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Utah Supreme Court

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Unknown.

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SUPREME COURT
BRIEF

NO. 4378 RR

IN THE

Supreme Court

of the

STATE OF UTAH

ROSE GIBBONS, and
AUSTIN K. TIERNAN,
Appellants,
vs.
R. G. FRAZIER, and
UTAH COPPER COMPANY,
a Corporation,
Respondents.

No. 4378

Respondents' Reply to Appellants' Application for Rehearing

DICKSON, ELLIS, PARSONS & ADAMSON,
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LEGAL PRINTING CO., SALT LAKE

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While avoiding a re-argument of this case, we will comment as briefly as possible upon appellants' application for rehearing and their argument in support thereof.

At the outset we are confronted with the statement beginning at the bottom of page 3 of appellants' application and frequently renewed in varying form

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throughout the course of appellants' argument in support of that application, that this court saw fit to go outside the briefs of counsel and brief the case for itself, and that in reaching its conclusion did so without the aid of argument. In this we think counsel erred. Coupled with this statement counsel intimate that respondents' counsel have been unfair in attacking their proof of discovery and the existence of the other essentials of a valid location upon the occasion of the entry of the Valentine Script—they state they feel "abused" because (as we interpret their remark) we conceded the validity of the location upon the trial below. We so interpret their remark because otherwise they would have no reason to feel abused. Such is the gravamen of this application for rehearing and the argument thereupon.

This is the appellants' lawsuit—an action in ejectment brought by them, wherein to succeed they must establish in themselves the paramount title to the premises in question—that burden is theirs. It was upon the trial below, upon the argument here and still is the theory of respondents that appellants can succeed in this suit only upon proof of legal title in themselves to the area in dispute, and that they cannot do because the government by its patent upon the Valentine Script had parted with its title to that area years before the entry or patent of the placer upon which appellants found their claim; that if appellants' suit in ejectment is to be construed a suit in equity to set aside the pat-

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ent upon the Valentine Script, then respondents must be permitted the defense of laches. Neither the trial court nor this court have indicated any intention of so treating this suit in ejectment. Accordingly, upon the trial below, when appellants attempted to prove a valid discovery, respondents objected to appellants' effort as calling for matter "wholly irrelevant, incompetent and immaterial to any issue in this case", (Tr. 59-60) and as a collateral attack upon the senior patent; that in this case the discovery on the placer claim was not in issue (Tr. 60); that for the purpose of this suit no legal title to the area in dispute could be predicated upon the placer patent until by an appropriate action in equity the senior patent upon the Valentine Script had been set aside; that appellants by their proof of such outstanding senior patent through which respondents deraign their title, had precluded any possibility of their success in the form of action they had chosen. Then counsel with alacrity chose to interpret respondents' objection as an admission of discovery, very properly testing this assumption, however, by the following: (Tr. 62-63)

> "Mr. McBroom: Just one point. Do you question the discovery at the time of the location of these deeds?
>
> "Mr. Ellis: We take the record as it has been offered in evidence, that is all we know about it.
>
> (Argument and discussion.)

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"The Court: When the United States Government issues a mining patent, isn't the mining patent enough?

"Mr. McBroom: I think so, your Honor, but the question may arise.

"Mr. Wallace: We will not go further, if your Honor please, to amplify this tender. It may be necessary, if there is going to be any question about this thing, so that my record may be sufficient.

"The Court: We have some legal questions to dispose of after a while, and I think you may introduce that proof of discovery, if you wish to.

"Mr. Parsons: Note an exception.

"The Court: As I say, I don't see any reason why it should be done, or how it can affect the issues in this case, but there may be something in the record that you will want.

"Mr. Wallace: If I didn't sincerely believe that it might arise, of course, I should not take the time of the court about this thing.

"The Court: If you disagree with me, if you feel that it is necessary to prove that fact, and want to make your record with reference to the discovery, you may proceed to do that. I take it that the presumption is that there was a discovery, mineral discovery, and that the location is properly made, and that presumption arises from the fact that the United States Government later issued a patent, a mining patent, on that ground. I take it that that is the position counsel takes for the reason of his objection.

