difference was no more than about three hundred feet and the discrepancies were hardly such as to create a "major obstacle" for determining the open ground that remained available for location of new mining claims, as alleged at Page 8 of the Powell Brief (Tr. at 158-69).

Both groups of respondents in their Briefs challenge the fifty-dollar per hour valuation figure used by appellant Silliman in computing the value of his labor and improvements to his claims. However, contrary to the assertions of respondents, this fifty-dollar figure is consistent with the testimony introduced by witnesses for respondents. The assessment work whose value is in question covers the period from October 1972 through August 1977. Brief of appellant at 13-17. According to the testimony of Mr. J. D. Wilson, the former owner of a dirt contracting company who retired from the business in 1973, his company charged sixteen dollars an hour for an operator at non union wages and a D-6 Caterpillar in 1971 to do road work in the Four Corners area. He indicated that this was a going rate for such services. He further testified that prices had gone up tremendously since he left the business and that 1971 was the latest year for which he had records (Tr. at 645-48). By late 1972, when appellant Silliman performed the first work relevant to the present issues, he had over twenty-five years experience as an operator of a caterpillar on mining claims. Even without considering Mr. Silliman's intimate knowledge of the claims in the Yellow Cat area, his experience alone would have allowed him to charge twenty-five dollars an hour in 1972 doing work on the property of others. When his intimate working knowledge of the mining claims at issue acquired over a twenty-five year period is considered, it is not at all unrealistic to state that the value of work he performed on these claims would be doubled to

the fifty dollar per hour figure used. While it is true that nominal rates continued to go up with inflation during the 1970s dramatically, as Mr. Boulden testified, it seems apparent that appellant Silliman was talking in real, not nominal, terms for the whole period involved and that is why the fifty-dollar figure he used was not increased with the passage of time. Appellant Silliman's single valuation figure, reflecting real purchasing power or labor value in 1972, is the more appropriate method of calculating the value of labor or improvements, as those terms are used in 30 U.S.C. § 28, because it is the value of labor performed on or benefiting the mining claim that matters.

This testimony harmonizes with the approximate figure of thirty dollars per hour quoted by appellant Silliman as the rate charged for work he did on other property some year or two prior to the time of trial; this figure was not a 1979 figure as Powell respondents assert in their Brief at pages 9 and 10 (Tr. at 377, 406). It should further be noted that the figures quoted by Mr. Boulden at Page 11 of Powells' Brief are only going rates for an outside operator, they are not rates that reflect the experience of appellant Silliman and his knowledge of the property in issue.

It should be noted that at page 13 of respondent Powell's Brief there is an apparent typographical error. On the sixth and seventh lines from the bottom of the page, it states that of 212 total assessment work hours claimed for the year ending

September 1, 1975, "197" hours were spent in road maintenance and rehabilitation. This should read "107" as on the fifth line from the bottom of the page.

At Pages 13 through 17 of respondent Powell's Brief, much is made of certain photos taken that were introduced at the trial which were asserted to fairly represent some of the "principal" roads in the disputed area. While the photographs speak for themselves, their relevance as to date and as to depiction of areas where appellants performed assesment work has never been established. Appellants rely on their statements at Pages 19 and 20 of their earlier Brief. A quick review of the pages of the trial transcript cited there will immediately make it clear that appellants first made their assertions about which roads were maintained before the introduction of these photographs.

Appellants again object to the use at page 19 of the Powell Brief of material from a deposition when that part of the deposition was never read into evidence at the trial. The statement of the court at pages 412-13 of the trial transcript that the depositions "are published and become a part of the record" is not sufficient to allow the use on appeal of portions of the depositions not actually read verbatim in court to appeallant Silliman because to do so is to deny his rights to be confronted with such material and to be given the opportunity to explain any discrepancy that may exist.

Finally, it should be noted that the Powell respondents at Page 26 of their Brief distort and misread what appellant said

at Page 21 of their Brief relating to the lack of written records kept by appellant to verify his account of assessment performed. Appellants reference to records later tendered refers to their Motion for a New Trial with accompanying affidavits of Kenneth and Blaine Silliman at pages 285-95 of the Record, not the pages of the trial transcript which respondents refer to.

ARGUMENT

I.