"Mr. Wallace: If counsel will take that position, your Honor, I would be through, but I

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would want him to take that concretely and specifically, but they say they will not.

"Mr. Parsons: Counsels' position is that the McGuire & Company Placer is wholly apart from this investigation, and has no place in this case.

"The Court: That raises the same question that we have argued already.

"Mr. Parsons: I think so, your Honor.

"The Court: And the court, while being inclined to agree with you, sustained the position of opposing counsel for the purpose of looking into the legal question later. The objection may be overruled, and you may now proceed.

"Mr. Parsons: Exception."

and then counsel proceeded to make their proof to which reference was made by our brief and upon which we predicated both written and oral argument in this court.

It would indeed be a strange rule that if a defendant during the trial, intent upon his conception of the issues and the law applicable thereto as he understood it, made an objection in the course of the plaintiff's examination, which objection the court overruled that the plaintiff might make his case upon his own theory, that then the defendant would thereafter in argument be precluded from testing the plaintiff's case upon plaintiff's own theory so adopted. Nothing more than that has occurred here. Respondents did

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not concede a discovery and appellants know they did not (Tr. 63):

> "Mr. Wallace: If counsel will take that position, your Honor, I would be through, but I would want him to take that concretely and specifically, but they say they will not."

The appellants were permitted to make their proof and presumably did their best.

It is equally strange that appellants now assert that this court came to its conclusion here without the aid of argument. In respondents' brief, beginning at page 22, will be found a discussion of the decision of the Supreme Court of the United States in Creed and Cripple Creek Mining & Milling Co. v. Uintah Tunnel Mining & Transportation Co., wherein respondents' counsel direct particular attention to the rule declared in that case to the effect that the mere issuance of patent "upon the McGuire & Company placer claim * * * raised no presumption of a discovery at any time prior to entry * * * nor any presumption of the staking of the claim on the ground, hence no presumption of a valid location prior to that date. Not only is there no presumption of a valid location upon the occasion of either entry or patent of the Valentine Script, but by all the authorities the issuance of the non-mineral patent was such an adjudication against the mineral character of the land and of its unoccupied and unappropriated condition as to be conclusive upon collateral attack in an action at either law or equity." A

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further discussion of the decision of the United States Circuit Court of Appeals in Uintah Tunnel Mining & Transportation Co. v. Creed, 119 Fed. 164, 57 C. C. A. 200, with emphasis again directed to the same question, will be found in respondents' brief beginning at page 38. Commencing at page 47 of respondents' brief is a discussion of what is necessary to a determination of the mineral or non-mineral character of land, and quoting from 18 R. C. L. § 122, at page 1222, will be found the statement that "land is not mineral unless it can be said that 'mineral can be obtained from it in such quantities and quality as to make it more valuable for mining than for agriculture' or uses other than mining", following which will be found at page 48, respondents' citation of Crissman v. Miller, and Steele v. Tannana Mines R. Co., in the discussion of what is necessary to a valid discovery, and at page 49, abstract of the testimony admitted below to prove that fact, which discussion is continued upon page 50 and contains the statement that "there was no testimony whatever as to the monumenting or marking of the claim on the ground * * * ." And therein, while reiterating our theory of the case and stating in our opinion that "appellants' theory * * * confuses all distinctions between law and equitable actions and the relief and defenses applicable thereto respectively", nevertheless that that part of the Valentine Script in conflict with the placer claim appeared non-mineral and that neither monumenting nor discovery had been proved upon the

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placer claim, "and hence neither can be presumed upon the occasion of the Valentine Script entry." And the appellants in their reply brief devote pages 8 to 14, both inclusive, to a discussion of this very question, saying that they felt abused and charging us with having "changed theory on appeal." And turning to appellants' assignments of error (Tr. 60) we find that while appellants asserted in their application for rehearing that no finding had been made upon which this court can predicate its decision, still appellants chose to treat Finding No. 2 (Tr. 12) as such a finding and assigned error in the making thereof because (Tr. 60) "the proof shows without contradiction that the McGuire & Company Placer Mining Claim was duly located prior to the entry of the west half of the east half of the northwest quarter of Section 26, and prior to the issuance of the agricultural patent to Bentley, and in consequence the mineral patent conveyed title by relation to the date of discovery and location". Are we to be precluded from discussing that assignment merely because the taking of testimony upon the discovery and monumenting and other essentials to a valid location of the placer claim was over our objection and did not conform with our theory of the case! This court rested its decision largely upon Creed and Cripple Creek Mining & Milling Co. v. Uintah Mining & Transportation Co., Crissman v. Miller and Steele v. Tannana Mines R. Co., all of them cited by respondents and given the same application they served in the opinion of this

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court. But in addition, there appears in the opinion of this court the following brief excerpt from the decision of the Supreme Court of Montana in Hickey v. Anaconda C. M. Co., 33 Mont. 46, 81 Pac. 806:

> "In our judgment, when a patentee seeks to show that his title is older than the evidence of his title indicates—when he seeks to show that, notwithstanding the date of his patent or receiver's final receipt, his title in fact relates back to the date of his location, he must show affirmatively a location valid under the laws of the state where the claim is situated."

Certainly no court has ever taken exception to that portion of the decision in Hickey v. Anaconda C. M. Co. quoted above. That decision was followed upon that point by the Supreme Court of Arizona as late as September 14, 1922, in Tom Reed Gold Mines Co. v. United Eastern Mining Co., 24 Ariz. 269, 209 Pac. 283; (certiorari denied, 260 U. S. 744, 67 L. Ed. 492, 43 Sup. Ct. 165) at 292 the court said:

> "One who claims rights anterior to the entry of a mining claim for patent and dependent upon the order of the facts making up the right to the land is not concluded by the patent, but may show such order, including the fact of his own prior discovery of mineral. Cases supra, and Kahn v. Old Teleg. M. Co., 2 Utah, 174-188, 11 Morrison's Mining Reports, 645; Last Chance Mining Co. v. Tyler Mining Co., 61 Fed. 557, 566, 9 C. C. A. 613; Hickey v. Anaconda C. M. Co., 33 Mont. 46, 81 Pac. 806; Butte & S. Co. v. Clark Mont. Realty Co., 249 U. S. 12, 39 Sup.

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> Ct. 231, 63 L. Ed. 447; Lindley on Mines (3d Ed.) § 783."

That is hornbook learning. The decision stressed by counsel of the United States Circuit Court of Appeals for the Ninth Circuit in Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609, in no manner questions the propriety of that statement, and the decision of the Supreme Court of the United States in the same case to be found in 249 U. S. 12, 63 L. Ed. 447, contains the following reference to the rule made in the manner of one stating a legal maxim:

> "Priority of right is not determined by dates of entries or patents of the respective claims, but by priority of discovery and location, which may be shown by testimony other than the entry and patent."

By the statutes of Montana a declaratory statement was required to be recorded twenty days after discovery and in the Hickey case it was held the statement recorded did not conform with the statute; that the statement in the prescribed form was necessary to a valid location; that by reason of this failure the location was invalid; that the patent title could not relate back to an invalid location so as to defeat intervening adverse rights. This was a logical application of the rule we are discussing and the federal court took no exception to the rule, but, influenced by the passage of a statute expressly saving the validity of locations wherein the declaratory statement was defective, held merely that

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the declaratory statement was not essential to a valid location and the location in that case being valid, the patent title would relate back to the date of such perfected location. We are not here interested in the declaratory statement requirement of the Montana statutes, and the Hickey case and that portion of the decision therein quoted by this court, correctly states the rule relative to the establishment of priority when claimed to antedate final entry, following therein Creed and Cripple Creek Mining & Milling Co. v. Uintah Tunnel Mining & Transportation Co., and the host of other decisions to the same effect. Patent titles of course relate to the valid locations. Kahn v. The Old Telegraph Mining Company,2 Utah 174. Patent titles do not relate to invalid locations. Patent titles do not by relation cut off rights that intervene before such locations became valid or were perfected, and hence the necessity where the proponent relies upon a title antedating final entry, he must prove a valid location and the date when the same became perfected and valid, to which discovery and monumenting upon the ground are unavoidable essentials. It is said by the Supreme Court of the United States in Creed and Cripple Creek M. & M. Co. v. Uintah Tunnel Mines & Transportation Co. that "the plaintiff's right does not antedate his discovery; at least it does not prevail over any then existing rights." What the relation may be in the absence of intervening rights is a matter without interest to us here. In the present case rights have