THE TRIAL COURT MISAPPLIED THE LAW APPLICABLE TO THE PERFORMANCE OF ASSESSMENT WORK FOR ASSOCIATED MINING CLAIMS

Responding to the first argument of appellants' Brief, the Powell respondents, at page 34 of their Brief, conclude that the trial court did not misapply the law to the facts of this case but that it merely founds appellants; evidence as to what they did without credibility. This conclusion does not withstand scrutiny. The first paragraph of the court's Memorandum Decision, the only document actually authored by the court, stated that the court did not "reject as intentionally false any of the testimony." This statement plainly contradicts the assertion of the Powell respondents that the Court found appellants testimony "so incredulous that the Court was unable to find any facts favorable to appellants." Moreover, the

alleged substantiation quoted above from Finding No. 18 is merely a repetition of respondents' own prior conclusion, inasmuch as this finding was drafted by respondents themselves.

Further examination of the court's Memorandum Decision supports the position of appellants that the court did not find appellants' evidence with regard to the performance of assessment work to be without substance, but that the court only discounted the value of the work performed by appellants. Beginning in the second paragraph, the Memorandum Decision continues as follows:

The evidence of the Plaintiffs does not convince the Court that sufficient or adequate assessment work was done in order to hold the conflict areas involved. The testimony of the other witnesses define an ostensible lack of assessment work, coupled with a general deterioration of or corner and discovery monuments indicative of abandonment brought on by the discontinuance of the productive mining adventure that existed in years prior thereto.

An additional element confronts the Court with reference to the apparent lack of assessment work. If claims are grouped so that assessment is allocated to the entire group or groups, some showing must be made that the entire group or groups indeed derived some benefit. In this case, where the groupings are so diversified and spread, the Court finds it difficult to find that road work, claimed as assessment work, on roads that in no way connect or service diversified groups of claims, satisfies the requirements of the law, and regulations mandating an intention to hold.

The inference is inescapable from this Memorandum Opinion that the court accepted that at least most of the work alleged to have been done by appellants was indeed performed. What

clearly concerned the court was the character of the work and the benefit to the claims accruing therefrom, not the fact of its performance.

With the realization that assessment work in some quantity was performed by appellants upon or leading to their mining claims, and that at least this much was accepted by the trial court as having been proven, the next inquiry is whether the work benefited the mining claims in question. As this Court recently recognized in a case involving the Powell respondents decided shortly after appellants' earlier Brief in this case was filed, it is "universally recognized that [assessment] work need not be performed on each individual claim, but may be made upon an adjacent interrelated claim if it can be deemed to benefit the claim." Powell v. Atlas Corp., 615 P.2d 1225, 1228 (Utah 1980). That holding of this Court reaffirmed as the law of this state a position squarely opposed to that urged by Powells (the same people who are among respondents in the present appeal) in that case, namely that assessment work is not sufficient to satisfy the requirements of 30 U.S.C.A § 28 when "not done on certain of the claims themselves, but on other claims in the area." Id., 615 P.2d at 1227. It should be noted that the similarities between Powell v. Atlas Corp. and the present case are striking. In both cases, Powells were junior locaters asserting the invalidity of prior located claims on the basis that proper assessment work had not been done. The critical assessment years were the same three as in the case at bar,

namely those ending September 1, 1973, 1974, and 1975. The only difference is that in Powell v. Atlas Corp., the trial court did not accept the position of the Powell's that work done outside the boundaries of the claim may not be applied toward preserving that claim from relocation while in the instant case, the trial court, while voicing vague adherence to the theory that assessment work performed for an entire group of claims is sufficient to satisfy the federal statute where the claims are benefitted by the work, misapplied this law to the facts by demanding discharge of an almost impossible burden, namely that drillsite preparation and road maintenance and rehabilitation to provide access to claims for their future development over an extensive deposit of uranium ore be allocated to artificially small segments of a larger group in the face of uncontroverted expert testimony that work tending to the development of any part of this extensive ore body was work benefiting other parts of the ore body as far as the claims extended and for up to a distance of almost five miles.

Appellants' earlier Brief establishes sufficient misunderstanding or misapplication of the relevant law to require a retrial of the issue of the adequacy of the assessment work performed by appellants in light of the clarification provided by this Court of the law relating to assessment work for groups of claims in Powell v. Atlas Corp.