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intervened, rights of a dignity no less than those of a United States patent. And to defeat the presumption arising thereupon the burden was upon the appellants, on their own theory of the case, to prove when their location was perfected and became a valid location. We make this statement by way of argument upon appellants' theory, although still insisting that such an inquiry would be appropriate only in an equitable action to set aside respondents' senior patent. Brockbank v. Albion Mining Co., 29 Utah 367, 81 Pac. 863. The Creed case is sufficient authority and was so regarded by this court, and in view of the consideration given by this court to and its decision upon this question, there appears no necessity for an additional argument thereof now.

Nor is it immaterial when the claim was marked on the ground. Lindley on Mines, 3d Ed.:

> "§ 339. Discovery is but one step in acquiring title to a mining claim. It must be followed by location."

> "§ 371. The Revised Statutes of the United States contain the mandatory provision, that the 'location must be distinctly marked on the ground so that its boundaries can be readily traced.' There is no escape from this requirement. * * * The requirement is an imperative and indispensable condition precedent to a valid location, and is not to be 'frittered away by construction.' After the discovery, it is the main act of original location."

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In Brockbank v. Albion Mining Co., 29 Utah 367, 81 Pac. 863, this court held that:

> " * * * where a discovery of mineral has been made, and a proper location notice filed, then, if the boundaries are marked on the ground, before intervening rights have accrued, the claim will be valid. The locator, however, delays at his peril, since thereby he assumes the risk of intervening rights of third parties. * * * "

The mineral character of the land in a contest between a mineral and a non-mineral entryman is not to be settled in favor of the mineral entry merely by the finding of color, even though such discovery may afford sufficient encouragement to miners to continue their exploration in the hope of finding gold in paying quantities. (Steele v. Tannana Mines R. Co., discussed at pages 48 and 49 of respondents' brief and cited and relied upon by this court in its decision in this case). As pointed out in respondents' brief—"In a contest between mineral and non-mineral claimants it is incumbent upon the former to show as a present fact that the character of the land is such that mineral can be obtained from it in such quantity and quality as to make it more valuable for mining than for agriculture. * * * When the controversy is between two mineral claimants the rule respecting the sufficiency of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for, by the very nature of the controversy between mineral claimants, it is tacitly assumed that the land is min-

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eral.'' (§ 122, 18 R. C. L., page 1222, cited at pages 30 and 31 of respondents' brief.)

By the non-mineral patent upon the Valentine Script (the senior patent) we have an adjudication by the Land Department that the land so patented was non-mineral in character. Appellants' testimony must be weighed in relation to their burden, if this action is to take on the character of one in equity and appellants be afforded herein an opportunity upon equitable principles to set aside the non-mineral patent. So measured, their effort must fail as decided by this court. It is fairly apparent from the testimony, we think, that the only value this placer claim now has or ever had was for residence, to which use it has been put. As testified by the appellants' witness Michael Gibbons (Ab. 51) ''It is pretty well roofed over, yes.'' There is no testimony from which one could conclude this adjudication, accomplished by the non-mineral patent, was in error.

Counsel expect much from the doctrine of relation, not merely that the patent title relates to the perfected valid location, but that a location once initiated may be perfected at any time and thereafter should patent issue, such patent title would relate to the time of the initial step, whether or not rights have intervened before such location attained any validity. A mere statement of their contention condemns it. Appellants can find no authority upon which to predicate it.

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CONCLUSION.

This court has considered and correctly decided sufficient of the questions involved in the case as to have conclusively disposed of the controversy. It has neither misconceived nor overlooked any material fact or facts that could affect the result it has attained by its decision, and it has based its decision on no wrong principle of law. Indeed, this court has founded its decision upon principles so elementary and universally accepted as to forbid a doubt as to the soundness thereof. Appellants' application for rehearing should be denied.

Respectfully submitted,

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Attorneys for Respondents.

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