This leads to a consideration of the value of the road work performed by appellant Silliman which should be credited to his

mining claims. At page 39 of the Powell brief, it is asserted that "'repetitive roadwork, especially road maintenance' does not qualify as annual assessment work," on the authority of a statement made in a seminar of March 1, 1979, sponsored by the Rocky Mountain Mineral Law Foundation. It should be noted that this seminar was one prepared for and delivered to landmen and paralegals. Such a restrictive view of what work will qualify as assessment work does not conform with what the law is. Furthermore, this statement is not the view of the Rocky Mountain Mineral Law Foundation as an institution, but merely that of the author of the quoted paper, and by no stretch of the imagination is it a "consensus of hundreds of lawyers and scholars who devote a great percentage of their time to mining law and who are recognized on a national level as experts in their field," as respondents assert. Indeed, in another publication of the same Rocky Mountain Mineral Law Foundation entitled "Annual Assessment Work" and subtitled "A definitive Legal Research Manual," it is stated at pages 2-35 and 2-36 that:

The construction and maintenance of roads for access to and from claims 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.

For further support of the proposition that road work, including road maintenance, is clearly labor satisfying the requirements of 30 U.S.C.A. § 28, see the cases and other materials cited at pages 32-35 of appellants earlier Brief.

It should also be noted that contrary to the assertions at page 41 of the Powell brief, mere proximity of a claim to a county road does not render work on private roads connecting the claim or associated drillsites to the county road valueless. Unless there are roads to transport machinery to the claim and ores from the claim, mere proximity of another road is of no help.

Nor is it accurate to characterize appellants' assessment work as mere token compliance with the requirements of the federal statute to discredit the good faith with which the work was performed. This road work clearly had no purpose other than the development of the ore body present. No other purpose for building roads in the Yellow Cat vicinity existed. While it may be admitted that a primary motivation for performing this work during the years in issue was to satisfy the requirements of the law, that is because it was economically imprudent, not only for appellants, but for anyone else, to do more than this minimal development work in light of existing market conditions. Yet this does not discredit the good faith of appellants because they had already spent more than 25 years actively mining the area in question prior to the temporary cessation of such activities in 1972. Support for this position is provided in a consideration of the justification for the assessment work requirement set out at Section 7.2 of Volume 2 of the respected treatise entitled The American Law of Mining edited by the Rocky Mountain Mineral Law Foundation, which reads:

The purpose of the assessment work requirement is to assure good faith and diligence and to prevent a claimant from locating numerous mining claims and holding the claims without working them, thus preventing others from occupying and developing the property.

The chief objection to the assessment work requirement is that the mining industry is particularly susceptible to fluctuating prices. When the price of the product from a particular mine justifies operations, the mine will be developed or worked regardless of the assessment work requirement. On the other hand, during periods of deflated prices, the assessment work requirement merely adds to the economic woes of the already troubled mine owner. This objection is appropriate when applied to claim owners who actually mine their claims when economic conditions permit. However, the objection is not applicable to those persons who acquire mining property for purposes of speculation; if there were no assessment work requirement, or some adequate substitute, all potentially valuable mineral land would soon be located as mining claims and would never again be available for bona fide location.

To this it may be added that mining claim owners, like all other business men, seek to maximize their profits by minimizing expenses through prudent exploration and development. The government, while justly requiring the expenditure of time and effort to improve the claims as evidence of the locator's good faith, must protect the locator's investment in these improvements as long as the locator is substantially complying with the annual assessment work requirements and allow the locator sufficient time to prudently develop the claim and extract the ore therefrom or the locator, without such assurance of future protection, will be loath to expend any substantial amount of time and effort making the investments in ore extraction and claim development desired by society. If the

courts are too quick in declaring forfeitures, few individuals will be willing to take the risk of inadvertently losing significant investments of time and money, leaving a greatly restricted pool of very risk preferring parties to engage in the mineral extraction industry. This course would lead to a concomitant increase in purely speculative holdings and society at large would be the loser with less minerals being marketed at correspondingly higher prices for an unchanged or increasing demand level.

II

THE TRIAL COURT ERRED IN ALLOCATING THE BURDEN OF ASSESSMENT WORK

"[T]he burden of proving a forfeiture is always upon the party relying upon the same" Hall v. Kearney, 18 Colo. 505, 33 P. 373 (1893), cited by Powells at page 31 of their brief. This risk of non-persuasion is borne by the party urging a forfeiture throughout the duration of a trial and can only be discharged by clear and convincing proof. New Mercur Mining Co. v. South Mercur Mining Co., 102 Utah 131, 128 P. 2d 269, 272 (1942) cert. den. 319 U.S. 753 (1943). It is only the "burden" of going forward or the duty to produce evidence substantial enough to get past a motion for summary judgment that shifts from a junior locator to a senior locator when it is shown that the assessment work performed by the senior locator included work performed outside the boundary of the claims which the work

is asserted to have benefitted. Once the senior locator presents such evidence, the risk of non-persuasion always borne by the junior locator compels him to rebut the evidence that the assessment work had been performed by the senior locator as alleged or to show that this work did not benefit the mining claims for whose behalf it is asserted.

In the present case, it is clear the court did not reject in toto the fact of the performance of the assessment work described by appellants and offered in evidence. It is likewise clear that respondents did not introduce any substantial evidence to rebut the evidence presented by appellant Silliman and his expert witness that the work of appellants would benefit the entire body of appellants' claims. The alleged inability of the trial court to make a finding as to the value of the assessment work performed by appellants is not, as respondents asserted, due to the failure of appellants to produce credible evidence of the value of their work. This so-called finding of fact drafted by respondents and quoted at page 44 of the Powell Brief was the result of an improper allocation of the burden of proof inasmuch as the evidence offered by respondents fell substantially short of the quantity required to rebut the evidence offered by appellants.

III

THE TRIAL COURT ERRED BY NOT APPLYING THE DOCTRINE OF APPORTIONMENT.

Even if the trial court did not accept in toto the evidence offered by appellants as to the quantity and value of the assessment work they performed, it is clear that the court did not reject all of this evidence either. Given the undisputed fact that some assessment work was performed by appellants for the benefit of their claims and the fact that the character of this work was never shown not to confer the benefits claimed for it, the trial court defaulted in its duty by not finding the value so conferred on appellants' mining claims. Such a failure to make required findings of fact is reversible error. Romrell v. Zions First Nat'l Bank, 611 P. 2d 392 (Utah 1980.). Once the value of the work is established pursuant to the apportionment doctrine of Utah Standard Mining Co. v. Tintic Indian Chief Mining & Milling Co., 73 Utah 456, 274 P. 950 (1929), it must be determined how that value is to be allocated among the several claims benefited by the work where that value is short of the statutory minimum for preserving all the mining claims. In the instant case, it cannot be determined at this point whether this is the case because the trial court refused to make a finding as to the value of the work performed by appellants. However, even assuming the trial court might have found that the total value of appellants' assessment work was less than that necessary to preserve all their claims, the decision must be faced as to how

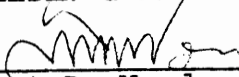
that value is to be allocated. The law of this state as established in Utah Standard is that the greatest number of claims possible should be preserved by allocating the total value of the labor performed or improvements made to as many of the claims actually benefited by the work as possible. This rule is not unduly generous for it merely secures for the owner of a senior location who has acted in good faith the exclusive right to continue developing that amount of mineral land for which he has paid the full investment price required by law and for which he continues to bear all the risk that the venture will not prove profitable.

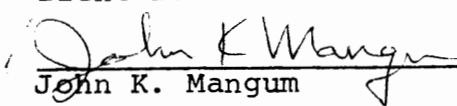
CONCLUSION

For the trial court's failure to properly apply the standards of law relating to the group development of claims held in common, for its failure to properly allocate the burden of proof, for its failure to make findings necessitated by the doctrine of apportionment, and for manifest confusion on what the facts were and on which facts were relevant to a determination of the issues in this case, or for any one of those errors, the trial court's decision should be reversed, all findings vacated, and this matter remanded for a new trial on the limited issue of compliance with the requirements of 30 U.S.C. Section 28.

Respectfully submitted this 6th day of February, 1981.

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CERTIFICATE OF MAILING

I hereby certify that two (2) copies of the foregoing Brief of Appellants were served upon counsel for each of the respondents by mailing the same, postage prepaid, to Duane A. Frandsen, of Frandsen, Keller & Jensen, attorneys for Respondents Powells, Professional Building, Price, Utah 84501, and to Aldine J. Coffman, Jr., of Coffman and Coffman, attorneys for Respondents Teares, Rows & Penromer, at 59 East Center Street, Drawer J, Moab, Utah 84532, this 6th day of February, 1981.

